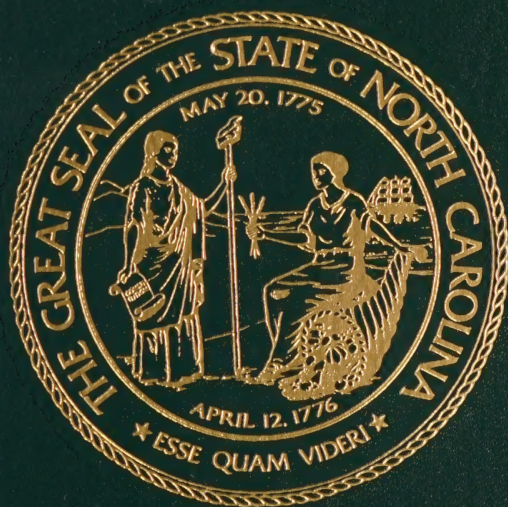


# GENERAL STATUTES OF NORTH CAROLINA

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ANNOTATED



2006 INTERIM SUPPLEMENT







# GENERAL STATUTES OF NORTH CAROLINA

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ANNOTATED

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**2006 INTERIM SUPPLEMENT**

**Volume 1**

**Chapters 1 to 105**

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CONTAINING GENERAL LAWS OF NORTH CAROLINA  
ENACTED BY THE GENERAL ASSEMBLY

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*Prepared under the Supervision of*

THE DEPARTMENT OF JUSTICE

OF THE STATE OF NORTH CAROLINA

*by*

*the Editorial Staff of the Publishers*

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45411-12 (interim supplement hardbound set)  
4660013 (interim supplement softbound set)

ISBN 0-8205-8186-0 (interim supplement hardbound set)  
ISBN 0-8205-8185-2 (interim supplement softbound set)



Matthew Bender & Company, Inc.

P.O. Box 7587, Charlottesville, VA 22906-7587

*www.lexisnexus.com*

(Pub.45350) (HB)  
(Pub.46405) (SB)



## Preface

This Volume contains the general laws of a permanent nature enacted by the General Assembly at the 2006 Regular Session, which are within Chapters 2006-1 through 2006-264, and brings to date the annotations included therein.

A majority of the Session Laws are made effective upon becoming law, but a few provide for stated effective dates. If the Session Law makes no provision for an effective date, the law becomes effective under G.S. 120-20 "from and after 60 days after the adjournment of the session" in which passed.

For detailed research on any subject, both within this volume and the General Statutes as a whole, see the General Index to the General Statutes.

Beginning with formal opinions issued by the North Carolina Attorney General on July 1, 1969, selected opinions which construe a specific statute are cited in the annotations to that statute. For a copy of an opinion or of its headnotes, write the Attorney General, P.O. Box 629, Raleigh, N.C. 27602.

This recompiled volume has been prepared and published under the supervision of the Department of Justice of the State of North Carolina. The members of the North Carolina Bar are requested to communicate any suggestions they may have for improving the General Statutes to the Department, or to LexisNexis, Charlottesville, Virginia.

ROY COOPER  
*Attorney General*







## Scope of Volume

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### **Statutes:**

Permanent portions of the General Laws enacted by the General Assembly through the 2006 Regular Session affecting Chapters 2006-1 through 2006-264.

### **Annotations:**

This publication contains annotations taken from decisions of the North Carolina Supreme Court, decisions of the North Carolina Court of Appeals, and decisions of the appropriate federal courts posted on LEXIS through September 22, 2004. These cases will be printed in the following reporters:

- South Eastern Reporter 2nd Series.
- Federal Reporter 3rd Series.
- Federal Supplement 2nd Series.
- Federal Rules Decisions.
- Bankruptcy Reports.
- Supreme Court Reporter.

Additionally, annotations have been taken from the following sources:

- North Carolina Law Review.
- Wake Forest Law Review.
- Campbell Law Review.
- Duke Law Journal.
- North Carolina Central Law Journal.
- Opinions of the Attorney General.

## Scope of Volume

Statutes

Permanent portions of the General Laws enacted by the General Assembly through the 2006 Regular Session affecting Chapters 200C-1 through 200C-

200

Annotations

This publication contains annotations taken from decisions of the North Carolina Supreme Court, decisions of the North Carolina Court of Appeals, and decisions of the appropriate federal courts noted on United States Reports per 22, 2004. These cases will be printed in the following reports:

North Carolina Reports and Series

Federal Reports and Series

Federal Supplement and Series

Federal Rules Decisions

North Carolina Reports

Supreme Court Reports

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North Carolina Law Review

Wake Forest Law Review

Carolina Law

Carolina Law

North Carolina

Opinions of

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## User's Guide

In order to assist both the legal profession and the layperson in obtaining the maximum benefit from the North Carolina General Statutes, a User's Guide has been included in Volume 1 of the General Statutes. This guide contains comments and information on the many features found within the General Statutes intended to increase the usefulness of this set of laws to the user. See Volume 1 of the General Statutes for the complete User's Guide.

## Abbreviations

(The abbreviations below are those found in the General Statutes that refer to prior codes.)

P.R. ....	Potter's Revisal (1821,1827)
R.S. ....	Revised Statutes (1837)
R.C. ....	Revised Code (1854)
C.C.P. ....	Code of Civil Procedure (1868)
Code .....	Code (1883)
Rev. ....	Revisal of 1905
C.S. ....	Consolidated Statutes (1919, 1924)

STATE OF NORTH CAROLINA

DEPARTMENT OF JUSTICE

Raleigh, North Carolina

November 2006

I, Roy Cooper, Attorney General of North Carolina, do hereby certify that the foregoing 2006 Interim Supplement to the General Statutes of North Carolina was prepared and published by LexisNexis under the supervision of the Department of Justice of the State of North Carolina.

ROY COOPER

Attorney General of North Carolina



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# **The General Statutes of North Carolina 2006 Interim Supplement**

## **Chapter 1. Civil Procedure.**

### **SUBCHAPTER III. PARTIES.**

#### **Article 6. Parties.**

Sec.

1-69.1. Unincorporated associations and partnerships; suit by or against.

### **SUBCHAPTER I. DEFINITIONS AND GENERAL PROVISIONS.**

#### **ARTICLE 1. *Definitions.***

#### **§ 1-1. Remedies.**

#### **CASE NOTES**

**Civil Actions or Special Proceedings.** — Trial court erred in denying the father's motion to set aside the order entered against him that terminated his parental rights in his minor daughter; the record showed that the summons that was issued in his case was not served upon him within the time limit for service of process under the civil procedure rule then in effect and

since that rule applied to civil actions or special proceedings such as a termination of parental rights case, the order was entered without the trial court having acquired personal jurisdiction over the father, and thus was void. In re A.B.D., 173 N.C. App. 77, 617 S.E.2d 707, 2005 N.C. App. LEXIS 1925 (2005).

### **SUBCHAPTER II. LIMITATIONS.**

#### **ARTICLE 3. *Limitations, General Provisions.***

#### **§ 1-15. Statute runs from accrual of action.**

#### **CASE NOTES**

- I. In General.
- II. Malpractice.

#### **I. IN GENERAL.**

##### **Dismissal Upheld.** —

Partner's breach of fiduciary duty claim was properly dismissed under G.S. 1A-1, N.C. R. Civ. P. 12(b)(6), because the last act upon which the claim was based occurred more than six

years before an attorney was sued; whether the three-year statute of limitations or the four-year statute of repose applied was immaterial as both had long since expired. Carlisle v. Keith, 169 N.C. App. 674, 614 S.E.2d 542, 2005 N.C. App. LEXIS 800 (2005).

**Applied** in McCutchen v. McCutchen, 170



N.C. App. 1, 612 S.E.2d 162, 2005 N.C. App. LEXIS 904 (2005).

II. MALPRACTICE.

**Malpractice Claim Barred.** —

Trial court properly dismissed an estate’s medical malpractice suit against the hospital defendants, the medical practice defendants, and a doctor where a first complaint that was voluntarily dismissed did not contain a G.S.

1A-1, N.C. R. Civ. P. 9(j) certification, and the re-filed complaint was filed after the statute of limitations expired and the 120-day extension, if it had been sought, would have expired; there was no expert review prior to the commencement of the original action, which was contrary to the North Carolina legislature’s intent in enacting Rule 9(j). *Estate of Barksdale v. Duke Univ. Med. Ctr.*, — N.C. App. —, 623 S.E.2d 51, 2005 N.C. App. LEXIS 2753 (2005).

§ 1-18. Disability of marriage.

CASE NOTES

**Matter Not Moot Due to Collateral Consequences.** — Although a father regained full custody of his child, since there were collateral legal consequences that could arise from a neglect adjudication, such as a determination

of whether another child was neglected, the appeal from the adjudication of neglect should not have been dismissed as moot. *In re A.K.*, 360 N.C. 449, 628 S.E.2d 753, 2006 N.C. LEXIS 44 (2006).

ARTICLE 4.

*Limitations, Real Property.*

§ 1-38. Seven years’ possession under color of title.

CASE NOTES

IV. Continuity of Possession.

IV. CONTINUITY OF POSSESSION.

**Clear Indicators of Open, Notorious, and Exclusive Possession of Lands by Government.** — Summary judgment was appropriate under G.S. 1-38(a) as marked lines, marked corners, road construction, timber cuttings, road maintenance, and activities related thereto, were clear indicators of open, notorious

and exclusive possession of the lands by the government and these activities and undisputed boundary markings and monumentations existed for a minimum period of 19 plus years, or a minimum period of 14 years. *United States v. Kubalak*, 365 F. Supp. 2d 677, 2005 U.S. Dist. LEXIS 10732 (W.D.N.C. Apr. 15, 2005).

§ 1-40. Twenty years adverse possession.

CASE NOTES

II. Possession, Generally.

II. POSSESSION, GENERALLY.

**Exclusivity.** — Where defendants claimed adverse possession of a cemetery lot under G.S. 1-40, plaintiffs’ motions for a directed verdict and for JNOV were properly denied; evidence that defendants had been farming the lot since the 1960’s and that there had not been a burial

in the lot in nearly 60 years provided more than a scintilla of evidence that defendants had made exclusive use of the lot as farmland for the requisite period; there was no evidence that plaintiffs had used the lot. *Jernigan v. Herring*, — N.C. App. —, 633 S.E.2d 874, 2006 N.C. App. LEXIS 1901 (2006).

## ARTICLE 5.

*Limitations, Other Than Real Property.*

## § 1-47. Ten years.

## CASE NOTES

## I. In General.

## I. IN GENERAL.

**Equitable estoppel** applied to bar a shareholder from denying the validity of certain corporate debts because the shareholder had asserted that the debts were valid in various

ways, and the directors lacked knowledge of the facts at issue. *Crisp v. E. Mortg. Inv. Co.*, — N.C. App. —, 632 S.E.2d 814, 2006 N.C. App. LEXIS 1833 (2006).

## § 1-50. Six years.

## CASE NOTES

## I. In General.

## V. Defective Products.

## I. IN GENERAL.

**Applied** in *Hodge v. Harkey*, — N.C. App. —, 631 S.E.2d 143, 2006 N.C. App. LEXIS 1310 (2006).

## V. DEFECTIVE PRODUCTS.

**Multiplicity of Claims Covered.** —

G.S. 1-50(a)(6) indicated that the legislature intended to cover a multiplicity of claims that

could have arisen out of a defective product; a farmer's fraud action based on the alleged failure of a manufactured silo to perform as advertised or indicated by the silo's promotional literature, was thus controlled by G.S. 1-50(a)(6), not by G.S. 1-52(9), and was time-barred. *Jack H. Winslow Farms, Inc. v. Dedmon*, 171 N.C. App. 754, 615 S.E.2d 41, 2005 N.C. App. LEXIS 1359 (2005), cert. denied, 360 N.C. 64, 621 S.E.2d 625 (2005).

## § 1-52. Three years.

## CASE NOTES

## I. In General.

## II. Contracts.

B. Actions to Which Section Applies.

C. Actions to Which Section Not Applicable.

D. Actions Held Barred.

## IV. Liability Created by Statutes.

## V. Trespass upon Realty.

## VII. Injury to Person or Rights of Another.

## XI. Fraud or Mistake.

B. Applicability.

E. Actions Held Barred.

F. Actions Not Barred.

## XIII. Accrual of Cause of Action for Personal Injury or Property Damage.

## XV. Assault, Battery, and False Imprisonment.

## I. IN GENERAL.

**Cited** in *Badgett v. Fed. Express Corp.*, 378 F. Supp. 2d 613, 2005 U.S. Dist. LEXIS 19307 (M.D.N.C. Apr. 7, 2005).

## II. CONTRACTS.

## B. Actions to Which Section Applies.

**Accrual When Infant's Guardian Learns of Breach by Fiduciary.** — Statute of limita-

tions began to run on an infant's claims of breach of fiduciary duty against the trustee of the infant's trust when the infant's guardian discovered the alleged improper conduct on the part of the trustee, not when the infant attained majority. *Toomer v. Branch Banking & Trust Co.*, 171 N.C. App. 58, 614 S.E.2d 328, 2005 N.C. App. LEXIS 1188 (2005), cert. denied, — N.C. —, 623 S.E.2d 263 (2005).

#### C. Actions to Which Section Not Applicable.

**Government's right to bring trespass action.** — Defendants' claim that the government's right to bring a trespass action was barred by the three year statute of limitations under G.S. 1-52 was without merit. The United States may bring an action in trespass within a six year period and such a provision, of course, preempted the North Carolina statute of limitations; in pursuing a viable claim, a federal agency is bound by the terms of the federal statute of limitations, which may not be lengthened or shortened by a state enactment. *United States v. Kubalak*, 365 F. Supp. 2d 677, 2005 U.S. Dist. LEXIS 10732 (W.D.N.C. Apr. 15, 2005).

#### D. Actions Held Barred.

##### Claims Were Time-Barred. —

Beneficiaries' claims for breach of fiduciary duty, which claims did not rise to the level of constructive fraud, against the bank that served as executor of a will and trustee of the beneficiaries' trusts were dismissed because their claims were barred by the three-year statute of limitations under G.S. 1-52(1). *Toomer v. Branch Banking & Trust Co.*, 171 N.C. App. 58, 614 S.E.2d 328, 2005 N.C. App. LEXIS 1188 (2005), cert. denied, — N.C. —, 623 S.E.2d 263 (2005).

**Alienation of Affections.** — Defendant was entitled to summary judgment on plaintiff's alienation of affections claim; as plaintiff conceded the acts complained of occurred pre-separation more than three years before she filed suit, and such a claim had to be based on pre-separation conduct, it was time-barred under G.S. 1-52(5). *McCutchen v. McCutchen*, 170 N.C. App. 1, 612 S.E.2d 162, 2005 N.C. App. LEXIS 904 (2005).

#### IV. LIABILITY CREATED BY STATUTES.

**Action Against Corporate Director.** — Summary judgment was granted in favor of a director of a corporation in an action alleging violations of G.S. 55-8-30 and N.Y. Gen. Bus. Law § 717 relating to the sale of certain illegal agreements because the causes of action were time barred. *Rich Food Servs., Inc. v. Rich Plan Corp.*, — F. Supp. 2d —, 2002 U.S. Dist. LEXIS 27799 (E.D.N.C. Nov. 11, 2002).

**Action Under Usury Statutes.** — Plaintiffs' claims against a trust company and its trustee under G.S. 24-10 failed where the statute of limitations for the action began to accrue when plaintiffs closed on their property and as that was more than four years prior to the filing of the action, the statute of limitations in G.S. 1-52(2)-(3) had expired. *Skinner v. Preferred Credit*, 172 N.C. App. 407, 616 S.E.2d 676, 2005 N.C. App. LEXIS 1806 (2005).

#### V. TRESPASS UPON REALTY.

**Property owner was not entitled to 17 years of back rent from an occupier** and an estate for the use of his property because there was a three-year statute of limitations under G.S. 42-4 and G.S. 1-52(2). *Perkins v. Watson*, — F. Supp. 2d —, 2005 U.S. Dist. LEXIS 11192 (M.D.N.C. June 3, 2005).

#### VII. INJURY TO PERSON OR RIGHTS OF ANOTHER.

**Criminal Conversion.** — Since a cause of action for criminal conversation was specifically identified in the three-year statute of limitations contained in G.S. 1-52(5), the discovery exception did not apply to criminal conversation cases; a criminal conversation case filed five years after the alleged affair ended was time barred despite the fact that the former husband may have discovered it some years after it ended. *Misenheimer v. Burris*, 169 N.C. App. 539, 610 S.E.2d 271, 2005 N.C. App. LEXIS 599 (2005).

##### Emotional Distress Claims. —

Store manager's claim of negligent infliction of emotional distress arising from an incident when a coworker exposed himself to her and grabbed her breast accrued within the three-year period allotted under G.S. 1-52(5), the claim was timely. *McDougal-Wilson v. Goodyear Tire & Rubber Co.*, 427 F. Supp. 2d 595, 2006 U.S. Dist. LEXIS 19865 (E.D.N.C. 2006).

#### XI. FRAUD OR MISTAKE.

##### B. Applicability.

**Section Not Applicable to Alleged Failure to Perform As Advertised.** — G.S. 1-50(a)(6) indicated that the legislature intended to cover a multiplicity of claims that could have arisen out of a defective product; a farmer's fraud action based on the alleged failure of a manufactured silo to perform as advertised or indicated by the silo's promotional literature, was thus controlled by G.S. 1-50(a)(6), not by G.S. 1-52(9), and was time-barred. *Jack H. Winslow Farms, Inc. v. Dedmon*, 171 N.C. App. 754, 615 S.E.2d 41, 2005 N.C. App. LEXIS 1359 (2005), cert. denied, 360 N.C. 64, 621 S.E.2d 625 (2005).



### E. Actions Held Barred.

#### Alleged Fraudulent Actions of Attorney.

— Partner's fraud claim was properly dismissed as time-barred as the partner received actual notice of another partner's ownership interest in a buyer of the partnership's property more than three years before an attorney was sued for failing to reveal or for misrepresenting the other partner's interest; the partner's claim that he was not required to adhere to the discovery provisions of the statute of limitations because he sued an attorney with whom he had an attorney-client relationship was rejected. *Carlisle v. Keith*, 169 N.C. App. 674, 614 S.E.2d 542, 2005 N.C. App. LEXIS 800 (2005).

#### Alleged Constructive Fraud of Attorney.

— Partner's constructive fraud claim against an attorney was properly dismissed as time-barred as the partner's claim accrued when he became aware of another partner's ownership interest in the buyer of the partnership's property, which was more than five years before an attorney was added to the suit. *Carlisle v. Keith*, 169 N.C. App. 674, 614 S.E.2d 542, 2005 N.C. App. LEXIS 800 (2005).

### F. Actions Not Barred.

**Sale of Illegal Agreements.** — Summary judgment was denied in a case against a director alleging negligent misrepresentation in connection with the sale of illegal agreements in North Carolina because there was a genuine issue of material fact as to whether the elements were met under New York law and whether the statute of limitations had expired under North Carolina law. *Rich Food Servs., Inc. v. Rich Plan Corp.*, — F. Supp. 2d —, 2002 U.S. Dist. LEXIS 27799 (E.D.N.C. Nov. 11, 2002).

## XIII. ACCRUAL OF CAUSE OF ACTION FOR PERSONAL INJURY OR PROPERTY DAMAGE.

#### Date of Discovery Rule. —

Partner's claim was properly dismissed as the partner knew of another partner's ownership interest in the buyer of the partnership's property more than three years before he sued an attorney for negligent misrepresentation; when the partner became aware of the other partner's ownership interest in the buyer, he experienced damage that was apparent or reasonably ought to have become apparent to him. *Carlisle v. Keith*, 169 N.C. App. 674, 614 S.E.2d 542, 2005 N.C. App. LEXIS 800 (2005).

Trial court erred in granting summary judgment to the city on the property owners' claims against the city based on a large amount of sewage being discharged on to their property during a heavy rain storm, which caused substantial property damage; the separate and

distinct heavy amount of damage started the limitations period running, not the lesser problems that had occurred with sewer discharge on to their property years earlier, and the city also did not have governmental immunity. *Harrison v. City of Sanford*, — N.C. App. —, 627 S.E.2d 672, 2006 N.C. App. LEXIS 698 (2006).

Summary judgment for a neighbor's tenant and a petroleum servicing company was proper as that the property owners did not discover that their land was contaminated by underground storage tanks on a neighbors' property until after the statute of repose had expired did not extend the time for filing suit. *Hodge v. Harkey*, — N.C. App. —, 631 S.E.2d 143, 2006 N.C. App. LEXIS 1310 (2006).

#### Contaminated Water. —

Summary judgment for a tenant and a petroleum servicing company was proper as the company removed underground storage tanks on the leased property in 1988, the tenant's lease ended in 1988, and the last act or omission that could give rise to a cause of action against either defendant occurred in 1988; as defendants' last acts or omissions occurred more than 10 years before the suit was filed, the claims were barred by the statute of repose. *Hodge v. Harkey*, — N.C. App. —, 631 S.E.2d 143, 2006 N.C. App. LEXIS 1310 (2006).

**Accrual of Alienation of Affections Claim.** — Summary judgment was improperly granted dismissing former wife's claim for alienation of affections filed in April 2003 on the ground that it was barred by the statute of limitations in G.S. 1-52(5) because, while the husband and the wife separated in 1998, the wife's allegations in her sworn affidavit and verified complaint, to the effect that the husband expressed his desire to return to the marriage multiple times in October 1999 and September 2000, that the couple purchased a car together in May 1999, that the couple maintained joint finances after their separation, that they participated in marriage counseling until February 2001, and that the husband told the wife during their last counseling session that he was not planning on divorcing her, presented a genuine issue of material fact as to whether there was love and affection following the wife's separation from the husband. Since a jury could determine that alienation did not occur until as late as February 2001 when the husband made the final decision to end the marriage and because the wife filed her complaint within three years of his decision, her claim for alienation of affections was not barred. *McCutchen v. McCutchen*, 360 N.C. 280, 624 S.E.2d 620, 2006 N.C. LEXIS 2 (2006).

## XV. ASSAULT, BATTERY, AND FALSE IMPRISONMENT.

**Action Held Time-Barred.** — Partner's civil conspiracy claim based on breach of fidu-

ciary duty, fraud, and negligent misrepresentation was properly dismissed as time-barred as the claim was brought more than six years after the date of a partnership transaction and eight years after a subdivision claim. *Carlisle v. Keith*, 169 N.C. App. 674, 614 S.E.2d 542, 2005 N.C. App. LEXIS 800 (2005).

**42 U.S.C.S. § 1983.** — Inmate's claims under 42 USCS § 1983 that a state violated his Fifth and Sixth Amendment rights by not act-

ing lawfully in settling a charge against the inmate in 1992 were dismissed pursuant to Fed. R. Civ. P. 12(b)(6) because, *inter alia*, the claims were time-barred by the three-year statute of limitations borrowed from G.S. 1-52(2), and the complaint did not plainly state, as required by Fed. R. Civ. P. 8(a). *Williams v. North Carolina*, — F. Supp. 2d —, 2004 U.S. Dist. LEXIS 28552 (E.D.N.C. Oct. 8, 2004).

## § 1-53. Two years.

### CASE NOTES

- II. Contractual Obligations of Local Governmental Units.
- III. Penalty for Usury.

#### II. CONTRACTUAL OBLIGATIONS OF LOCAL GOVERNMENTAL UNITS.

**Claims Barred.** — Trial court did not err in granting partial summary judgment for the board of education on the corporation's breach of contract claim or in granting summary judgment for the board of education on the corporation's breach of warranty claim because both claims were barred by the two-year statute of limitations found in G.S. 1-53(1) where the corporation was aware of its injury at least by April 24, 2001, but it did not sue until August 26, 2003. *ABL Plumbing & Heating Corp. v. Bladen County Bd. of Educ.*, — N.C. App. —, 623 S.E.2d 57, 2005 N.C. App. LEXIS 2728 (2005).

#### III. PENALTY FOR USURY.

##### When Statute Begins to Run. —

Where all details of borrowers' loan, including the interest rate, fees, and expenses, were disclosed before the closing in loan documents to the borrowers, who had the capacity and the opportunity to discover their claim but failed to do so, the statute of limitations for the borrowers' usury claim began to run on the date of the closing of their loan. *Shepard v. Ocwen Fed. Bank, FSB*, 172 N.C. App. 475, 617 S.E.2d 61, 2005 N.C. App. LEXIS 1810 (2005).

## § 1-54. One year.

### CASE NOTES

- IV. Libel and Slander.

#### IV. LIBEL AND SLANDER.

**Doctor's counterclaim against a patient for slander per se was dismissed because none of the allegations of oral slander occurred within the limitations period;** while an allegation was made that unsigned letters were mailed by the patient to the doctor's partner, the appellate court did not con-

sider this allegation as the doctor only counterclaimed for slander per se, which included oral statements, and not for libel, which encompassed the letter as a written statement. *Iadanza v. Harper*, 169 N.C. App. 776, 611 S.E.2d 217, 2005 N.C. App. LEXIS 808 (2005), cert. denied, 360 N.C. 63, 621 S.E.2d 624 (2005).

## § 1-55. Six months.

### CASE NOTES

**Cited in** *Badgett v. Fed. Express Corp.*, 378 F. Supp. 2d 613, 2005 U.S. Dist. LEXIS 19307 (M.D.N.C. Apr. 7, 2005).

## ARTICLE 5A.

*Limitations, Actions Not Otherwise Limited.***§ 1-56. All other actions, 10 years.**

## CASE NOTES

## II. Actions to Which Section Applies.

**II. ACTIONS TO WHICH SECTION APPLIES.****Constructive Fraud Based on Breach of Fiduciary Duty. —**

Claim of constructive fraud based upon a breach of fiduciary duty falls under the 10-year

statute of limitations. *Toomer v. Branch Banking & Trust Co.*, 171 N.C. App. 58, 614 S.E.2d 328, 2005 N.C. App. LEXIS 1188 (2005), cert. denied, — N.C. —, 623 S.E.2d 263 (2005).

## SUBCHAPTER III. PARTIES.

## ARTICLE 6.

*Parties.***§ 1-69.1. Unincorporated associations and partnerships; suit by or against.**

(a) Except as provided in subsection (b) of this section:

- (1) All unincorporated associations, organizations or societies, or general or limited partnerships, foreign or domestic, whether organized for profit or not, may hereafter sue or be sued under the name by which they are commonly known and called, or under which they are doing business, to the same extent as any other legal entity established by law and without naming any of the individual members composing it.
- (2) Any judgments and executions against any such association, organization or society shall bind its real and personal property in like manner as if it were incorporated.
- (3) Any unincorporated association, organization, society, or general partnership bringing a suit in the name by which it is commonly known and called must allege the specific location of the recordation required by G.S. 66-68.

(b) Unincorporated nonprofit associations are subject to Chapter 59B of the General Statutes and not this section. (1955, c. 545, s. 3; 1975, c. 393, ss. 1, 2; 2006-226, s. 3.)

**Editor's Note.** — Session Laws 2006-226, s. 5, is a severability clause.

Session Laws 2006-226, s. 6, provides: "This act does not affect an action or proceeding commenced or right accrued before this act takes effect."

Session Laws 2006-226, s. 7 provides: "The Revisor of Statutes shall cause to be printed along with this act all relevant portions of the official comments to the Uniform Unincorporated Nonprofit Association Act and all explanatory comments of the drafters of this act as the Revisor deems appropriate."

**Effect of Amendments.** — Session Laws 2006-226, s. 3, effective January 1, 2007, designated the previously existing provisions as subdivisions (a)(1) through (a)(3); added the introductory language of subsection (a); and added subsection (b).



## SUBCHAPTER IIIA. JURISDICTION.

## ARTICLE 6A.

*Jurisdiction.*

## § 1-75.4. Personal jurisdiction, grounds for generally.

## CASE NOTES

- I. General Consideration.
- II. Due Process Considerations.
  - A. In General.
  - B. Determining Minimum Contacts.
- IV. Cases in Which Minimum Contacts Requirement Not Met.
- VI. Local Act or Omission.
- IX. Cases Decided Under Prior Law.
  - B. Minimum Contacts.

## I. GENERAL CONSIDERATION.

**Applied** in *Pfizer Inc. v. Synthon Holding*, B.V., 386 F. Supp. 2d 666, 2005 U.S. Dist. LEXIS 24544 (M.D.N.C. Sept. 7, 2005).

**Cited** in *Sawyers v. Farm Bureau Ins. Co. of N.C., Inc.*, 170 N.C. App. 17, 612 S.E.2d 184, 2005 N.C. App. LEXIS 893 (2005); *Deer Corp. v. Carter*, — N.C. App. —, 629 S.E.2d 159, 2006 N.C. App. LEXIS 968 (2006); *Simpson v. Snyder's of Hanover, Inc.*, — F. Supp. 2d —, 2006 U.S. Dist. LEXIS 42091 (W.D.N.C. June 12, 2006).

## II. DUE PROCESS CONSIDERATIONS.

## A. In General.

**Analysis Under This Section and Federal Due Process Clause.** —

North Carolina's long-arm statute, G.S. 1-75.4(1)(d), has been interpreted as extending to the full extent permitted by the Constitution. *Burleson v. Toback*, 391 F. Supp. 2d 401, 2005 U.S. Dist. LEXIS 29822 (M.D.N.C. Sept. 30, 2005).

**But Courts Cannot Expand Jurisdiction Beyond Due Process Limitations.** —

Trial court properly dismissed machine purchaser's complaint against foreign corporation for failure to appropriately allege that North Carolina had personal jurisdiction over the corporation; while it was true that jurisdiction under the long-arm statute, G.S. 1-75.4(5)(e), existed because the foreign corporation shipped its machine to North Carolina via common carrier, due process considerations required that the foreign corporation have minimum contacts with the forum, and such minimum contacts were not shown. *Charter Med., LTD v. Zigmed, Inc.*, 173 N.C. App. 213, 617 S.E.2d 352, 2005 N.C. App. LEXIS 1917 (2005).

## B. Determining Minimum Contacts.

**Jurisdiction Held to Exist Over Former Employee.** — Where a copyright holder sued its former employee, alleging that the former employee worked for the copyright holder for approximately two months in its Charlotte, North Carolina office, and stole the software code at issue from its Charlotte office, the court found that exercising personal jurisdiction over the former employee comported with due process. *Innovative Multimedia Solutions v. Sulit*, — F. Supp. 2d —, 2006 U.S. Dist. LEXIS 31257 (W.D.N.C. May 16, 2006).

## IV. CASES IN WHICH MINIMUM CONTACTS REQUIREMENT NOT MET.

**Electronic Communications Over The Internet.** —

Passive, non-interactive website maintained by defendant did not indicate a manifest intent to target and focus on North Carolina when viewed in conjunction with the overall character of the website, and could not support the exercise of specific jurisdiction; the website did not accept orders, and instead simply described defendant's products and gave contact information for her in Indiana. *Woods Int'l, Inc. v. McRoy*, 436 F. Supp. 2d 744, 2006 U.S. Dist. LEXIS 43776 (M.D.N.C. 2006).

**No Purposeful Action Directed Toward State.** — Accounting firm's motion to dismiss for lack of personal jurisdiction was granted; plaintiffs' contention that the accounting firm, in preparing audit reports that it knew a Delaware corporation with offices in Ohio and Missouri would use in marketing materials distributed throughout the United States, placed its product in the stream of commerce such that personal jurisdiction was appropriate

in North Carolina was without merit because the accounting firm took no action purposefully directed toward the forum state. *Allison v. Lomas*, 387 F. Supp. 2d 516, 2005 U.S. Dist. LEXIS 26345 (M.D.N.C. Aug. 26, 2005).

Plaintiffs failed to demonstrate that the court had personal jurisdiction over an attorney and a law firm where the attorney drafted, approved, and recommended for use a Delaware corporation's offering materials and prepared a legal opinion that was distributed to investors in a mobile billboard scheme, the services were not purposefully directed toward the state of North Carolina and plaintiffs' claims could not have been said to arise out of any contact the attorney or the law firm had with North Carolina, the attorney was not licensed to conduct business in North Carolina and plaintiffs had neither asserted nor identified any contacts with the state whatsoever, and plaintiffs failed to establish that the attorney or the law firm maintained the continuous and systematic contacts required to exercise general jurisdiction in North Carolina. *Allison v. Lomas*, 387 F. Supp. 2d 516, 2005 U.S. Dist. LEXIS 26345 (M.D.N.C. Aug. 26, 2005).

**Cease and Desist Letter Insufficient to Assert Personal Jurisdiction.** — Cease and desist letter sent by defendant to plaintiff was not sufficient to support the assertion of personal jurisdiction over defendant, as defendant did not attempt to solicit business in North Carolina or enter into any agreement or business relationship in North Carolina. *Woods Int'l, Inc. v. McRoy*, 436 F. Supp. 2d 744, 2006 U.S. Dist. LEXIS 43776 (M.D.N.C. 2006).

**Out-of-State Credit Trust and Trustee.** — Long-arm jurisdiction did not exist over an out-of-state credit trust and its trustee under G.S. 1-75.4(1)(d), (5)(d), or (6)(b) as the trust did not engage in substantial activity within North Carolina, it did not receive shipped goods, documents of title, or other things of value from North Carolina, and the few mortgage notes it held that were secured by North Carolina property were insufficient to constitute a holding of tangible property in North Carolina. *Skinner v. Preferred Credit*, 172 N.C. App. 407, 616 S.E.2d 676, 2005 N.C. App. LEXIS 1806 (2005).

**Acts not occurring in state.** —

Single \$150 shipment of defendant's products was sold by one of defendant's Indiana customers to a North Carolina resident at a trade show in Kentucky did not form the basis for specific

jurisdiction because the claims in plaintiff's declaratory judgment action did not "arise out of" that prior shipment of products. *Woods Int'l, Inc. v. McRoy*, 436 F. Supp. 2d 744, 2006 U.S. Dist. LEXIS 43776 (M.D.N.C. 2006).

When a patient sued a pharmacy for negligence, breach of implied warranties, liability under G.S. 99B-6, and to pierce the pharmacy's corporate veil and hold its president liable, the president did not have sufficient contacts with North Carolina for the trial court to exercise personal jurisdiction over him because he had not been in the state since age 18, and he signed an application for the pharmacy to do business in North Carolina in his capacity as the pharmacy's president. *Rauch v. Urgent Care Pharm., Inc.*, — N.C. App. —, 632 S.E.2d 211, 2006 N.C. App. LEXIS 1566 (2006).

## VI. LOCAL ACT OR OMISSION.

### **Tortious Interference With Contract.** —

Third party nonresident defendant's motion to dismiss for lack of personal jurisdiction was denied in part because the court had jurisdiction over the nonresident under North Carolina's Long Arm Statute, G.S. 1-75.4 where it was alleged that her actions in the state tortiously interfered with a contract with resident insurer; however, the nonresident's motion to dismiss was granted with respect to two breach of contract claims that arose out of conduct occurring outside of North Carolina and were not part of the common nucleus the other claims involving the resident insurer. *N.C. Mut. Life Ins. Co. v. McKinley Fin. Serv., Inc.*, 386 F. Supp. 2d 648, 2005 U.S. Dist. LEXIS 24913 (M.D.N.C. Sept. 2, 2005).

## IX. CASES DECIDED UNDER PRIOR LAW.

### **B. Minimum Contacts.**

**Defendant's Sexual Activity in North Carolina Satisfied Minimum Contacts Requirement.** — Trial court properly denied a girlfriend's motion to dismiss a wife's claim that the girlfriend alienated the affections of the wife's husband, because the girlfriend's acts of calling, e-mailing, and engaging in sex acts with the husband in North Carolina satisfied the longarm statute, G.S. 1-75.4(3), and due process. *Fox v. Gibson*, — N.C. App. —, 626 S.E.2d 841, 2006 N.C. App. LEXIS 534 (2006).

## § 1-75.7. Personal jurisdiction — Grounds for without service of summons.

### CASE NOTES

#### **General Appearance Confers Jurisdiction Despite Absence of Service.** —

Where the person who was served with a

summons directed to a corporation attended the Small Claims Division proceedings and fully participated on the corporation's behalf,

the corporation thereby made a general appearance and thus waived its right to challenge proper service of process; the trial court erred in reversing a judgment entered by a Small Claims Division magistrate based on invalid service. *Woods v. Billy's Auto.*, — N.C. App. —, 622 S.E.2d 193, 2005 N.C. App. LEXIS 2595 (2005).

**Waiver of Jurisdictional Defense by General Appearance. —**

Juvenile petition was filed June 11, 2004, and the summons was issued four days later, but the summons was returned by the sheriff on June 30, 2004, unserved; on July 8, 2004, the

mother attended a hearing regarding the allegations her minor child was neglected and dependent. The mother was not only present in court, but also agreed to continue the matter until July 22, 2004, and there was no evidence that the mother raised any objection at that hearing regarding insufficient service of process or personal jurisdiction; thus, her actions amounted to waiver of her right to challenge the trial court's exercise of personal jurisdiction over her regardless of whether she was served with a juvenile summons in compliance with G.S. 1A-1-4. *In re A.J.M.*, — N.C. App. —, 630 S.E.2d 33, 2006 N.C. App. LEXIS 1220 (2006).

**§ 1-75.10. Proof of service of summons, defendant appearing in action.**

**CASE NOTES**

**Proof of Service Established Despite Third-Party Signature on Postal Receipt. —**

Trial court erred in granting defendant's motion to dismiss plaintiff's negligence action for improper service of process because by filing a copy of the signed return receipt, along with an affidavit that comported with G.S. 1-75.10,

plaintiff was entitled to a rebuttable presumption of valid service; defendant did not state or otherwise present any evidence that his mother, who signed for the civil summons and complaint, was not authorized to accept service for him. *Carpenter v. Agee*, 171 N.C. App. 98, 613 S.E.2d 735, 2005 N.C. App. LEXIS 1164 (2005).

**§ 1-75.12. Stay of proceeding to permit trial in a foreign jurisdiction.**

**CASE NOTES**

**Cited** in *Banc of Am. Secs. LLC v. Evergreen Int'l Aviation, Inc.*, 169 N.C. App. 690, 611 S.E.2d 179, 2005 N.C. App. LEXIS 799 (2005).

**SUBCHAPTER IV. VENUE.**

**ARTICLE 7.**

*Venue.*

**§ 1-77. Where cause of action arose.**

**CASE NOTES**

III. Against Public Officers, etc.

**III. AGAINST PUBLIC OFFICERS, ETC.**

**Injurious Results Taking Effect in Another County. —**

Forsyth County was a proper venue in a negligence and medical malpractice against

paramedics, Rockingham County and the Rockingham County Emergency Medical Services because the alleged injuries occurred in Forsyth County when the head of the stretcher that the injured party was transported on bounced off a stair of the ambulance and hit the



ground. *Morris v. Rockingham County*, 170 N.C. App. 417, 612 S.E.2d 660, 2005 N.C. App. LEXIS 997 (2005).

## § 1-82. Venue in all other cases.

### CASE NOTES

**Motion for Removal Improperly Denied.** — Where plaintiff declared in her complaint alleging assault, battery, and intentional infliction of emotional distress that she was a resident of Vance County, North Carolina, and that defendant was a resident of Granville County,

North Carolina, and where all of the events alleged in the complaint occurred in Granville County, North Carolina, Wake County was not the proper venue. *Hawley v. Hobgood*, — N.C. App. —, 622 S.E.2d 117, 2005 N.C. App. LEXIS 2478 (2005).

## § 1-83. Change of venue.

### CASE NOTES

#### I. In General.

##### I. IN GENERAL.

**Delay in Ruling on Motion for Change of Venue.** — Where defendant sought removal of the action due to improper venue in his answer, the fact that it was plaintiff's motion to compel discovery that prodded defendant into action on the motion was immaterial; the nine month

delay, standing alone, did not constitute an implied waiver by defendant, and since defendant timely filed a demand for change of venue, he was entitled to show that venue was improper. *Hawley v. Hobgood*, — N.C. App. —, 622 S.E.2d 117, 2005 N.C. App. LEXIS 2478 (2005).

## SUBCHAPTER V. COMMENCEMENT OF ACTIONS.

### ARTICLE 11.

#### *Lis Pendens.*

## § 1-116. Filing of notice of suit.

### CASE NOTES

#### **U.S. Government's Interest.** —

Defendants' motion to cancel notice of lis pendens was denied as the statutory prerequisites for the filing of notices of lis pendens, under G.S. 1-116(a)(1), Fla. Stat. § 48.23, and S.C. Code Ann. § 15-11-10, were met because, inter alia, pursuant to 21 USCS § 853(c), the U.S. gained an interest in all forfeitable property owned by defendants, including any iden-

tifiable substitute property, at the moment in time that the crimes alleged in the indictment occurred, and it was no consequence that the substitute property claimed as subject to forfeiture was acquired by defendants prior to the alleged illegal activity. *United States v. Woods*, 436 F. Supp. 2d 753, 2006 U.S. Dist. LEXIS 44917 (E.D.N.C. 2006).

SUBCHAPTER VII. PRETRIAL HEARINGS; TRIAL AND ITS INCIDENTS.

ARTICLE 19.

*Trial.*

§ 1-181. Requests for special instructions.

CASE NOTES

**Cited** in *State v. Mewborn*, — N.C. App. —, 631 S.E.2d 224, 2006 N.C. App. LEXIS 1411 (2006).

SUBCHAPTER VIII. JUDGMENT.

ARTICLE 23.

*Judgment.*

§ 1-228. Regarded as a deed and registered.

CASE NOTES

**Agreement in Divorce Proceedings.** — Dismissal of assignee’s motion to subject real estate to execution sale was reversed as the assignee’s judgment lien attached to a husband’s undivided interest in property formerly held as a tenancy by the entirety upon the date of his divorce, when the property was converted by law to a tenancy in common, and when he conveyed his interest to his former wife, she

took title subject to the judgment lien; a consent order providing for a future transfer of the property was not a conveyance as it provided for a future transfer of the property, did not provide a legal description or state the location of the property, and was not filed with the register of deeds. *Martin v. Roberts*, — N.C. App. —, 628 S.E.2d 812, 2006 N.C. App. LEXIS 964 (2006).

§ 1-234. Where and how docketed; lien.

CASE NOTES

IV. Enforcement and Loss of Lien.

IV. ENFORCEMENT AND LOSS OF LIEN.

**Motion to Subject Real Estate to Execution Improperly Denied.** — Dismissal of assignee’s motion to subject real estate to execution sale was reversed as the assignee’s judgment lien attached to a husband’s undivided interest in property formerly held as a tenancy by the entirety upon the date of his divorce, when the property was converted by law to a tenancy in common, and when he

conveyed his interest to his former wife, she took title subject to the judgment lien; a consent order providing for a future transfer of the property was not a conveyance as it provided for a future transfer of the property, did not provide a legal description or state the location of the property, and was not filed with the register of deeds. *Martin v. Roberts*, — N.C. App. —, 628 S.E.2d 812, 2006 N.C. App. LEXIS 964 (2006).

## ARTICLE 26.

*Declaratory Judgments.*

**§ 1-253. Courts of record permitted to enter declaratory judgments of rights, status and other legal relations.**

## CASE NOTES

- I. In General.
- II. Scope of Article.
- IV. What May Be Determined by Declaratory Judgment.
  - C. Actions in Which Declaratory Judgment Held Unavailable.

**I. IN GENERAL.****Purpose of Article. —**

Trial court did not err in granting summary judgment to the governor, state public safety agency, state highway patrol, and certain unidentified persons, and denying the wrecker service owner's motion for summary judgment on the wrecker service owner's declaratory judgment action seeking a determination that regulations used to remove his wrecker service business from the state's Wrecker Rotation Services List were illegal and that the regulations were preempted by federal law; the trial court had the authority to declare that the regulations were not illegal because the General Assembly granted to the state public safety agency the power to direct the state highway patrol to establish regulations for private wrecker services. *Ramey v. Easley*, — N.C. App. —, 632 S.E.2d 178, 2006 N.C. App. LEXIS 1308 (2006).

**Applied** in *Trent v. Place, LLC*, — N.C. App. —, 632 S.E.2d 529, 2006 N.C. App. LEXIS 1683 (2006).

**Cited** in *Calhoun v. WHA Med. Clinic, PLLC*, — N.C. App. —, 632 S.E.2d 563, 2006 N.C. App. LEXIS 1654 (2006).

**II. SCOPE OF ARTICLE.****Scope of Article, Generally. —**

When employers and insurers objected to paying hospitals certain amounts which had been approved by the Industrial Commission, in workers' compensation claims, and the employers and insurers challenged the constitutionality of the statute under which these amounts were approved, the employers and insurers could have brought an action under the Uniform Declaratory Judgment Act, G.S. 1-253 seeking relief. *Carlinas Med. Ctr. v. Emplrs & Carriers Listed in Exhibit A*, 172

N.C. App. 549, 616 S.E.2d 588, 2005 N.C. App. LEXIS 1773 (2005).

**IV. WHAT MAY BE DETERMINED BY DECLARATORY JUDGMENT.****C. Actions in Which Declaratory Judgment Held Unavailable.**

**Interpretation of Property Settlement Agreement Incorporated Within a Consent Judgment of Divorce. —** District court erred by interpreting a property settlement agreement via a declaratory judgment action brought by an ex-husband against his ex-wife because the proper remedy with regard to interpreting the agreement, which had been incorporated into a consent judgment of divorce, was a contempt proceeding and not an independent declaratory judgment action; as a result, the district court lacked subject matter jurisdiction of the matter and the order interpreting the agreement, which was in favor of the ex-husband, was vacated on appeal. *Fucito v. Francis*, — N.C. App. —, 622 S.E.2d 660, 2005 N.C. App. LEXIS 2715 (2005).

**Actions to Quiet Title. —** Dismissal of a suit brought by a group of beachfront landowners against the State of North Carolina, the State of North Carolina Department of Environment and Natural Resources, the Coastal Resources Commission, the Division of Coastal Management, and its director, was upheld on appeal because the landowners failed to allege in their complaint sufficient allegations to establish that the State of North Carolina asserted any claim of title to their land under G.S. 41-10.1 to have constituted a waiver of the state's sovereign immunity with regard to the landowners' suit to prevent the general public from interfering with their use of certain beach property, which the landowners claimed was deeded to them. *Fabrikant v. Currituck County*,



174 N.C. App. 30, 621 S.E.2d 19, 2005 N.C. App. LEXIS 2219 (2005).

## § 1-254. Courts given power of construction of all instruments.

### CASE NOTES

**Interpretation of Property Settlement Agreement Incorporated Within a Consent Judgment of Divorce.** — District court erred by interpreting a property settlement agreement via a declaratory judgment action brought by an ex-husband against his ex-wife because the proper remedy with regard to interpreting the agreement, which had been incorporated into a consent judgment of divorce,

was a contempt proceeding and not an independent declaratory judgment action; as a result, the district court lacked subject matter jurisdiction of the matter and the order interpreting the agreement, which was in favor of the ex-husband, was vacated on appeal. *Fucito v. Francis*, — N.C. App. —, 622 S.E.2d 660, 2005 N.C. App. LEXIS 2715 (2005).

## § 1-258. Review.

### CASE NOTES

**Applied** in *Calhoun v. WHA Med. Clinic, PLLC*, — N.C. App. —, 632 S.E.2d 563, 2006 N.C. App. LEXIS 1654 (2006); *Trent v. Place*,

LLC, — N.C. App. —, 632 S.E.2d 529, 2006 N.C. App. LEXIS 1683 (2006).

## § 1-260. Parties.

### CASE NOTES

**Cited** in *Good Hope Hosp., Inc. v. N.C. HHS*, 174 N.C. App. 266, 620 S.E.2d 873, 2005 N.C. App. LEXIS 2399 (2005).

## § 1-261. Jury trial.

### CASE NOTES

**Applied** in *Calhoun v. WHA Med. Clinic, PLLC*, — N.C. App. —, 632 S.E.2d 563, 2006 N.C. App. LEXIS 1654 (2006).

## SUBCHAPTER IX. APPEAL.

### ARTICLE 27.

#### *Appeal.*

## § 1-271. Who may appeal.

### CASE NOTES

I. In General.

- II. Parties Held Entitled to Appeal.
- III. Parties Held Not Entitled to Appeal.

#### I. IN GENERAL.

**Applied** in *In re B.D.*, 174 N.C. App. 234, 620 S.E.2d 913, 2005 N.C. App. LEXIS 2387 (2005).

#### II. PARTIES HELD ENTITLED TO APPEAL.

**Researcher Who Was Required to Produce Documents in Criminal Case Was Aggrieved Party.** — Where the trial court ordered a researcher to produce certain documents for defendant's appellate counsel, the researcher, which claimed that the documents were privileged, had grounds to appeal under G.S. 1-271 and G.S. 1-277; requiring disclosure of the allegedly privileged documents affected a substantial right, and thus the researcher was an aggrieved party. *State v. Bradley*, — N.C. App. —, 634 S.E.2d 258, 2006 N.C. App. LEXIS 1968 (2006).

#### III. PARTIES HELD NOT ENTITLED TO APPEAL.

**Guardian Ad Litem Not Served in Parental Rights Termination Case.** — Trial court did not err by exercising personal jurisdiction over a mother with regard to terminating her parental rights to her son by serving the summons required by G.S. 7B-1106(a)(5) upon the attorney advocate of the child's guardian ad litem rather than the guardian ad litem, because the guardian ad litem did not object at trial to the sufficiency of service nor did the guardian ad litem argue the issue on appeal; the mother actually lacked standing to challenge service of the summons in that she was not an aggrieved party on that issue. *In re J.B.*, 172 N.C. App. 1, 616 S.E.2d 264, 2005 N.C. App. LEXIS 1589 (2005).

### § 1-277. Appeal from superior or district court judge.

#### CASE NOTES

- I. In General.
- II. From What Decisions, etc., Appeal Lies.
  - B. Interlocutory Orders.
    - 1. In General.
    - 2. Substantial Right.
- V. Illustrative Cases.
  - A. Appellant Held Entitled to Appeal.
    - 1. In General.
    - 3. Summary Judgment.

#### I. IN GENERAL.

**Applied** in *Banc of Am. Secs. LLC v. Evergreen Int'l Aviation, Inc.*, 169 N.C. App. 690, 611 S.E.2d 179, 2005 N.C. App. LEXIS 799 (2005); *In re R.T.W.*, 359 N.C. 539, 614 S.E.2d 489, 2005 N.C. LEXIS 646 (2005).

**Cited** in *Fox v. Gibson*, — N.C. App. —, 626 S.E.2d 841, 2006 N.C. App. LEXIS 534 (2006); *Deer Corp. v. Carter*, — N.C. App. —, 629 S.E.2d 159, 2006 N.C. App. LEXIS 968 (2006).

#### II. FROM WHAT DECISIONS, ETC., APPEAL LIES.

##### B. Interlocutory Orders.

##### 1. In General.

**G.S. 1-277(b) does not apply to challenges to sufficiency of service of process.** — *Autec, Inc. v. Southlake Holdings, LLC*, 171 N.C. App. 147, 613 S.E.2d 727, 2005 N.C. App. LEXIS 1162 (2005).

##### Order Compelling Discovery. —

Because a physician's assertions of statutory privilege related directly to the matters to be disclosed under a trial court's interlocutory discovery order, the challenged discovery order affected a substantial right and the physician's interlocutory appeal was properly before the appellate court under G.S. 1-277(a) and G.S. 7A-27(d)(1). *Armstrong v. Barnes*, 171 N.C. App. 287, 614 S.E.2d 371, 2005 N.C. App. LEXIS 1262 (2005), cert. denied, 360 N.C. 60, 621 S.E.2d 173 (2005).

Order imposing sanctions for discovery violations and ordering the production of documents was an interlocutory order that was appealable because the order imposed sanctions pursuant to G.S. 1A-1, Rule 37(b). Such an appeal tests the validity of both the discovery order and the sanctions imposed. *In re Pedestrian Walkway Failure*, 173 N.C. App. 254, 618 S.E.2d 796, 2005 N.C. App. LEXIS 2022 (2005).

**Court's ruling on a separation-property settlement agreement, etc.**

Because a partial summary judgment giving a wife two parcels of land, before the divorcing parties' property was equitably divided, was an interlocutory order, a husband was not required to file an appeal from the interlocutory order; no substantial right of either party was involved, and the partial summary judgment was appealable when the husband filed his appeal from the equitable distribution judgment. *Davis v. Davis*, 360 N.C. 518, 631 S.E.2d 114, 2006 N.C. LEXIS 593 (2006).

**Trial court's denial of a motion to enforce a settlement did not resolve the underlying personal injury claim, and the order of denial was therefore interlocutory;** since the trial court did not certify that there was no just reason to delay the appeal, and the denial did not affect a substantial right, there was no right to an immediate appeal since an appeal of the denial was still allowed once there was a final judgment. *Milton v. Thompson*, 170 N.C. App. 176, 611 S.E.2d 474, 2005 N.C. App. LEXIS 903 (2005).

**When Interlocutory Orders Are Appealable. —**

Trial court erred in holding that contractor's withdrawal of appeal from the order dismissing its claims against a manufacturer became a final judgment and the law of the case because the contractor was not required to immediately appeal the trial court's order dismissing its claims. The contractor did not waive its right to appeal after the entry of final judgment by foregoing an interlocutory appeal since the appeal was permissive rather than mandatory, under G.S. 1-277, and the dismissal order was subject to appellate review. *Atl. Coast Mech., Inc. v. Arcadis, Geraghty & Miller of N.C., Inc.*, — N.C. App. —, 623 S.E.2d 334, 2006 N.C. App. LEXIS 58 (2006).

Because the appeal was final as to the appealing defendants, and the trial court certified the appeal, the appellate court was required to review plaintiff's appeal on the merits. *James River Equip., Inc. v. Tharpe's Excavating, Inc.*, — N.C. App. —, 634 S.E.2d 548, 2006 N.C. App. LEXIS 1897 (2006).

When a patient sued a pharmacy for negligence, breach of implied warranties, liability under G.S. 99B-6, and to pierce the pharmacy's corporate veil and hold its president liable, and the warranty claim and claim to pierce the corporate veil were dismissed, the patient did not show, in an interlocutory appeal of that dismissal, that she would lose a substantial right if she could not immediately appeal the dismissal. *Rauch v. Urgent Care Pharm., Inc.*, — N.C. App. —, 632 S.E.2d 211, 2006 N.C. App. LEXIS 1566 (2006).

**Dismissal of All Claims Against Less**

**Than All Defendants. —** Because the appeal was final as to the appealing defendants, and the trial court certified the appeal, the appellate court was required to review plaintiff's appeal on the merits. *James River Equip., Inc. v. Tharpe's Excavating, Inc.*, — N.C. App. —, 634 S.E.2d 548, 2006 N.C. App. LEXIS 1897 (2006).

**2. Substantial Right.**

**Section Prohibits Appeal of Interlocutory Orders Unless Substantial Right Is Affected. —**

Because the trial court did not rule on the merits of an employee's claim for unemployment benefits, but found that the Employment Security Commission's order did not address all of the relevant issues raised by the record, and the findings were incomplete and failed to set out the sequence of events regarding the timing and notification of the employee's discharge, the order was clearly interlocutory; hence, without evidence that the employee's substantial rights were affected, or that any criteria for an immediate appeal was required, the employee's appeal was dismissed. *Reeves v. Yellow Transp., Inc.*, 170 N.C. App. 610, 613 S.E.2d 350, 2005 N.C. App. LEXIS 1076 (2005), review denied, — N.C. —, 619 S.E.2d 511 (2005).

**Motion For Change of Venue. —** In cases where a trial court's decision deprives an appellant of a substantial right that would be lost absent immediate review, appellate court was allowed to review the appeal; motions for change of venue because the county designated was not proper affected a substantial right and were immediately appealable. *Hawley v. Hobgood*, — N.C. App. —, 622 S.E.2d 117, 2005 N.C. App. LEXIS 2478 (2005).

**Questions affecting title to property immediately reviewable. —** Possible existence of an easement, the basis upon which a trial court ordered joinder of individual unit owners in a townhome development, was a question affecting title, and thus the trial court's joinder order in a suit seeking a condemnation of a homeowners' association's common area was subject to immediate review. *N.C. DOT v. Stagecoach Vill.*, 360 N.C. 46, 619 S.E.2d 495, 2005 N.C. LEXIS 996 (2005).

**Substantial Right Held Not Affected, Precluding Immediate Appeal. —**

Order allowing estates to amend their complaint in a medical malpractice suit was not immediately appealable where the issues of a hospital's claim that, without immediate review, it lost the right to avoid trial altogether by (1) raising the statute of limitations, (2) raising "estoppel by laches" as an affirmative defense, or (3) having the amended complaint dismissed for failure to comply with G.S. 1A-1, N.C. R. Civ. P. 9(j), were not brought before the trial



court, and no substantial right was lost by the failure to allow immediate review; the estates were also entitled to sanctions against the hospital. *Estate of Spell v. Ghanem*, — N.C. App. —, 622 S.E.2d 725, 2005 N.C. App. LEXIS 2717 (2005).

Appeal by corporation, president, and vice president from the denial of the motion to dismiss pursuant to G.S. 1A-1-12(b)(1), (6) was interlocutory and did not affect a substantial right pursuant to G.S. 1-277(a) and G.S. 7A-27(d); the appeal, therefore, was dismissed in accordance with G.S. 1A-1-54(b). *Capps v. NW Sign Indus. of N.C., Inc.*, 171 N.C. App. 409, 614 S.E.2d 552, 2005 N.C. App. LEXIS 1203 (2005).

**Substantial Right Held Affected.** — Where a trial court granted plaintiff summary judgment as to liability on a criminal conversation claim, and granted defendant summary judgment as to an alienation of affections claim, though no final judgment was entered as to the issue of damages for the criminal conversation claim, nor was certification granted under G.S. 1A-1, N.C. R. Civ. P. 54(b) as to the alienation of affections claim, the appeal affected a substantial right that would be lost absent immediate review, because the elements of damages were so closely related that they did not support separate awards for each tort. *McCutchen v. McCutchen*, 170 N.C. App. 1, 612 S.E.2d 162, 2005 N.C. App. LEXIS 904 (2005).

In a defamation action, the appeal of the candidate and campaign from the trial court's denial of their G.S. 1A-1, N.C. R. Civ. P. 12(b)(6) motion was interlocutory, and the denial did not challenge a substantial right that was to be lost absent immediate appellate review pursuant to G.S. 1-277(a); the instant case was akin to a previous case in which an appeal from a motion for judgment on pleadings pursuant to G.S. 1A-1, N.C. R. Civ. P. 12(c) was dismissed, and the instant case was distinguishable from a previous case in which an appeal on a ruling on a motion for summary judgment pursuant to G.S. 1A-1, N.C. R. Civ. P. 56 was allowed, as a motion under G.S. 1A-1, N.C. R. Civ. P. 12(c) was more similar to a G.S. 1A-1, N.C. R. Civ. P. 12(b)(6) motion. *Grant v. Miller*, 170 N.C. App. 184, 611 S.E.2d 477, 2005 N.C. App. LEXIS 902 (2005).

Widow sufficiently established that the order below affected a substantial right and that interlocutory review was therefore appropriate under circumstances in which the trial court had ordered the widow to pay \$150,000 which she had withdrawn from a decedent's bank account. *Estate of Redden v. Redden*, — N.C. App. —, 632 S.E.2d 794, 2006 N.C. App. LEXIS 1638 (2006).

Shareholders were entitled to an interlocutory appeal of the trial court's denial of their motion for the appointment of a receiver because they established a substantial right to the preservation of what they alleged were their corporation's assets and opportunities under G.S. 1-277(a) and G.S. 7A-27(d)(1), which right was substantially affected by the trial court's denial of the appointment of a receiver. *Barnes v. Kochhar*, — N.C. App. —, 633 S.E.2d 474, 2006 N.C. App. LEXIS 1574 (2006).

**Res judicata.** — Interlocutory appeal of the denial of defendants' motion for summary judgment in a constructive trust action was allowed; the basis of the motion for summary judgment was that res judicata barred the constructive trust action and in such a case, the failure to allow an appeal might affect a substantial right in that the possibility existed that without an immediate appeal, they would be required to twice defend against the same claim by plaintiffs. *Tiber Holding Corp. v. DiLoreto*, 170 N.C. App. 662, 613 S.E.2d 346, 2005 N.C. App. LEXIS 1081 (2005), cert. denied, — N.C. —, 623 S.E.2d 263 (2005).

## V. ILLUSTRATIVE CASES.

### A. Appellant Held Entitled to Appeal.

#### 1. In General.

**Researcher Who Was Required to Produce Documents in Criminal Case Was Aggrieved Party.** — Where the trial court ordered a researcher to produce certain documents for defendant's appellate counsel, the researcher, which claimed that the documents were privileged, had grounds to appeal under G.S. 1-271 and G.S. 1-277; requiring disclosure of the allegedly privileged documents affected a substantial right, and thus the researcher was an aggrieved party. *State v. Bradley*, — N.C. App. —, 634 S.E.2d 258, 2006 N.C. App. LEXIS 1968 (2006).

#### 3. Summary Judgment.

##### Summary Judgment Held to Affect Substantial Right. —

While an order granting summary judgment was interlocutory, it was appealable because the cause of action for criminal conversation, which was still before the trial court, was so connected with the claim for alienation of affections that only one issue of damages should be submitted to the jury, and thus, a substantial right was at stake to have the same jury hear the wife's two claims. *McCutchen v. McCutchen*, 360 N.C. 280, 624 S.E.2d 620, 2006 N.C. LEXIS 2 (2006).

## § 1-278. Interlocutory orders reviewed on appeal from judgment.

### CASE NOTES

#### **Preservation of Issue for Review.** —

Because defendants did not specifically reference the trial court's order of substitution in the notice of appeal, and because the record contained no indication that they had objected to the entry of that order, the appellate court lacked jurisdiction to review their contentions regarding the order. *Dixon v. Hill*, 174 N.C. App. 252, 620 S.E.2d 715, 2005 N.C. App. LEXIS 2393 (2005).

**Interlocutory Appeal from Summary Judgment.** — Because the investors' theory of the insurance and securities broker's liability was that the broker was vicariously liable for

the agent's and subagent's actions, many of the same factual issues applied to the claims against the broker, the agent, and the subagent and inconsistent verdicts could result from separate trials; therefore, the appellate court had jurisdiction to review the appeal of the trial court's grant of summary judgment to the broker on all the investors' claims as a substantial right was affected. *Estate of Redding v. Welborn*, 170 N.C. App. 324, 612 S.E.2d 664, 2005 N.C. App. LEXIS 1001 (2005).

**Cited in** *State ex rel. Cooper v. NCCS Loans, Inc.*, — N.C. App. —, 624 S.E.2d 371, 2005 N.C. App. LEXIS 2588 (2005).

## § 1-289. Undertaking to stay execution on money judgment.

### CASE NOTES

**Child Support Order.** — Trial court did not err when it ordered a father to pay a bond in the amount of \$2,000 toward his alleged child support arrearage, because an order for child support was a money judgment for which a trial

court had authority to order a bond to stay the proceeding for appeal. *Clark v. Gragg*, 171 N.C. App. 120, 614 S.E.2d 356, 2005 N.C. App. LEXIS 1187 (2005).

## § 1-292. How judgment for real property stayed.

### CASE NOTES

**Factors to Consider in Setting Bond Amount.** — Where appellants sought a bond under G.S. 1-292 for a stay pending appeal of an order requiring them to sell land to appellee, the trial court had to determine the value of the loss to the appellee of the use and occupancy of the property during the appeal; appellants' affidavit asserting that the bond should be \$1 because they did not intend to use or occupy the property was, therefore, beside the point. *Currituck Assocs. Residential P'ship v. Hollowell*, 170 N.C. App. 399, 612 S.E.2d 386, 2005 N.C. App. LEXIS 1000 (2005).

**Insufficient Evidence to Support Bond Amount.** — Where appellants sought a bond under G.S. 1-292 for a stay pending appeal of an order requiring them to sell land to appellee, an affidavit stating that appellee would incur damages of about \$1.369 million per year if delayed in developing the land did not support the trial court's \$1 million bond requirement, as there was no showing the affidavit was based on the affiant's personal knowledge. *Currituck Assocs. Residential P'ship v. Hollowell*, 170 N.C. App. 399, 612 S.E.2d 386, 2005 N.C. App. LEXIS 1000 (2005).

## § 1-294. Scope of stay; security limited for fiduciaries.

### CASE NOTES

**Section Not Controlling over Specific Statute.** —

Where the trial court terminated the mother's parental rights during the pendency of the

mother's custody review order appeal, G.S. 1-294 did not deprive the trial court of jurisdiction to terminate the mother's parental rights, as such jurisdiction was granted under G.S.

7B-1101 and G.S. 7B-1103. In re R.T.W., 359 N.C. 539, 614 S.E.2d 489, 2005 N.C. LEXIS 646 (2005).

**Order on Remand Noticing Matter Did Not Constitute Exercise of Jurisdiction.** — Although two courts cannot have jurisdiction over the same order at the same time, a district court's order on remand noticing a matter did not constitute the exercise of jurisdiction under

N.C. R. App. P. 28(b)(6) when an appellate court filed its opinion, but before the judgment was certified, the district court set the case for hearing and sent notice of the hearing to a party. In re T.S., — N.C. App. —, 631 S.E.2d 19, 2006 N.C. App. LEXIS 1299 (2006).

**Applied in** McKyer v. McKyer, — N.C. App. —, 632 S.E.2d 828, 2006 N.C. App. LEXIS 1829 (2006).

## ARTICLE 27A.

### *Appeals And Transfers From The Clerk.*

#### § 1-301.3. Appeal of estate matters determined by clerk.

##### CASE NOTES

**Notice of Appeal Constituted Only a General Objection.** — Petitioner's notice of appeal to the superior court from a decision of the clerk of superior court was properly characterized as a general objection; the appeal did

not relate specifically to any of the clerk's 66 findings of fact, but constituted only a broad-side attack on them. In re Estate of Whitaker, — N.C. App. —, 633 S.E.2d 849, 2006 N.C. App. LEXIS 1902 (2006).

## SUBCHAPTER X. EXECUTION.

### ARTICLE 30.

#### *Betterments.*

#### § 1-340. Petition by claimant; execution suspended; issues found.

##### CASE NOTES

**Betterments Statutes Do Not Create Right Against State.** —

Dismissal of a suit brought by a group of beachfront landowners against the State of North Carolina, the State of North Carolina Department of Environment and Natural Resources, the Coastal Resources Commission, the Division of Coastal Management, and its director, was upheld on appeal because the landowners failed to allege in their complaint sufficient allegations to establish that the State

of North Carolina asserted any claim of title to their land under G.S. 41-10.1 to have constituted a waiver of the state's sovereign immunity with regard to the landowners' suit to prevent the general public from interfering with their use of certain beach property, which the landowners claimed was deeded to them. Fabrikant v. Currituck County, 174 N.C. App. 30, 621 S.E.2d 19, 2005 N.C. App. LEXIS 2219 (2005).

### ARTICLE 31.

#### *Supplemental Proceedings.*

#### § 1-352. Execution unsatisfied, debtor ordered to answer.

##### CASE NOTES

**Existence of Alternative Remedies Did Not Preclude Action.** — While, in order to

recover on a judgment that certain buyers had obtained against a corporation, the buyers



might have had enforcement of the judgment by proceeding on an execution under G.S. 1-352, the existence of those possible alternative remedies did not preclude the buyers from bringing an action, as they did, against the

corporation's owners, and the action should not have been dismissed. *Blair v. Robinson*, — N.C. App. —, 631 S.E.2d 217, 2006 N.C. App. LEXIS 1394 (2006).

## § 1-362. Debtor's property ordered sold.

### CASE NOTES

**Disability Insurance Payments Were Not Exempt Earnings.** — Where North Carolina, pursuant to G.S. 1C-1601(f), opted out of 11 U.S.C.S. § 522, any bankruptcy property exemptions were controlled by state law; thus, a North Carolina debtor could not use § 522 to exempt disability insurance policy payments from his bankruptcy estate and the payments were not exempt under G.S. 1-362 because such payments were not earnings for performance of personal services but resulted from nonperformance. In *re Dillon*, — Bankr. —, 2005 Bankr. LEXIS 1314 (Bankr. M.D.N.C. July 8, 2005).

**Claimed Expenses Not Necessary for Support.** — Where a bankruptcy debtor

claimed that monthly expenses exceeded the debtor's income and thus recently earned cash was necessary for the support of the debtor, the debtor failed to show that the cash was necessary for the debtor's support; the debtor, who had no dependents and regular income, had the financial capacity to support the debtor without resort to the additional cash since certain of the debtor's claimed expenses involved voluntary car payments for the debtor's siblings and contributions to a savings program, which were not expenses necessary for the support of the debtor. In *re Young*, — Bankr. —, 2001 Bankr. LEXIS 2184 (Bankr. M.D.N.C. July 12, 2001).

## SUBCHAPTER XII. SPECIAL PROCEEDINGS.

### ARTICLE 33.

#### *Special Proceedings.*

## § 1-393. Chapter and Rules of Civil Procedure applicable to special proceedings.

### CASE NOTES

#### **Special Proceedings.** —

Trustee removal proceedings are held in an estate matter and not in a special proceeding or in a civil action, and clerks of court are not required to also make decisions regarding discovery and other issues of law arising during estate matters; instead, the clerks of superior courts hear the matters before them summarily, and are responsible for determining questions of fact rather than providing judgment in favor of one party or the other. In *re Estate of Newton*, 173 N.C. App. 530, 619 S.E.2d 571, 2005 N.C. App. LEXIS 2120 (2005).

**Termination Proceedings.** — Trial court

erred in denying the father's motion to set aside the order entered against him that terminated his parental rights in his minor daughter; the record showed that the summons that was issued in his case was not served upon him within the time limit for service of process under the civil procedure rule then in effect and since that rule applied to civil actions or special proceedings such as a termination of parental rights case, the order was entered without the trial court having acquired personal jurisdiction over the father, and thus was void. In *re A.B.D.*, 173 N.C. App. 77, 617 S.E.2d 707, 2005 N.C. App. LEXIS 1925 (2005).

## SUBCHAPTER XIII. PROVISIONAL REMEDIES.

## ARTICLE 35.

*Attachment.*

## Part 1. General Provisions.

## § 1-440.1. Nature of attachment.

## CASE NOTES

**Strict Construction.** —

Attachment of the proceeds from the sale of real property pursuant to G.S. 1-440.1(a) was not warranted where no facts suggested that the individual who possessed the funds would

dispose, assign, or secrete property with the intent to defraud. *Anderson v. Brokers, Inc.* (In re *Brokers, Inc.*), — Bankr. —, 2005 Bankr. LEXIS 1916 (Bankr. M.D.N.C. Sept. 22, 2005).

## § 1-440.2. Actions in which attachment may be had.

## CASE NOTES

**Strict construction.** — Attachment of the proceeds from the sale of real property pursuant to G.S. 1-440.1(a) was not warranted where no facts suggested that the individual who possessed the funds would dispose, assign, or

secrete property with the intent to defraud. *Anderson v. Brokers, Inc.* (In re *Brokers, Inc.*), — Bankr. —, 2005 Bankr. LEXIS 1916 (Bankr. M.D.N.C. Sept. 22, 2005).

## § 1-440.3. Grounds for attachment.

## CASE NOTES

**Fraudulent Disposition of Property.** —

Attachment of the proceeds from the sale of real property pursuant to G.S. 1-440.1(a) was not warranted where no facts suggested that the individual who possessed the funds would

dispose, assign, or secrete property with the intent to defraud. *Anderson v. Brokers, Inc.* (In re *Brokers, Inc.*), — Bankr. —, 2005 Bankr. LEXIS 1916 (Bankr. M.D.N.C. Sept. 22, 2005).

## Part 2. Procedure to Secure Attachment.

## § 1-440.11. Affidavit for attachment; amendment.

## CASE NOTES

## I. In General.

## I. IN GENERAL.

**Strict Construction.** —

Attachment of the proceeds from the sale of real property pursuant to G.S. 1-440.1(a) was not warranted where no facts suggested that

the individual who possessed the funds would dispose, assign, or secrete property with the intent to defraud. *Anderson v. Brokers, Inc.* (In re *Brokers, Inc.*), — Bankr. —, 2005 Bankr. LEXIS 1916 (Bankr. M.D.N.C. Sept. 22, 2005).

## ARTICLE 38.

*Receivers.*

## Part 1. Receivers Generally.

## § 1-502. In what cases appointed.

## CASE NOTES

**Appointment Within Discretion of Court.** — Shareholders appeal of the trial court's interlocutory order denying their motion for the appointment of a receiver was dismissed because the shareholders were not entitled to

the appointment of a receiver because the appointment of a receiver was within the discretion of the trial court under G.S. 1-502. *Barnes v. Kochhar*, — N.C. App. —, 633 S.E.2d 474, 2006 N.C. App. LEXIS 1574 (2006).

## SUBCHAPTER XIV. ACTIONS IN PARTICULAR CASES.

## ARTICLE 43.

*Nuisance and Other Wrongs.*

## § 1-539.1. Damages for unlawful cutting, removal or burning of timber; misrepresentation of property lines.

## CASE NOTES

**Trespass Not Established.** — Plaintiffs were not entitled to double damages under G.S. 1-539.1 where the logger allegedly harvested timber and removed it from their land without permission; the trespass element of G.S. 1-539.1 was not established because third-

party defendant, a tenant-in-common with plaintiffs, gave the logger consent to harvest and remove timber from the property. *Mitchell v. Broadway*, — N.C. App. —, 628 S.E.2d 847, 2006 N.C. App. LEXIS 980 (2006).

## SUBCHAPTER XV. INCIDENTAL PROCEDURE IN CIVIL ACTIONS.

## ARTICLE 44B.

*Structured Settlement Protection Act.*

## § 1-543.12. Structured settlement payment rights.

## CASE NOTES

**Transfer Invalidated.** — Approval of a factoring company's application to receive assignment of payment rights under annuities issued under settlement agreements was erroneous where the transfers contravened G.S. 1-543.15(a) because they required an annuitant

to waive the right to independent professional advice and contravened G.S. 1-543.12, which prohibited transfers of payments that have arisen under North Carolina's Workers' Compensation Act. *Dean v. Symetra Assigned Benefits Serv. Co (In re Rapid Settlements LTD)*,



133 Wn. App. 350, 136 P.3d 765, 2006 Wash. App. LEXIS 1119 (2006).

## § 1-543.15. No waiver; penalties.

### CASE NOTES

**Transfer Invalidated.** — Approval of a factoring company's application to receive assignment of payment rights under annuities issued under settlement agreements was erroneous where the the transfers contravened G.S. 1-543.15(a) because they required an annuitant to waive the right to independant professional

advice and contravened G.S. 1-543.12, which prohibited transfers of payments that have arisen under North Carolina's Workers' Compensation Act. *Dean v. Symetra Assigned Benefits Serv. Co (In re Rapid Settlements LTD)*, 133 Wn. App. 350, 136 P.3d 765, 2006 Wash. App. LEXIS 1119 (2006).

### ARTICLE 45C.

### *Revised Uniform Arbitration Act.*

## § 1-569.1. Definitions.

### CASE NOTES

**Cited in** *Carroll v. Ferro*, — N.C. App. —, 633 S.E.2d 708, 2006 N.C. App. LEXIS 1904 (2006).

## § 1-569.3. When Article applies.

### CASE NOTES

**Cited in** *Moose v. Versailles Condo. Ass'n*, 171 N.C. App. 377, 614 S.E.2d 418, 2005 N.C. App. LEXIS 1199 (2005).

## § 1-569.7. Motion to compel or stay arbitration.

### CASE NOTES

**Remand Required When Trial Court Did Not State Reasons for Denial of Motion.** — When the trial court denied defendants' motion to stay the proceedings and to compel arbitration, but did not state the grounds for its

decision, reversal and remand was required because meaningful appellate review of the decision was impossible. *Steffes v. DeLapp*, — N.C. App. —, 629 S.E.2d 892, 2006 N.C. App. LEXIS 1176 (2006).

## § 1-569.17. Witnesses; subpoenas; depositions; discovery.

### CASE NOTES

**Use of civil discovery constituted waiver of right to compel arbitration;** therefore, the trial court properly denied a property management company's motion to

compel arbitration of an action by property owners seeking to recover for damages to the property, as the company engaged in extensive discovery which was not permissible pursuant

to G.S. 1-569.17. *Moose v. Versailles Condo. Ass'n*, 171 N.C. App. 377, 614 S.E.2d 418, 2005 N.C. App. LEXIS 1199 (2005).

§ 1-569.23. Vacating award.

CASE NOTES

**Waiver of Untimeliness of Award.** — Business partner's and limited liability companies' failure to object to the untimeliness of an arbitration award before entry constituted a waiver, regardless of whether they based their claim on 9 USCS § 10 or former G.S. 1-567.13 (now G.S. 1-569.23). *Carroll v. Ferro*, — N.C. App. —, 633 S.E.2d 708, 2006 N.C. App. LEXIS 1904 (2006).

**What Errors May Be Corrected on Review.** —

Assuming *arguendo* that an arbitrator erred in his application of the law, this did not constitute him exceeding his authority to warrant vacatur of an arbitration award under 9 USCS § 10 or former G.S. 1-567.13 (now G.S. 1-569.23). *Carroll v. Ferro*, — N.C. App. —, 633 S.E.2d 708, 2006 N.C. App. LEXIS 1904 (2006).

§ 1-569.24. Modification or correction of award.

CASE NOTES

**But Prejudgment Interest Authorized Where in Parties' Agreement.** — Trial court did not impermissibly modify arbitration award under G.S. 1-569.24 when it calculated prejudgment interest under G.S. 24-5(b) but merely enforced the award as written, since both the arbitration agreement as understood between the parties and the arbitration award as drafted by the arbitrator contemplated an award of prejudgment interest. *Lovin v. Byrd*, — N.C. App. —, 631 S.E.2d 58, 2006 N.C. App. LEXIS 1395 (2006).

**Remand with Instructions to Trial**

**Court.** — Nothing in a trial court's order modifying an arbitrator's award indicated that the court considered the proper standard for modifying or correcting the award, and nothing in the order indicated that the trial court determined that there were grounds under either 9 USCS § 11 or former G.S. 1-567.14 (now G.S. 1-569.24) supporting modification or correction of the award; accordingly, the trial court's ruling modifying the award was reversed and the case was remanded. *Carroll v. Ferro*, — N.C. App. —, 633 S.E.2d 708, 2006 N.C. App. LEXIS 1904 (2006).

## Chapter 1A. Rules of Civil Procedure.

### Article 2.

#### Commencement of Action; Service of Process, Pleadings, Motions, and Orders.

##### Rule

5. Service and filing of pleadings and other papers.

### ARTICLE 1.

#### *Scope of Rules—One Form of Action.*

### Rule 1. Scope of rules.

#### CASE NOTES

##### **Applicability of Rules. —**

While the North Carolina Rules of Civil Procedure govern civil proceedings generally, they do not apply when a differing procedure is prescribed by statute; a trial court's denial of a corporation's motion to intervene in a case seeking review of an annexation ordinance was proper, since the corporation failed to comply with G.S. 160A-50 procedures by moving to intervene six months after the ordinance was adopted. *Gates Four Homeowners Ass'n v. N.C. Municipality*, 170 N.C. App. 688, 613 S.E.2d 55, 2005 N.C. App. LEXIS 1088 (2005).

Trustee removal proceedings are held in an estate matter and not in a special proceeding or in a civil action, and clerks of court are not required to also make decisions regarding discovery and other issues of law arising during

estate matters; instead, the clerks of superior courts hear the matters before them summarily, and are responsible for determining questions of fact rather than providing judgment in favor of one party or the other. In *re Estate of Newton*, 173 N.C. App. 530, 619 S.E.2d 571, 2005 N.C. App. LEXIS 2120 (2005).

**Appeals of Annexation Ordinances. —** Petitioners' motion under G.S. 1A-1-24(a) to intervene in another party's petition for review of an annexation ordinance was properly denied, because G.S. 1A-1-24(a) does not apply to appeals of annexation ordinances under G.S. 160A-50(a). *Home Builders Ass'n of Fayetteville N.C., Inc. v. City of Fayetteville*, 170 N.C. App. 625, 613 S.E.2d 521, 2005 N.C. App. LEXIS 1072 (2005).

### Rule 2. One form of action.

#### CASE NOTES

#### I. In General.

##### I. IN GENERAL.

**Cited** in *Skinner v. Preferred Credit*, 172

N.C. App. 407, 616 S.E.2d 676, 2005 N.C. App. LEXIS 1806 (2005).

### ARTICLE 2.

#### *Commencement of Action; Service of Process, Pleadings, Motions, and Orders.*

### Rule 3. Commencement of action.

#### CASE NOTES

#### I. In General.



**I. IN GENERAL.**

— N.C. App. —, 629 S.E.2d 344, 2006 N.C. App. LEXIS 1058 (2006).

**Cited** in *Conner Bros. Mach. Co. v. Rogers*,

**Rule 4. Process.****CASE NOTES**

- I. In General.
- II. Personal Service on Natural Persons.
  - A. In General.
  - C. Service by Registered or Certified Mail.
- IV. Service on Corporations.
- V. Service by Publication.
- VII. Discontinuance and Extensions.

**I. IN GENERAL.****Summons Must Be Served Within 30 Days (Now 60 Days). —**

Trial court erred in denying the father's motion to set aside an order terminating his parental rights; since the father was not served within the time limit for serving process once a summons was issued and no extension of time was obtained, the trial court did not obtain personal jurisdiction over him in a case where the mother filed a petition to terminate the father's parental rights. In re A.B.D., 173 N.C. App. 77, 617 S.E.2d 707, 2005 N.C. App. LEXIS 1925 (2005).

**Section Not Applicable to Termination of Parental Right Proceeding Begun Within Two Years of Service. —** Because the first termination of parental rights action against the mother had been dismissed, service in the instant action was proper under G.S. 1A-1-5, not G.S. 1A-1-4, as it was made less than two years after the original action began. In re P.L.P., 173 N.C. App. 1, 618 S.E.2d 241, 2005 N.C. App. LEXIS 1921 (2005), *aff'd*, — N.C. —, 625 S.E.2d 779 (2006).

**Return Not Set Aside on Testimony of One Witness. —**

Where defendant submitted only one witness affidavit disputing service of process, that one affidavit was insufficient to rebut the presumption that a return under G.S. 1A-1-4(j)(1)a. of valid service from a sheriff's deputy was proof of valid service. Dismissal of plaintiff's complaint under G.S. 1A-1-12(b)(4), (5), for insufficient service was improper. *Saliby v. Connors*, 171 N.C. App. 435, 614 S.E.2d 416, 2005 N.C. App. LEXIS 1258 (2005).

**Service on Local Union Did Not Effect Service on International Union. —** In an employment discrimination action in which an employee attempted to serve process on an international union by mailing the summons and complaint to a local union's office, the international union was not properly served

under Fed. R. Civ. P. 4(c)(2) and (e)(1) and N.C. R. Civ. P. 4(j)(8) because the unions were autonomous entities, the local union was not authorized to accept service of process on behalf of the international union, and the local union was not a mere agent of the international union. *Hoyle v. UAW Local Union 5285*, 444 F. Supp. 2d 467, 2006 U.S. Dist. LEXIS 54422 (W.D.N.C. 2006).

**Cited** in *Dixon v. Hill*, 174 N.C. App. 252, 620 S.E.2d 715, 2005 N.C. App. LEXIS 2393 (2005).

**II. PERSONAL SERVICE ON NATURAL PERSONS.****A. In General.****Waiver of Right to Challenge Jurisdiction. —**

Juvenile petition was filed June 11, 2004, and the summons was issued four days later, but the summons was returned by the sheriff on June 30, 2004, unserved; on July 8, 2004, the mother attended a hearing regarding the allegations her minor child was neglected and dependent. The mother was not only present in court, but also agreed to continue the matter until July 22, 2004, and there was no evidence that the mother raised any objection at that hearing regarding insufficient service of process or personal jurisdiction; thus, her actions amounted to waiver of her right to challenge the trial court's exercise of personal jurisdiction over her regardless of whether she was served with a juvenile summons in compliance with G.S. 1A-1-4. In re A.J.M., — N.C. App. —, 630 S.E.2d 33, 2006 N.C. App. LEXIS 1220 (2006).

**C. Service by Registered or Certified Mail.**

**Reception by Mother. —** Trial court erred in granting defendant's motion to dismiss plaintiff's negligence action for improper service of process because by filing a copy of the signed return receipt, along with an affidavit that comported with G.S. 1-75.10, plaintiff was

entitled to a rebuttable presumption of valid service. Defendant did not state or otherwise present any evidence that his mother, who signed for the civil summons and complaint, was not authorized to accept service for him; the G.S. 1A-1-4(j)(1)(c) requirements for service of process were met. *Carpenter v. Agee*, 171 N.C. App. 98, 613 S.E.2d 735, 2005 N.C. App. LEXIS 1164 (2005).

#### IV. SERVICE ON CORPORATIONS.

**General Appearance Waives Right to Challenge Service of Process.** — Where the person who was served with a summons directed to a corporation attended the Small Claims Division proceedings and fully participated on the corporation's behalf, the corporation made a general appearance and thus waived its right to challenge proper service of process; the trial court erred in reversing a judgment entered by a Small Claims Division magistrate based on invalid service. *Woods v. Billy's Auto.*, — N.C. App. —, 622 S.E.2d 193, 2005 N.C. App. LEXIS 2595 (2005).

**Service on Other Defendant Did Not Relate Back to Original Summons.** — Since the original summons was not directed to the corporation but to a different defendant, a later summons against the corporation did not relate back to the original summons, and since there was not a properly directed summons that was merely not served, G.S. 1A-1-4(d) did not apply and the later summons was not a valid alias or pluries summons; thus, service on the corporation fell outside of the authorized time and the case was not filed within the one year period required by G.S. 1A-1-41(a)(1). *Stack v. Union Reg'l Mem'l Med. Ctr., Inc.*, 171 N.C. App. 322, 614 S.E.2d 378, 2005 N.C. App. LEXIS 1255 (2005), cert. denied, 360 N.C. 66, 621 S.E.2d 877 (2005).

#### V. SERVICE BY PUBLICATION.

**Conclusory Findings of Fact As to Service By Publication.** — Judgment granting a summary judgment divorce was vacated as a conclusory finding was made that a wife had been properly served and that the trial court had jurisdiction over her, without making the findings necessary to support the conclusions, despite the facts that: (1) the husband attempted to serve the complaints on the wife at two different addresses, (2) the husband's affidavit of service by publication failed to state that the husband mailed a notice of service by publication to the wife before the first publication, and (3) the husband mailed the notice of hearing to the wife at a different address than he used during the second attempt at service of the complaint; no findings were made as to the use of service by publication by the husband or his due diligence in attempting to serve the wife, or that the husband was not required to mail notice of the service by publication to the wife before the first publication. *Agbemavor v. Keteku*, — N.C. App. —, 629 S.E.2d 337, 2006 N.C. App. LEXIS 1074 (2006).

#### VII. DISCONTINUANCE AND EXTENSIONS.

**Action Is Abated When No Summons Is Issued.** — Preliminary injunction against defendants was vacated in plaintiff's civil action because no summons was issued within five days after the complaint was filed as required by G.S. 1A-1, N.C. R. Civ. P. 4(a); the action had abated and was deemed never to have commenced, and the trial court lacked subject matter jurisdiction and authority to issue the preliminary injunction. *Conner Bros. Mach. Co. v. Rogers*, — N.C. App. —, 629 S.E.2d 344, 2006 N.C. App. LEXIS 1058 (2006).

### Rule 5. Service and filing of pleadings and other papers.

(a) *Service of orders, subsequent pleadings, discovery papers, written motions, written notices, and other similar papers — When required.* — Every order required by its terms to be served, every pleading subsequent to the original complaint unless the court otherwise orders because of numerous defendants, every paper relating to discovery required to be served upon a party unless the court otherwise orders, every written motion other than one which may be heard ex parte, and every written notice, appearance, demand, offer of judgment and similar paper shall be served upon each of the parties, but no service need be made on parties in default for failure to appear except that pleadings asserting new or additional claims for relief against them shall be served upon them in the manner provided for service of summons in Rule 4.

(a1) *Service of briefs or memoranda in support or opposition of certain dispositive motions.* — In actions in superior court, every brief or memorandum in support of or in opposition to a motion to dismiss, a motion for judgment on the pleadings, a motion for summary judgment, or any other motion seeking a final determination of the rights of the parties as to one or



more of the claims or parties in the action shall be served upon each of the parties at least two days before the hearing on the motion. If the brief or memorandum is not served on the other parties at least two days before the hearing on the motion, the court may continue the matter for a reasonable period to allow the responding party to prepare a response, proceed with the matter without considering the untimely served brief or memorandum, or take such other action as the ends of justice require. The parties may, by consent, alter the period of time for service. For the purpose of this two-day requirement only, service shall mean personal delivery, facsimile transmission, or other means such that the party actually receives the brief within the required time.

(b) *Service — How made.* — A pleading setting forth a counterclaim or cross claim shall be filed with the court and a copy thereof shall be served on the party against whom it is asserted or on the party's attorney of record. With respect to all pleadings subsequent to the original complaint and other papers required or permitted to be served, service with due return may be made in the manner provided for service and return of process in Rule 4 and may be made upon either the party or, unless service upon the party personally is ordered by the court, upon the party's attorney of record. With respect to such other pleadings and papers, service upon the attorney or upon a party may also be made by delivering a copy to the party or by mailing it to the party at the party's last known address or, if no address is known, by filing it with the clerk of court. Delivery of a copy within this rule means handing it to the attorney or to the party, leaving it at the attorney's office with a partner or employee, or by sending it to the attorney's office by a confirmed telefacsimile transmittal for receipt by 5:00 P.M. Eastern Time on a regular business day, as evidenced by a telefacsimile receipt confirmation. If receipt of delivery by telefacsimile is after 5:00 P.M., service will be deemed to have been completed on the next business day. Service by mail shall be complete upon deposit of the pleading or paper enclosed in a post-paid, properly addressed wrapper in a post office or official depository under the exclusive care and custody of the United States Postal Service.

A certificate of service shall accompany every pleading and every paper required to be served on any party or nonparty to the litigation, except with respect to pleadings and papers whose service is governed by Rule 4. The certificate shall show the date and method of service or the date of acceptance of service and shall show the name and service address of each person upon whom the paper has been served. If one or more persons are served by facsimile transmission, the certificate shall also show the telefacsimile number of each person so served. Each certificate of service shall be signed in accordance with and subject to Rule 11 of these rules.

(c) *Service — Numerous defendants.* — In any action in which there are unusually large numbers of defendants, the court, upon motion or of its own initiative, may order that service of the pleadings of the defendants and replies thereto need not be made as between the defendants and that any crossclaim, counterclaim, or matter constituting an avoidance or affirmative defense contained therein shall be deemed to be denied or avoided by all other parties and that the filing of any such pleading and service thereof upon the plaintiff constitutes due notice of it to the parties. A copy of every such order shall be served upon the parties in such manner and form as the court directs.

(d) *Filing.* — The following papers shall be filed with the court, either before service or within five days after service:

- (1) All pleadings, as defined by Rule 7(a) of these rules, subsequent to the complaint, whether such pleadings are original or amended.
- (2) Written motions and all notices of hearing.
- (3) Any other application to the court for an order that may affect the rights of or in any way commands any individual, business entity,



governmental agency, association, or partnership to act or to forego action of any kind.

- (4) Notices of appearance.
- (5) Any other paper required by rule or statute to be filed.
- (6) Any other paper so ordered by the court.
- (7) All orders issued by the court.

All other papers, regardless of whether these rules require them to be served upon a party, should not be filed with the court unless (i) the filing is agreed to by all parties, or (ii) the papers are submitted to the court in relation to a motion or other request for relief, or (iii) the filing is permitted by another rule or statute. Briefs or memoranda provided to the court may not be filed with the clerk of court unless ordered by the court. The party taking a deposition or obtaining material through discovery is responsible for its preservation and delivery to the court if needed or so ordered.

- (e)(1) *Filing with the court defined.* — The filing of pleadings and other papers with the court as required by these rules shall be made by filing them with the clerk of the court, except that the judge may permit the papers to be filed with him, in which event he shall note thereon the filing date and forthwith transmit them to the office of the clerk.
- (2) *Filing by electronic means.* — If, pursuant to G.S. 7A-34 and G.S. 7A-343, the Supreme Court and the Administrative Officer of the Courts establish uniform rules, regulations, costs, procedures and specifications for the filing of pleadings or other court papers by electronic means, filing may be made by the electronic means when, in the manner, and to the extent provided therein. (1967, c. 954, s. 1; 1971, c. 538; c. 1156, s. 2.5; 1975, c. 762, s. 1; 1983, c. 201, s. 1; 1985, c. 546; 1991, c. 168, s. 1; 2000-127, s. 1; 2001-379, s. 3; 2001-388, s. 1; 2001-487, s. 107.5(a); 2004-199, s. 5(a); 2005-138, ss. 1, 2; 2006-187, s. 2(a).)

#### **Editor's Note. —**

Session Laws 2006-187, s. 13, provides in part: "Section 2 of this act is effective when it becomes law [August 3, 2006] and applies to all matters filed with the courts on or after the date that the Supreme Court adopts rules for electronic filing as authorized by that section."

#### **Effect of Amendments. —**

Session Laws 2006-187, s. 2(a), effective Au-

gust 3, 2006, in subdivision (e)(2), substituted "electronic means" for "telefacsimile transmission" in the subheading and in the subdivision, inserted "costs," following "rules, regulations," and substituted "electronic means" for "transmission." See Editor's note for applicability.

### **CASE NOTES**

**Service on Defendant At Last-Known Address After Attorney Withdrew Was Proper.** — Where defendant's attorney was allowed to withdraw, plaintiffs mailed their motion for summary judgment to defendant's last known address, and defendant never argued that it was not at that address, service was proper under G. S. 1A-1, Rule 5(b). *Dixon v. Hill*, 174 N.C. App. 252, 620 S.E.2d 715, 2005 N.C. App. LEXIS 2393 (2005).

**Termination of Parental Rights Actions.** — Because the first termination of parental

rights action against the mother had been dismissed, service in the instant action was proper under G.S. 1A-1-5 as it was made less than two years after the original action began. *In re P.L.P.*, 173 N.C. App. 1, 618 S.E.2d 241, 2005 N.C. App. LEXIS 1921 (2005), *aff'd*, — N.C. —, 625 S.E.2d 779 (2006).

**Applied** in *Excel Staffing Serv. v. HIP Reidsville*, 172 N.C. App. 281, 616 S.E.2d 349, 2005 N.C. App. LEXIS 1582 (2005).

## Rule 6. Time.

### CASE NOTES

- I. In General.
- II. Enlargement of Time.

#### I. IN GENERAL.

**Cited** in *Skinner v. Preferred Credit*, 172 N.C. App. 407, 616 S.E.2d 676, 2005 N.C. App. LEXIS 1806 (2005); *Megremis v. Megremis*, — N.C. App. —, 633 S.E.2d 117, 2006 N.C. App. LEXIS 1828 (2006).

#### II. ENLARGEMENT OF TIME.

**Not requested.** — Trial court erred in denying the father's motion to set aside an order

terminating his parental rights; since the father was not served within the time limit for serving process once a summons was issued and no extension of time was obtained, the trial court did not obtain personal jurisdiction over him in a case where the mother filed a petition to terminate the father's parental rights. *In re A.B.D.*, 173 N.C. App. 77, 617 S.E.2d 707, 2005 N.C. App. LEXIS 1925 (2005).

### ARTICLE 3.

### *Pleadings and Motions.*

## Rule 7. Pleadings allowed; motions.

### CASE NOTES

- I. In General.
- III. Motions and Other Papers.

#### I. IN GENERAL.

**Cited** in *Santana v. Santana*, 171 N.C. App. 432, 614 S.E.2d 438, 2005 N.C. App. LEXIS 1204 (2005).

#### III. MOTIONS AND OTHER PAPERS.

**Statute of Limitations Defense.** — Attorney's failure to affirmatively plead a statute of limitations defense in his written motion to

dismiss did not bar the trial court from considering the defense because a partner briefed and argued that his fraud, negligent misrepresentation, and civil conspiracy claims were not time-barred; further, the motion was in writing and stated with sufficient particularity the grounds for dismissal. *Carlisle v. Keith*, 169 N.C. App. 674, 614 S.E.2d 542, 2005 N.C. App. LEXIS 800 (2005).

## Rule 8. General rules of pleadings.

### CASE NOTES

- I. In General.
- III. Affirmative Defenses.

#### I. IN GENERAL.

**Cited** in *Dixon v. Hill*, 174 N.C. App. 252, 620 S.E.2d 715, 2005 N.C. App. LEXIS 2393 (2005); *State ex rel. Cooper v. NCCS Loans, Inc.*, — N.C. App. —, 624 S.E.2d 371, 2005 N.C. App. LEXIS 2588 (2005); *James River Equip., Inc. v. Mecklenburg Utils., Inc.*, — N.C. App. —, 634 S.E.2d 557, 2006 N.C. App. LEXIS 1898 (2006).

#### III. AFFIRMATIVE DEFENSES.

**Failure to plead an affirmative defense ordinarily results in waiver thereof, etc.** —

Defendants waived the affirmative defense of estoppel at summary judgment by failing to affirmatively assert the defense of estoppel in either their original answer or their amended answer. *HSI N.C., LLC v. Diversified Fire Prot.*

of Wilmington, Inc., 169 N.C. App. 767, 611 S.E.2d 224, 2005 N.C. App. LEXIS 805 (2005).

**Consenting to claim splitting does not constitute waiver of defense of collateral estoppel** under *Bockweg* or *Howerton*. *Youse v. Duke Energy Corp.*, 171 N.C. App. 187, 614 S.E.2d 396, 2005 N.C. App. LEXIS 1209 (2005).

**Amendment of Complaint.** — Order allowing estates to amend their complaint in a medical malpractice suit was not immediately appealable where the issues of a hospital's claim that, without immediate review, it lost the right to avoid trial altogether by (1) raising the statute of limitations, (2) raising "estoppel by laches" as an affirmative defense, or (3) having the amended complaint dismissed for failure to comply with G.S. 1A-1, N.C. R. Civ. P. 9(j), were not brought before the trial court, and no substantial right was lost by the failure to allow

immediate review; the estates were also entitled to sanctions against the hospital. *Estate of Spell v. Ghanem*, — N.C. App. —, 622 S.E.2d 725, 2005 N.C. App. LEXIS 2717 (2005).

**Assertion of Affirmative Defense on Appeal from Small Claims Court.** — When a landlord successfully sued a tenant for summary ejectment in small claims court, and the tenant obtained a trial de novo in district court, the tenant did not waive its affirmative defense of estoppel by not pleading it in district court because, in small claims court, the only pleading was the complaint, and on appeal to district court, the district court judge could elect to try the case on the pleadings filed, so the tenant did not waive its affirmative defense. *Don Setliff & Assocs. v. Subway Real Estate Corp.*, — N.C. App. —, 631 S.E.2d 526, 2006 N.C. App. LEXIS 1414 (2006).

## Rule 9. Pleading special matters.

### CASE NOTES

- I. In General.
- III. Fraud, Duress, Mistake, etc.
- VII. Pleading and Practice.

#### I. IN GENERAL.

**Order allowing estates to amend their complaint in a medical malpractice suit was not immediately appealable** where the issues of a hospital's claim that, without immediate review, it lost the right to avoid trial altogether by (1) raising the statute of limitations, (2) raising "estoppel by laches" as an affirmative defense, or (3) having the amended complaint dismissed for failure to comply with G.S. 1A-1, N.C. R. Civ. P. 9(j), were not brought before the trial court, and no substantial right was lost by the failure to allow immediate review; the estates were also entitled to sanctions against the hospital. *Estate of Spell v. Ghanem*, — N.C. App. —, 622 S.E.2d 725, 2005 N.C. App. LEXIS 2717 (2005).

**Trial Court Erred in Dismissing Claim.** — G.S. 1A-1, N.C. R. Civ. P. 60(b) did not apply to an interlocutory order denying a motion to dismiss a medical malpractice case, and a trial court lacked the authority to grant relief from that denial and to dismiss the case; in any event, a decision ruling that G.S. 1A-1, N.C. R. Civ. P. 9(j) was constitutional did not affect rights acquired in an earlier holding that the rule was invalid, and the trial court erred in dismissing the malpractice on the basis of G.S. 1A-1, N.C. R. Civ. P. 9(j). *Rupe v. Hucks-Follis*, 170 N.C. App. 188, 611 S.E.2d 867, 2005 N.C. App. LEXIS 901 (2005).

**Cited in** *Rauch v. Urgent Care Pharm., Inc.*,

— N.C. App. —, 632 S.E.2d 211, 2006 N.C. App. LEXIS 1566 (2006).

#### III. FRAUD, DURESS, MISTAKE, ETC.

**Allegations establishing fraud must be stated with particularity.**

Where plaintiff consumers in a proposed class action admitted that the named consumers did not have grounds for any relief against defendant law firm under the North Carolina Racketeer Influenced and Corrupt Organizations Act (NCRICO), G.S. 75D-8(c), because they suffered no injury to their business or property, and instead argued the absent class members would be able to do so, the named consumers, who pleaded mail and wire fraud as predicate acts to show violation of NCRICO, could not provide the required facts to plead fraud as against the class members with particularity, as was required by Fed. R. Civ. P. 9(b) and G.S. 1A-1, Rule 9(b), and thus, is was appropriate to dismiss the NCRICO claim for failure to state a claim. *Godfredson v. JBC Legal Group, P.C.*, 387 F. Supp. 2d 543, 2005 U.S. Dist. LEXIS 17878 (E.D.N.C. 2005).

#### VII. PLEADING AND PRACTICE.

**Medical malpractice complaint, etc.** —

Trial court properly dismissed an estate's medical malpractice suit against the hospital defendants, the medical practice defendants, and a doctor where a first complaint that was



voluntarily dismissed did not contain a G.S. 1A-1, N.C. R. Civ. P. 9(j) certification, and the re-filed complaint was filed after the statute of limitations expired and the 120-day extension, if it had been sought, would have expired; there was no expert review prior to the commencement of the original action, which was contrary to the North Carolina legislature's intent in enacting Rule 9(j). *Estate of Barksdale v. Duke Univ. Med. Ctr.*, — N.C. App. —, 623 S.E.2d 51, 2005 N.C. App. LEXIS 2753 (2005).

Estate's claim that at the time its original complaint was filed, it was G.S. 1A-1, N.C. R. Civ. P. 9(j) under *Anderson v. Assimos*, 553 S.E.2d 63 (2001), was rejected because: (1) the North Carolina Supreme Court vacated the ruling in *Anderson* to the extent that it concluded that Rule 9(j) was unconstitutional before the estate voluntarily dismissed its complaint, (2) once the North Carolina Supreme

Court's decision became controlling, the estate was required to comply with Rule 9(j), and (3) the estate had the opportunity to amend its complaint to include the Rule 9(j) certification and to have the amendment relate back to the original filing date, but it did not do so. *Estate of Barksdale v. Duke Univ. Med. Ctr.*, — N.C. App. —, 623 S.E.2d 51, 2005 N.C. App. LEXIS 2753 (2005).

**Rule 9(j) Does Not Apply to Legal Malpractice Complaints.** — G.S. 1A-1-9(j) applies solely to medical malpractice actions, not to legal malpractice actions. Accordingly, in a legal malpractice suit based on an attorney's actions in a medical malpractice case, it was error to dismiss the complaint because plaintiffs had not complied with the pleading requirements of Rule 9(j). *Formyduval v. Britt*, — N.C. App. —, 630 S.E.2d 192, 2006 N.C. App. LEXIS 1222 (2006).

## Rule 11. Signing and verification of pleadings.

### CASE NOTES

#### I. In General.

##### I. IN GENERAL.

##### **Lack of Verification.** —

While a petition in a child neglect proceeding was notarized, the notarization reading "sworn and subscribed to before me," the petition was neither signed nor verified by the director of a county department for social services or an authorized representative of the director; thus, the petition requesting that a juvenile be adjudicated neglected was not in compliance with the statute requiring that all petitions be verified pursuant to G.S. 7B-403, and the trial court therefore lacked subject matter jurisdiction to adjudicate the matter. *In re T.R.P.*, 173 N.C. App. 541, 619 S.E.2d 525, 2005 N.C. App. LEXIS 2098 (2005).

##### **When Sanctions May Not Be Imposed.** —

Sanctions against an employer were properly denied under G.S. 1A-1, N.C. R. Civ. P. 11(a) in an action for breach of a non-competition contract because all certification requirements were met; the former employee did not show that the employer knew its misstatements to

the trial court were incorrect, the complaint was facially plausible, and the action was not filed for an improper purpose since the employer voluntarily dismissed it when the employee stopped working for a competitor. *Kohler Co. v. McIvor*, — N.C. App. —, 628 S.E.2d 817, 2006 N.C. App. LEXIS 981 (2006).

##### **Award of Attorneys' Fees Upheld.** —

Since findings of fact were superfluous in summary judgment orders, the trial court properly ordered the payment of attorney's fees as a sanction under G.S. 1A-1-11 in response to a company's motion to amend the summary judgment order to include findings of fact and conclusions of law. *Phelps-Dickson Builders, L.L.C. v. Amerimann Partners*, 172 N.C. App. 427, 617 S.E.2d 664, 2005 N.C. App. LEXIS 1791 (2005).

**Cited** in *May v. Down E. Homes of Beulaville, Inc.*, — N.C. App. —, 623 S.E.2d 345, 2006 N.C. App. LEXIS 51 (2006); *Megremis v. Megremis*, — N.C. App. —, 633 S.E.2d 117, 2006 N.C. App. LEXIS 1828 (2006).

## Rule 12. Defenses and objections; when and how presented; by pleading or motion; motion for judgment on pleading.

### CASE NOTES

#### I. In General.

#### V. Personal Jurisdiction.

## VIII. Insufficiency of Service.

## IX. Failure to State Claim.

## A. In General.

## B. Conversion of Motion to Dismiss to Summary Judgment Motion.

## XI. Motion for Judgment on the Pleadings.

## I. IN GENERAL.

**Amendment of Complaint.** — Order allowing estates to amend their complaint in a medical malpractice suit was not immediately appealable where the issues of a hospital's claim that, without immediate review, it lost the right to avoid trial altogether by (1) raising the statute of limitations, (2) raising "estoppel by laches" as an affirmative defense, or (3) having the amended complaint dismissed for failure to comply with G.S. 1A-1, N.C. R. Civ. P. 9(j), were not brought before the trial court, and no substantial right was lost by the failure to allow immediate review; the estates were also entitled to sanctions against the hospital. *Estate of Spell v. Ghanem*, — N.C. App. —, 622 S.E.2d 725, 2005 N.C. App. LEXIS 2717 (2005).

**Dissent Erred in Claiming that Issue of Waiver Ex Mero Motu Could Be Addressed.** — Dissent erred in raising an issue as to the waiver of sovereign immunity under G.S. 9-32 as the claim was not raised by the parties; the dissent's claim that issue of waiver ex mero motu could be addressed because the North Carolina Board of Nursing moved to dismiss the complaint pursuant to N.C. R. Civ. P. 12(b)(1) and 12(b)(2) was rejected as: (1) the Board only moved to dismiss a negligent infliction of emotional distress claim pursuant to Rule 12(b)(1) and 12(b)(2), (2) the Board moved to dismiss the violation of N.C. Gen. Stat. § 9-32 claim pursuant to N.C. R. Civ. P. 12(b)(6), and (3) the parties stipulated that the trial court had both subject matter jurisdiction and personal jurisdiction. *Abbott v. N.C. Bd. of Nursing*, — N.C. App. —, 627 S.E.2d 482, 2006 N.C. App. LEXIS 714 (2006).

**Applied in Banc of Am. Secs. LLC v. Evergreen Int'l Aviation, Inc.**, 169 N.C. App. 690, 611 S.E.2d 179, 2005 N.C. App. LEXIS 799 (2005); *Carlisle v. Keith*, 169 N.C. App. 674, 614 S.E.2d 542, 2005 N.C. App. LEXIS 800 (2005); *Iadanza v. Harper*, 169 N.C. App. 776, 611 S.E.2d 217, 2005 N.C. App. LEXIS 808 (2005), cert. denied, 360 N.C. 63, 621 S.E.2d 624 (2005); *Welch Contr., Inc. v. N.C. DOT*, — N.C. App. —, 622 S.E.2d 691, 2005 N.C. App. LEXIS 2725 (2005); *Beachcrete, Inc. v. Water St. Ctr. Assocs., L.L.C.*, 172 N.C. App. 156, 615 S.E.2d 719, 2005 N.C. App. LEXIS 1575 (2005); *Jarman v. Deason*, 173 N.C. App. 297, 618 S.E.2d 776, 2005 N.C. App. LEXIS 2038 (2005); *Newberne v. Dep't of Crime Control & Pub. Safety*, 359 N.C. 782, 618 S.E.2d 201, 2005 N.C. LEXIS 835 (2005); *Good Hope Hosp., Inc. v. N.C. HHS*, 174 N.C. App. 266, 620 S.E.2d 873,

2005 N.C. App. LEXIS 2399 (2005); *Pate v. N.C. DOT*, — N.C. App. —, 626 S.E.2d 661, 2006 N.C. App. LEXIS 528 (2006); *Cockerham-Ellerbee v. Town of Jonesville*, — N.C. App. —, 626 S.E.2d 685, 2006 N.C. App. LEXIS 533 (2006); *Myers v. McGrady*, 360 N.C. 460, 628 S.E.2d 761, 2006 N.C. LEXIS 47 (2006); *McClennahan v. N.C. Sch. of the Arts*, — N.C. App. —, 630 S.E.2d 197, 2006 N.C. App. LEXIS 1175 (2006); *Shelton v. Duke Univ. Health Sys.*, — N.C. App. —, 633 S.E.2d 113, 2006 N.C. App. LEXIS 1628 (2006); *Trent v. Place, LLC*, — N.C. App. —, 632 S.E.2d 529, 2006 N.C. App. LEXIS 1683 (2006); *James River Equip., Inc. v. Mecklenburg Utils., Inc.*, — N.C. App. —, 634 S.E.2d 557, 2006 N.C. App. LEXIS 1898 (2006).

**Cited in** *Chatmon v. N.C. HHS*, — N.C. App. —, 622 S.E.2d 684, 2005 N.C. App. LEXIS 2711 (2005); *Brown v. Centex Homes*, 171 N.C. App. 741, 615 S.E.2d 86, 2005 N.C. App. LEXIS 1356 (2005); *Freeman v. Food Lion, LLC*, 173 N.C. App. 207, 617 S.E.2d 698, 2005 N.C. App. LEXIS 1919 (2005); *Skinner v. Preferred Credit*, 172 N.C. App. 407, 616 S.E.2d 676, 2005 N.C. App. LEXIS 1806 (2005); *May v. Down E. Homes of Beulaville, Inc.*, — N.C. App. —, 623 S.E.2d 345, 2006 N.C. App. LEXIS 51 (2006); *Hill v. West*, — N.C. App. —, 627 S.E.2d 662, 2006 N.C. App. LEXIS 692 (2006); *Ripellino v. N.C. Sch. Bds. Ass'n*, — N.C. App. —, 627 S.E.2d 225, 2006 N.C. App. LEXIS 537 (2006); *Kohler Co. v. McIvor*, — N.C. App. —, 628 S.E.2d 817, 2006 N.C. App. LEXIS 981 (2006); *Rauch v. Urgent Care Pharm., Inc.*, — N.C. App. —, 632 S.E.2d 211, 2006 N.C. App. LEXIS 1566 (2006).

## V. PERSONAL JURISDICTION.

**No Error in Denial of Motion.** — Despite a distributor's claims that his manufacturer's export agent, who lived in Great Britain, had tortiously interfered with the distributor-manufacturer relationship, in that the agent hired the distributor's salesman with the intention of establishing his own distributorship, a trial court did not err in denying the distributor's motion, made pursuant to G.S. 1A-1, N.C. R. Civ. P. 60(b), to vacate its order in which it had dismissed the complaint on the ground that under the Due Process Clause, the trial court had no personal jurisdiction over the manager. Review under a Rule 60(b) motion was limited to determining whether a trial court had abused its discretion, the documents submitted with the motion would not have changed the trial court's ruling on the motion to dismiss,



and the distributor had been given the opportunity to obtain and present the documents in the evidentiary hearing on the Rule 60(b) motion but had failed to do so. *Deer Corp. v. Carter*, — N.C. App. —, 629 S.E.2d 159, 2006 N.C. App. LEXIS 968 (2006).

Despite a distributor's claims that his manufacturer's export agent, who lived in Great Britain, had tortiously interfered with the distributor-manufacturer relationship, in that the agent hired the distributor's salesman with the intention of establishing his own distributorship, a trial court did not err in ruling that under the Due Process Clause, no personal jurisdiction existed over the manager. The personal knowledge requirement for documents and affidavits, as contained in G.S. 1A-1, N.C. R. Civ. P. 56(e), applied to motions to dismiss under G.S. 1A-1, N.C. R. Civ. P. 12(b)(2), not all parts of the distributor's affidavits and complaint were based on personal knowledge, and only those parts based on personal knowledge, which were insufficient to show personal jurisdiction, could be considered. *Deer Corp. v. Carter*, — N.C. App. —, 629 S.E.2d 159, 2006 N.C. App. LEXIS 968 (2006).

## VIII. INSUFFICIENCY OF SERVICE.

### Appeal. —

In a collection suit, the court of appeals did not reach a debtor's argument that the trial court erred in denying its motion to dismiss, pursuant to G.S. 1A-1-12(b)(5), on the ground the creditor did not comply with all requirements for service by publication, where the order from which the debtor sought appeal was interlocutory. *Autec, Inc. v. Southlake Holdings, LLC*, 171 N.C. App. 147, 613 S.E.2d 727, 2005 N.C. App. LEXIS 1162 (2005).

### Service Not Insufficient. —

Where defendant submitted only one witness affidavit disputing service of process, that one affidavit was insufficient to rebut the presumption that a return under G.S. 1A-1-4(j)(1)a. of valid service from a sheriff's deputy was proof of valid service; dismissal of plaintiff's complaint under G.S. 1A-1-12(b)(4), (5) for insufficient service was improper. *Saliby v. Conners*, 171 N.C. App. 435, 614 S.E.2d 416, 2005 N.C. App. LEXIS 1258 (2005).

## IX. FAILURE TO STATE CLAIM.

### A. In General.

#### Lack of Standing. —

Where the trial court did not certify the order denying construction company's motion to dismiss an action brought by homeowners association as immediately appealable pursuant to G.S. 1A-1, Rule 54, and the construction company did not appear to be deprived of any substantial right which could not be protected

by timely appeal from the ultimate disposition of the controversy on its merits, the appeal was dismissed. *Pineville Forest Homeowners Ass'n v. Portrait Homes Constr. Co.*, — N.C. App. —, 623 S.E.2d 620, 2006 N.C. App. LEXIS 71 (2006).

### Complaint Sufficient to Withstand Motion to Dismiss. —

Superior court erroneously dismissed a claim filed by two of decedent's step-grandchildren that defendants, two of the decedent's other step-grandchildren, maliciously caused their step-grandmother to execute a will that left them only nominal bequests, as: (1) the movant step-grandchildren would not be able to obtain adequate relief through a caveat proceeding; and (2) it did not appear that the step-grandchildren could not prove a set of facts supporting their claim which would entitle them to relief. *Murrow v. Henson*, 172 N.C. App. 792, 616 S.E.2d 664, 2005 N.C. App. LEXIS 1809 (2005).

### Unfair and Deceptive Trade Practices.

Because the buyers to a contract with the seller did not possess any contract rights due to the insufficiency of their consideration, they could not allege damages by virtue of any alleged unfair and deceptive acts of the seller relating to that alleged contract. *McLamb v. T.P. Inc.*, 173 N.C. App. 586, 619 S.E.2d 577, 2005 N.C. App. LEXIS 2122 (2005).

### Or Where Plaintiff Is Not Entitled to Relief Requested. —

Trial court did not err in granting an employer's motion under G.S. 1A-1, Rule 12(b)(6) dismissing employee's claim of wrongful discharge in violation of public policy because she engaged in a protected activity in requesting that the employer pay for a medical evaluation of a work-related injury; employee's request that the employer pay for a doctor's visit or other medical services was merely an abstract assertion, and was not an assertion of rights under the Workers' Compensation Act, G.S. 97-1 et seq. where there was no evidence that she filed a workers' compensation claim that would have triggered the statutory and common law protection against employer retaliation in violation of public policy. *Whitings v. Wolfson Casing Corp.*, 173 N.C. App. 218, 618 S.E.2d 750, 2005 N.C. App. LEXIS 1916 (2005).

### Standard of Review. —

Appellate court reviews de novo rulings on motions made pursuant to G.S. 1A-1-12(b)(6). *Toomer v. Branch Banking & Trust Co.*, 171 N.C. App. 58, 614 S.E.2d 328, 2005 N.C. App. LEXIS 1188 (2005), cert. denied, — N.C. —, 623 S.E.2d 263 (2005).

Appellate court reviewed the trial court's dismissal of the taxpayers' lawsuit to determine whether the allegations of the complaint, if treated as true, were sufficient to state a claim



upon which relief could be granted under some legal theory. *Coley v. State*, 360 N.C. 493, 631 S.E.2d 121, 2006 N.C. LEXIS 594 (2006).

**Appeal of Denial of Motion to Dismiss Is Interlocutory.** — Appeal by corporation, president, and vice president from the denial of the motion to dismiss pursuant to G.S. 1A-1-12(b)(1), (6) was interlocutory and did not affect a substantial right pursuant to G.S. 1-277(a) and G.S. 7A-27(d); the appeal, therefore, was dismissed in accordance with G.S. 1A-1-54(b). *Capps v. NW Sign Indus. of N.C., Inc.*, 171 N.C. App. 409, 614 S.E.2d 552, 2005 N.C. App. LEXIS 1203 (2005).

**Failure to Allege Waiver of Immunity.** —

Trial court properly dismissed an employee's wrongful termination complaint for failure to state a claim as the North Carolina Board of Nursing was a state agency that was entitled to a defense of sovereign immunity as the Board was enacted by G.S. 90-171.21, three members of the Board were appointed by the North Carolina Governor and the North Carolina legislature under G.S. 90-171.21(b), and its duties, as set forth in G.S. 90-171.23(b), served a public purpose; the employee failed to allege that the Board waived its sovereign immunity. *Abbott v. N.C. Bd. of Nursing*, — N.C. App. —, 627 S.E.2d 482, 2006 N.C. App. LEXIS 714 (2006).

**Appeal of Dismissal.** —

In a defamation action, the appeal of the candidate and campaign from the trial court's denial of their G.S. 1A-1, N.C. R. Civ. P. 12(b)(6) motion was interlocutory, and the denial did not challenge a substantial right that was to be lost absent immediate appellate review pursuant to G.S. 1-277(a); the instant case was akin to a previous case in which an appeal from a motion for judgment on pleadings pursuant to G.S. 1A-1, N.C. R. Civ. P. 12(c) was dismissed, and the instant case was distinguishable from a

previous case in which an appeal on a ruling on a motion for summary judgment pursuant to G.S. 1A-1, N.C. R. Civ. P. 56 was allowed, as a motion under G.S. 1A-1, N.C. R. Civ. P. 12(c) was more similar to a G.S. 1A-1, N.C. R. Civ. P. 12(b)(6) motion. *Grant v. Miller*, 170 N.C. App. 184, 611 S.E.2d 477, 2005 N.C. App. LEXIS 902 (2005).

**B. Conversion of Motion to Dismiss to Summary Judgment Motion.**

**When Motion to Dismiss Converted to Summary Judgment Motion.** —

Trial court converted a G.S. 1A-1, N.C. R. Civ. P. 12(b)(6) motion into a motion for summary judgment because the court considered matters outside of the pleadings in the form of exhibits, depositions, affidavits and discovery responses. *Bailey v. Handee Hugo's, Inc.*, 173 N.C. App. 723, 620 S.E.2d 312, 2005 N.C. App. LEXIS 2302 (2005).

**XI. MOTION FOR JUDGMENT ON THE PLEADINGS.**

**As to appellate consideration of motion for judgment on pleadings, etc.** —

Motion to dismiss an appeal from the granting of a motion for judgment on the pleadings under N.C. R. Civ. P. 12(c) was granted because no substantial rights were affected; there was no showing that any defenses or arguments concerning actual malice in a First Amendment defamation claim would have been lost if the case was allowed to proceed. *Boyce & Isley, PLLC v. Cooper*, 169 N.C. App. 572, 611 S.E.2d 175, 2005 N.C. App. LEXIS 675 (2005).

**Standard of review.** — Appellate court reviews de novo rulings on motions made pursuant to G.S. 1A-1-12(c). *Toomer v. Branch Banking & Trust Co.*, 171 N.C. App. 58, 614 S.E.2d 328, 2005 N.C. App. LEXIS 1188 (2005), cert. denied, — N.C. —, 623 S.E.2d 263 (2005).

## Rule 13. Counterclaim and crossclaim.

### CASE NOTES

- I. In General.
- II. Counterclaims.

#### I. IN GENERAL.

**Factors to Consider.** — In analyzing whether two or more claims arose out of the same transaction or occurrence for purposes of the compulsory counterclaim rule, the Supreme Court of North Carolina adopts the following three federal caselaw factors for a court to consider: (1) whether the issues of fact and law raised by the claim and counterclaim are largely the same; (2) whether substantially the same evidence bears on both claims; and (3)

whether any logical relationship exists between the two claims. Though application of the compulsory counterclaim rule is not reducible to any simple formula, a North Carolina court should inquire, at a minimum, into those three factors when deciding if a claim arises out of the transaction or occurrence that is the subject matter of the opposing party's claim. *Jonesboro United Methodist Church v. Mullins-Sherman Architects, L.L.P.*, 359 N.C. 593, 614 S.E.2d 268, 2005 N.C. LEXIS 643 (2005).

## II. COUNTERCLAIMS.

**Compulsory Counterclaim Rule Applied.** — Church's suit for breach of contract, breach of express and implied warranties, and negligence/malpractice against a general contractor was barred pursuant to the compulsory counterclaim rule of G.S. 1A-1-13(a), because the church's claims all arose out of the same transaction that was settled in favor of the general contractor in a prior suit in another

county wherein the general contractor sued the church to enforce a settlement agreement that had been entered into between the parties with regard to the construction dispute; the church was aware of its claims against the general contractor when the prior suit was brought. *Jonesboro United Methodist Church v. Mullins-Sherman Architects, L.L.P.*, 359 N.C. 593, 614 S.E.2d 268, 2005 N.C. LEXIS 643 (2005).

## Rule 14. Third-party practice.

### CASE NOTES

#### **Third-Party Defendant Not Liable Where Original Defendant Not Liable.** —

Where a personal injury action filed against the Pender County Board of Education was dismissed, the appeal of the dismissal of the Board's third-party claims against the architecture firm seeking, under G.S. 1A-1, Rule 14(a), indemnity and contribution, was moot, as the viability of the third-party claims was dependent upon the survival of the original action. *Spearman v. Pender County Bd. of Educ.*, — N.C. App. —, 623 S.E.2d 331, 2006 N.C. App. LEXIS 61 (2006).

Where the Pender County Board of Education filed a third-party complaint against the architectural firm seeking indemnification or contribution under G.S. 1A-1, Rule 14(a) in the injured parties' personal injury action against the Board, dismissal of the injured parties' claim against the Board prevented the Board from asserting a viable claim against the firm; as a result, dismissal of the third-party complaint was proper, and appeal from that dismissal was moot. *Zizzo v. Pender County Bd. of Educ.*, — N.C. App. —, 623 S.E.2d 328, 2006 N.C. App. LEXIS 64 (2006).

**Same Allegations As in Original Plaintiff's Complaint.** — Trial court did not err by denying the motion to dismiss the complaint against it by the Division of Forest Resources, which asserted liability under the Tort Claims Act by third-party plaintiffs because the complaints against an individual forest ranger had

been dismissed, since plaintiff's allegations as to the Division of Forest Resources were identical to those made by third-party plaintiffs and the claims arose out the same transaction and occurrence that was the subject matter of plaintiff's original claim. *Myers v. McGrady*, 170 N.C. App. 501, 613 S.E.2d 334, 2005 N.C. App. LEXIS 1087 (2005).

**Impleaded Negligence Claim Barred by Public Duty Doctrine.** — Denial of the motion to dismiss and for judgment on the pleadings filed by the North Carolina Division of Forest Resources (NCDFR), a division of the North Carolina Department of Environment and Natural Resources (NCDENR), was reversed as the public duty doctrine applied to negligence claims filed under the North Carolina Tort Claims Act, G.S. 143-291 et seq., against NCDENR for the alleged mismanagement of forest fires; as G.S. 113-51, 113-52, 113-54, and 113-55, which set forth the powers and duties of NCDENR and appointed state forest rangers, were designed to protect the citizens of North Carolina as a whole, NCDENR did not owe a specific duty to the administratrix of a decedent killed in a car accident allegedly due to a forest ranger's negligence in managing a forest fire or to the other drivers and owners of cars involved in the accident and their negligence complaints failed to state a claim. *Myers v. McGrady*, 360 N.C. 460, 628 S.E.2d 761, 2006 N.C. LEXIS 47 (2006).

## Rule 15. Amended and supplemental pleadings.

### CASE NOTES

- I. In General.
- III. Relation Back of Amendments.

#### I. IN GENERAL.

**Implied Consent Not Shown.** — In a wrongful death action based on the medical specialist's medical malpractice, the trial court did not err in failing to instruct the jury on

insulating negligence because the specialist did not plead insulating negligence and it was not evident from the record that both parties understood the issue was to be tried by implied consent as provided in G.S. 1A-1, Rule 15(b).



The evidence tended to show independent acts of negligence by two parties, the specialist and another doctor who was a former codefendant, which united to cause a single injury. *Boykin v. Kim*, 174 N.C. App. 278, 620 S.E.2d 707, 2005 N.C. App. LEXIS 2396 (2005).

**Amendment to Add New Party.** —

Trial court properly denied an alleged accident victim's motion to add a necessary party under G.S. 1A-1, N.C. R. Civ. P. 15, because an amendment to add a new party would have been futile and unduly prejudicial; further, the statute of limitations had run and would not stand against a new party, and the relation back doctrine, which extended periods for pursuing claims, did not apply to a party. *Bailey v. Handee Hugo's, Inc.*, 173 N.C. App. 723, 620 S.E.2d 312, 2005 N.C. App. LEXIS 2302 (2005).

**Applied** in *Sylva Shops, Ltd. P'ship v. Hibbard*, — N.C. App. —, 623 S.E.2d 785, 2006 N.C. App. LEXIS 181 (2006).

### III. RELATION BACK OF AMENDMENTS.

**Order allowing estates to amend their complaint in a medical malpractice suit was not immediately appealable** where the issues of a hospital's claim that, without immediate review, it lost the right to avoid trial altogether by (1) raising the statute of limitations, (2) raising "estoppel by laches" as an affirmative defense, or (3) having the amended complaint dismissed for failure to comply with G.S. 1A-1, N.C. R. Civ. P. 9(j), were not brought before the trial court, and no substantial right was lost by the failure to allow immediate review; the estates were also entitled to sanctions against the hospital. *Estate of Spell v. Ghanem*, — N.C. App. —, 622 S.E.2d 725, 2005 N.C. App. LEXIS 2717 (2005).

## ARTICLE 4.

### *Parties.*

## Rule 17. Parties plaintiff and defendant; capacity.

### CASE NOTES

- I. In General.
- III. Infants and Incompetents.

#### I. IN GENERAL.

**Application to Termination of Parental Rights Proceedings.** — Trial court erred in denying the father's motion to set aside the order entered against him that terminated his parental rights in his minor daughter; the record showed that the summons that was issued in his case was not served upon him within the time limit for service of process under the civil procedure rule then in effect and since that rule applied to civil actions or special proceedings such as a termination of parental rights case, the order was entered without the trial court having acquired personal jurisdiction over the father, and thus was void. *In re A.B.D.*, 173 N.C. App. 77, 617 S.E.2d 707, 2005 N.C. App. LEXIS 1925 (2005).

In an action to terminate the mother's parental rights, the trial court did not err in failing to conduct a hearing on whether to appoint a guardian ad litem for the mother because there were no circumstances of the type that, of brought to the judge's attention, would have raised a substantial question regarding the mother's competency. *In re S.N.H.*, — N.C. App. —, 627 S.E.2d 510, 2006 N.C. App. LEXIS 717 (2006).

**G.S. 7B-1101 Did Not Require the Appointment of a Guardian Ad Litem for the Mother As the Parental Termination Proceedings Did Not Focus on the Mother's Incompetency.** — Trial court terminated a mother's parental rights based on: (1) neglect; (2) wilfully leaving the children in foster care for more than 12 months without showing reasonable progress; (3) wilfully failing to provide financial support to the children; and (4) abandonment of the children for at least six months immediately preceding the filing of the petition for termination of parental rights; the mother did not request that a guardian ad litem (GAL) be appointed. Also, the petition for termination of her parental rights did not allege the mother's incapability to parent the children, and no allegations were asserted, and no showing was made that the mother was incompetent; thus, the trial court was not required to appoint a GAL to the mother under either G.S. 7B-1401 and 35A-1101, or G.S. 1A-1-17. *In re D.H.*, — N.C. App. —, 629 S.E.2d 920, 2006 N.C. App. LEXIS 1195 (2006).

**Cited** in *In re O.C.*, 171 N.C. App. 457, 615 S.E.2d 391, 2005 N.C. App. LEXIS 1272 (2005), cert. denied, — N.C. —, 623 S.E.2d 587 (2005);



Trent v. Place, LLC, — N.C. App. —, 632 S.E.2d 529, 2006 N.C. App. LEXIS 1683 (2006).

### III. INFANTS AND INCOMPETENTS.

#### **A Guardian Ad Litem Must Always Be Appointed for An Incapable Parent in a Termination Proceeding. —**

When it was alleged that a mother's parental rights to two children should be terminated because she (1) neglected them while they were in an agency's care within the meaning of G.S. 7B-101, under G.S. 7B-1111(a)(1), (2) willfully left the children in foster care for more than 12 months without showing reasonable progress to correct the conditions that led to their removal, under G.S. 7B-1111(a)(2), and (3) willfully failed to pay a reasonable portion of the cost of the children's care while in an agency's custody, under G.S. 7B-1111(a)(3), there was no requirement that a guardian ad litem be appointed for the parent, even though the petition made reference to the mother's drug abuse and mental illness, because there was no allegation under G.S. 7B-1111(a)(6) that the mother was incapable of caring for her children, she did not seek a guardian ad litem, and the trial court properly inquired into her competency, under

G.S. 1A-1, N.C. R. Civ. P. 17. In re J.A.A., — N.C. App. —, 623 S.E.2d 45, 2005 N.C. App. LEXIS 2706 (2005).

G.S. 7B-1101.1 requires that a guardian ad litem be appointed in accordance with the provisions of G.S. 1A-1, N.C. R. Civ. P. 17 to represent a parent, meaning that where an allegation is made that parental rights should be terminated, a trial court is required to conduct a hearing to determine whether a guardian ad litem should be appointed to represent the parent, and an allegation under G.S. 7B-1111(a)(6) serves as a triggering mechanism, alerting the trial court that it should conduct a hearing to determine whether a guardian ad litem should be appointed; at the hearing, the trial court must determine whether the parents are incompetent within the meaning of G.S. 35A-1101, such that the individual would be unable to aid in their defense at the termination of parental rights proceeding, and the trial court should always keep in mind that the appointment of a guardian ad litem will divest the parent of their fundamental right to conduct his or her litigation according to their own judgment and inclination. In re J.A.A., — N.C. App. —, 623 S.E.2d 45, 2005 N.C. App. LEXIS 2706 (2005).

## **Rule 19. Necessary joinder of parties.**

### CASE NOTES

#### I. In General.

##### I. IN GENERAL.

#### **Joinder Required Where Complete Determination Cannot Otherwise Be Had. —**

In a condemnation action brought against a homeowner's association relating to common area property owned by the homeowner's association, the trial court did not err in ordering joinder of each individual record owner of a lot in the townhouse development since those individual owners had an easement of enjoyment in and to the common area at issue. N.C. DOT v. Stagecoach Vill., — N.C. App. —, 622 S.E.2d 142, 2005 N.C. App. LEXIS 2594 (2005).

#### **Who Are Necessary Parties. —**

Corporate owners were not necessary parties to a prior suit against their corporation under G.S. 1A-1-19(a), which certain prospective buyers of a manufactured home had filed against the corporation to recover a deposit that they had paid; thus, res judicata did not bar the buyers' second action against the corporation and the owners, in which the buyers sought to pierce the corporate veil and hold the owners personally liable on the prior judgment. Blair v. Robinson, — N.C. App. —, 631 S.E.2d 217, 2006 N.C. App. LEXIS 1394 (2006).

**Cited** in Page v. Bald Head Ass'n, 170 N.C. App. 151, 611 S.E.2d 463, 2005 N.C. App. LEXIS 890 (2005).

## **Rule 23. Class actions.**

### CASE NOTES

#### I. In General.

##### I. IN GENERAL.

#### **Review of Order Denying Class Certification. —**

Trial court properly denied certification of

class for employees of a retailer in regard to their contract and wage claims as the proposed class was overbroad and infeasible, individual issues would have predominated over common issues, and conflicts of interest existed amongst

the members of the proposed class. *Harrison v. Wal-Mart Stores, Inc.*, 170 N.C. App. 545, 613 S.E.2d 322, 2005 N.C. App. LEXIS 1082 (2005).

**Rule Does Not Bar Class Actions Against State or Counties.** — Fact that rule does not specifically mention the State of North Carolina or counties does not mean that all class actions against the State or its counties are barred by sovereign immunity; indeed, class action declaratory judgment suits that seek

injunctive and payment relief against the State have been allowed. Thus, the rule did not mean that a county did not have to refund “school impact fees” improperly imposed upon developers and home builders. *Durham Land Owners Ass’n v. County of Durham*, — N.C. App. —, 630 S.E.2d 200, 2006 N.C. App. LEXIS 1187 (2006).

**Cited in** *Jacobs v. Physicians Weight Loss Ctr. of Am., Inc.*, 173 N.C. App. 663, 620 S.E.2d 232, 2005 N.C. App. LEXIS 2280 (2005).

## Rule 24. Intervention.

### CASE NOTES

#### I. In General.

##### I. IN GENERAL.

**Motion Prior to Trial and After Judgment.** — Appellants’ motion to intervene in another party’s petition for review of an annexation ordinance was properly denied because, even assuming G.S. 1A-1-24(a) applied to appeals of annexation ordinances under G.S. 160A-50(a), judgment had already entered, intervention would have prejudiced the city and the other party, and appellants did not offer a legitimate reason for the delay. *Home Builders Ass’n of Fayetteville N.C., Inc. v. City of Fayetteville*, 170 N.C. App. 625, 613 S.E.2d 521, 2005 N.C. App. LEXIS 1072 (2005).

**Intervention Improper Where Filed After Settlement Was Approved.** — Denial of a corporation’s motion to intervene in a case seeking review of an annexation ordinance was proper, since the corporation failed to comply with G.S. 160A-50 procedures by moving to intervene six months after the ordinance was adopted; intervention was also improper under G.S. 1A-1-24, due to the facts that the motion was filed after judgment approving a settlement was entered and that the proposed intervention would have prejudiced the original par-

ties by destroying their settlement. *Gates Four Homeowners Ass’n v. N.C. Municipality*, 170 N.C. App. 688, 613 S.E.2d 55, 2005 N.C. App. LEXIS 1088 (2005).

**Permissive Intervenor.** — G.S. 1A-1-24(b)(2) did not require a permissive intervenor to show a direct personal or pecuniary interest in the subject of the litigation, and therefore an order ruling that intervenors did not have standing to bring their claims seeking to establish an easement was independent of an earlier ruling permitting the intervention, and so was not a modification, change, or overruling of a prior order of another superior court judge. *Koenig v. Town of Kure Beach*, — N.C. App. —, 631 S.E.2d 884, 2006 N.C. App. LEXIS 1569 (2006).

**Appeals of Annexation Ordinances.** — Petitioners’ motion under G.S. 1A-1-24(a) to intervene in another party’s petition for review of an annexation ordinance was properly denied, because G.S. 1A-1-24(a) does not apply to appeals of annexation ordinances under G.S. 160A-50(a). *Home Builders Ass’n of Fayetteville N.C., Inc. v. City of Fayetteville*, 170 N.C. App. 625, 613 S.E.2d 521, 2005 N.C. App. LEXIS 1072 (2005).

## Rule 25. Substitution of parties upon death, incompetency or transfer of interest; abatement.

### CASE NOTES

#### I. In General.

##### I. IN GENERAL.

**Summary Judgment for Deceased Defendant Ineffective Where Motion to Substitute Personal Representative Had Never Been Ruled Upon.** — After defendant doctor died, the medical malpractice action survived only against the personal representative

or collector of the estate pursuant to G.S. 28A-18-1(a), and thus where the trial court never ruled upon the motion under G.S. 25(a) to substitute the executrix of the estate the trial court’s summary judgment order with respect to the doctor had no effect. *Purvis v. Moses H. Cone Mem’l Hosp. Serv. Corp.*, — N.C. App. —,

624 S.E.2d 380, 2006 N.C. App. LEXIS 128 (2006).

**Substitution Order Ineffective Where Personal Representative Not Yet Appointed.** — Where order directing the substitution of a yet-to-be-appointed personal representative for deceased defendant did not comply with G.S. 28A-18-1 or G.S. 1A-1, Rule 25, the order could not operate retroactively to substitute him as defendant once the personal representative was appointed, and the trial court erred in granting plaintiffs' summary judgment motion because the personal representative did not receive timely notice of the

motion under G.S. 1A-1, Rule 56. *Dixon v. Hill*, 174 N.C. App. 252, 620 S.E.2d 715, 2005 N.C. App. LEXIS 2393 (2005).

**Annulment Action Survived Decedent's Death.** — Where an executrix had filed a case on a decedent's behalf as his guardian ad litem, seeking an annulment of the decedent's marriage while the decedent was alive, and where substantial property rights hinged on the validity of the marriage, the action did not abate on the decedent's death and the executrix was entitled to pursue it. *Clark v. Foust-Graham*, 171 N.C. App. 707, 615 S.E.2d 398, 2005 N.C. App. LEXIS 1365 (2005).

## ARTICLE 5.

### *Depositions and Discovery.*

## Rule 26. General provisions governing discovery.

### CASE NOTES

- I. In General.
- II. Scope of Discovery Generally.
- IV. Trial Preparation.

#### I. IN GENERAL.

**Order Compelling Production of Documents Held Proper.** — Because, despite the fact that insurers claimed that requested documents were privileged, the insurers failed to produce the 450 documents at issue for an in camera inspection, they failed to carry their burden of establishing that those documents were privileged, and an order compelling production of those 450 documents was proper. *Wachovia Bank, N.A. v. Clean River Corp.*, — N.C. App. —, 631 S.E.2d 879, 2006 N.C. App. LEXIS 1567 (2006).

**Substantial Need Shown for Document Prepared for Trial.** — Declaration prepared for use in a federal lawsuit between a bank and a vendor was protected by the work-product doctrine, but the bank was compelled to disclose it to a former bank employee who demonstrated a substantial need for the document and an inability to obtain it elsewhere; her wrongful termination action was based on the theory that she was fired because she refused to sign the allegedly inaccurate or untruthful document. *Isom v. Bank of Am., N.A.*, — N.C. App. —, 628 S.E.2d 458, 2006 N.C. App. LEXIS 970 (2006).

**Cited in** *Moose v. Versailles Condo. Ass'n*, 171 N.C. App. 377, 614 S.E.2d 418, 2005 N.C. App. LEXIS 1199 (2005).

#### II. SCOPE OF DISCOVERY GENERALLY.

**Limited Discovery After Default Judgment Entered.** — Trial court did not err in limiting discovery solely to the issues of whether the seller's conduct amounted to an unfair or deceptive trade practice where the trial court had earlier entered a default against the seller. *Blankenship v. Town & Country Ford, Inc.*, — N.C. App. —, 622 S.E.2d 638, 2005 N.C. App. LEXIS 2616 (2005).

**Orders regarding matters of discovery are within the discretion of the trial court, etc.**

Because a construction company was allowed to review all discoverable documents, its G.S. 1A-1-26(b)(1) motion to compel discovery was properly denied; consequently, the trial court properly granted summary judgment to the developer and its agent. *Phelps-Dickson Builders, L.L.C. v. Amerimann Partners*, 172 N.C. App. 427, 617 S.E.2d 664, 2005 N.C. App. LEXIS 1791 (2005).

**Exclusion of Statement From Treating Physician.** — Exclusion of written response from a treating physician, which was in response to a facsimile sent by defense counsel that detailed three questions regarding causation of an employee's alleged work-related injury and subsequent disability, was proper since the communication was ex parte and



consisted of interrogatories to a non-party, which were not authorized by any caselaw precedent nor any rule of evidence. *Mayfield v. Parker Hannifin*, — N.C. App. —, 621 S.E.2d 243, 2005 N.C. App. LEXIS 2472 (2005).

**Denial to Interview Child in Parental Termination Proceeding Was Not Abuse of Discretion.** — Trial court did not err by denying a mother's motion to interview her son for whom a proceeding was initiated against the mother for termination of her parental rights because, as evidenced by the multiple findings of fact contained within multiple court orders, any contact the mother had with the child was disruptive to his own therapeutic progress and it was clear from the record that the trial court was concerned with the mother's behavior in attempting to learn of the child's whereabouts, particularly since the mother abducted the child from his school bus stop while he was in

foster care. *In re J.B.*, 172 N.C. App. 1, 616 S.E.2d 264, 2005 N.C. App. LEXIS 1589 (2005).

#### IV. TRIAL PREPARATION.

**Materials prepared in the ordinary course of business are not protected under subsection (b)(3), etc.**

In a medical malpractice case, it appeared that documents generated pursuant to a hospital policy "for the reporting of all unexpected events" would not be entitled to protection under G.S. 1A-1, N.C. R. Civ. P. 26(b)(3) because they would have been prepared in the ordinary course of business; remand was required, however, to determine whether the documents in question had been generated pursuant to that policy. *Diggs v. Novant Health, Inc.*, — N.C. App. —, 628 S.E.2d 851, 2006 N.C. App. LEXIS 983 (2006).

## Rule 32. Use of depositions in court proceedings.

### CASE NOTES

**Objection Based On Dead Man's Statute Not Waived.** — Pursuant to N.C. R. Civ. P. 32(d)(3)(a), administrator did not waive objection based on Dead Man's Statute by failing to make it at widow's deposition. *Estate of Redden v. Redden*, — N.C. App. —, 632 S.E.2d 794, 2006 N.C. App. LEXIS 1638 (2006).

**Discretion of Trial Court.** — Trial court did not err in allowing the employee to play the videotaped cross-examination of a doctor who

was originally deposed by the railroad; it was within the trial court's discretion about whether to allow such testimony and no error occurred in that regard since the railroad had already shown the jury the direct examination of the doctor and, thus, could not well object to the employee playing the cross-examination of the doctor. *Williams v. CSX Transp., Inc.*, — N.C. App. —, 626 S.E.2d 716, 2006 N.C. App. LEXIS 532 (2006).

## Rule 33. Interrogatories to parties.

### CASE NOTES

**Dismissal Proper.** — Dismissal of plaintiff's suit was affirmed as it could be inferred that the trial court considered lesser sanctions given that it stated that lesser sanctions were urged by plaintiff and that, given the severity of disobedience by plaintiff's counsel, lesser sanctions were inappropriate; plaintiff's misconduct

was serious as plaintiff did not answer or object to any of an insurer's discovery requests, seek a protective order, or proffer any justification for the inaction. *Badillo v. Cunningham*, — N.C. App. —, 629 S.E.2d 909, 2006 N.C. App. LEXIS 1226 (2006).

## Rule 34. Production of documents and things and entry upon land for inspection and other purposes.

### CASE NOTES

#### I. In General.

##### I. IN GENERAL.

**Dismissal Proper.** — Dismissal of plaintiff's suit was affirmed as it could be inferred that the trial court considered lesser sanctions given that it stated that lesser sanctions were urged

by plaintiff and that, given the severity of disobedience by plaintiff's counsel, lesser sanctions were inappropriate; plaintiff's misconduct was serious as plaintiff did not answer or object to any of an insurer's discovery requests, seek a

protective order, or proffer any justification for the inaction. *Badillo v. Cunningham*, — N.C.

App. —, 629 S.E.2d 909, 2006 N.C. App. LEXIS 1226 (2006).

## Rule 36. Requests for admission; effect of admission.

### CASE NOTES

#### **Discretion with Trial Court to Allow or Disallow Withdrawal of Admissions. —**

Trial court did not abuse its discretion in denying corporations' motions to withdraw their deemed admissions, after the corporations failed to timely answer a service provider's requests for admissions. *Excel Staffing Serv. v. HP Reidsville*, 172 N.C. App. 281, 616 S.E.2d 349, 2005 N.C. App. LEXIS 1582 (2005).

**Unverified Responses to Request For Admissions Do Not Constitute Affidavit Sufficient to Defeat Motion for Summary Judgment. —** Where defendant's responses to plaintiffs' request for admissions were not verified, they could not be deemed to be an affidavit; and as they were not in the category of "depositions, answers to interrogatories, and admissions on file" specified in G.S. 1A-1, Rule 56 as material that could be considered, they were insufficient to defeat plaintiffs' motion for summary judgment. *Dixon v. Hill*, 174 N.C. App. 252, 620 S.E.2d 715, 2005 N.C. App. LEXIS 2393 (2005).

#### **Admission Sufficient to Support Summary Judgment. —**

Trial court did not err in granting judgment to a services provider against corporations, jointly and severally, on a breach of contract claim, as the corporations admitted to the breach, and the deemed admissions showed that the subsidiary corporations were mere instrumentalities of the parent corporation. Ex-

cel Staffing Serv. v. HP Reidsville, 172 N.C. App. 281, 616 S.E.2d 349, 2005 N.C. App. LEXIS 1582 (2005).

**Award of Attorney Fees and Costs Based on Denial of Request for Admissions Improper. —** Driver met her burden of proof in showing that at the time for request of admission, reasonable grounds existed to believe that she might prevail on some matters denied, and good reasons, her lack of knowledge, existed for the failure to admit other issues at that time; accordingly, the trial court erred in awarding plaintiffs' attorney fees and costs based on the driver's denial. *Oakes v. Wooten*, 173 N.C. App. 506, 620 S.E.2d 39, 2005 N.C. App. LEXIS 2100 (2005).

#### **Sanctions for Violation of Court Orders.**

— Trial court order precluding plaintiff from presenting any testimony or exhibits that implied or inferred that her back injury was caused by a pedestrian walkway failure that was the basis for the suit was proper as within the discretion of the trial court pursuant to G.S. 1A-1, Rule 37, where plaintiff committed discovery violations by failing to consult with her experts before answering various requests for admissions, failing to disclose certain experts before the cut-off date set by the trial court, and failing to produce documents to substantiate her injuries. In re *Pedestrian Walkway Failure*, 173 N.C. App. 254, 618 S.E.2d 796, 2005 N.C. App. LEXIS 2022 (2005).

## Rule 37. Failure to make discovery; sanctions.

### CASE NOTES

#### **The trial judge has broad discretion, etc.**

— Trial court did not abuse its discretion in denying an insurer's motion for sanctions against an insured for the insured's failure to complete a deposition that was being taken, based on the insured's counterclaims against the insurer, arising from an underlying dog bite case that the insurer had provided legal representation and some coverage on, as a question regarding the scope of the attorney-client privilege between the appointed attorney from the insurer for the benefit of the insured, the insured, and the insurer, was a question of first impression, and the insured was "substantially justified" in relying on the attorney-client priv-

ilege when he terminated the deposition. *Nationwide Mut. Fire Ins. Co. v. Bourlon*, 172 N.C. App. 595, 617 S.E.2d 40, 2005 N.C. App. LEXIS 1789 (2005), *aff'd*, — N.C. —, 625 S.E.2d 779 (2006).

#### **Dismissal as Sanction. —**

Dismissal of plaintiff's suit was affirmed as it could be inferred that the trial court considered lesser sanctions given that it stated that lesser sanctions were urged by plaintiff and that, given the severity of disobedience by plaintiff's counsel, lesser sanctions were inappropriate; plaintiff's misconduct was serious as plaintiff did not answer or object to any of an insurer's discovery requests, seek a protective order, or proffer any justification for the inaction. *Badillo*



v. Cunningham, — N.C. App. —, 629 S.E.2d 909, 2006 N.C. App. LEXIS 1226 (2006).

Trial court is not required to list and specifically reject each possible lesser sanction prior to determining that dismissal is appropriate for a failure to respond to discovery requests. *Badillo v. Cunningham*, — N.C. App. —, 629 S.E.2d 909, 2006 N.C. App. LEXIS 1226 (2006).

**Dismissal Upheld.** —

Trial judge did not abuse his discretion by dismissing plaintiff's personal injury suit for discovery violations because the plaintiff failed to produce a 2001 tax return critical to his assertion of damages involving lost profits and lost earning capacity, and made false representations regarding his profits from the sale of a house, which was central to the issue of damages. By failing to comply with the trial court's order to compel and then asserting his Fifth Amendment right against self-incrimination in a court-ordered deposition, the plaintiff opened himself up to dismissal of his civil case since, despite less severe sanctions being available, the defendants were deprived of necessary discovery. *In re Pedestrian Walkway Failure*, 173 N.C. App. 237, 618 S.E.2d 819, 2005 N.C. App. LEXIS 2032 (2005).

**Appealability of Sanctions Order.** —

Order imposing sanctions for discovery violations and ordering the production of documents was an interlocutory order that was appealable because of the portion of the order that imposed sanctions pursuant to G.S. 1A-1, N.C. R. Civ. P. 37(b). Such an appeal tests the validity of both

the discovery order and the sanctions imposed. *In re Pedestrian Walkway Failure*, 173 N.C. App. 254, 618 S.E.2d 796, 2005 N.C. App. LEXIS 2022 (2005).

**Sanctions Improper Where Burden of Proof Met.** — Driver met her burden of proof in showing that at the time for request of admission, reasonable grounds existed to believe that she might prevail on some matters denied, and good reasons, her lack of knowledge, existed for the failure to admit other issues at that time; accordingly, the trial court erred in awarding plaintiffs' attorney fees and costs based on the driver's denial. *Oakes v. Wooten*, 173 N.C. App. 506, 620 S.E.2d 39, 2005 N.C. App. LEXIS 2100 (2005).

Trial court order precluding plaintiff from presenting any testimony or exhibits that implied or inferred that her back injury was caused by a pedestrian walkway failure that was the basis for the suit was proper as within the discretion of the trial court pursuant to G. S. 1A-1, Rule 37, where plaintiff committed discovery violations by failing to consult with her experts before answering various requests for admissions, failing to disclose certain experts before the cut-off date set by the trial court, and failing to produce documents to substantiate her injuries. *In re Pedestrian Walkway Failure*, 173 N.C. App. 254, 618 S.E.2d 796, 2005 N.C. App. LEXIS 2022 (2005).

**Cited in** *Megremis v. Megremis*, — N.C. App. —, 633 S.E.2d 117, 2006 N.C. App. LEXIS 1828 (2006).

## ARTICLE 6.

### *Trials.*

## Rule 41. Dismissal of actions.

### CASE NOTES

- I. In General.
- II. Voluntary Dismissal.
- III. Involuntary Dismissal.
  - A. In General.
  - B. Failure to Prosecute or to Comply with Rules or Orders.
  - C. Failure to Show Right to Relief.

#### I. IN GENERAL.

##### **Authority to Determine Whether Plaintiff May Commence New Action.** —

Court exercised its discretion under G.S. 1A-41(b) and specified that a new action based on the same claim maybe commenced within one year or less after the dismissal of the instant action because G.S. 1A-41(a) was a tolling provision legislatively adopted that fell into a category of substantive matters of state law to

be followed by federal courts absent substantial countervailing federal interests. *Southstar Funding, L.L.C. v. Warren, Perry & Anthony, P.L.L.C.*, 445 F. Supp. 2d 583, 2006 U.S. Dist. LEXIS 61500 (E.D.N.C. 2006).

**Substantial evidence in the record supported an administrative law judge's findings** and its dismissal of a day care's petition for a contested case hearing where the day care filed nothing in nearly six months following the



filing of the petition, despite receiving several orders from the administrative law judge to file and serve prehearing statements and other responses to motions. *Lincoln v. N.C. HHS*, 172 N.C. App. 567, 616 S.E.2d 622, 2005 N.C. App. LEXIS 1804 (2005).

**Cited in** *In re J.A.G.*, — N.C. App. —, — S.E.2d —, 2005 N.C. App. LEXIS 1091 (June 7, 2005).

## II. VOLUNTARY DISMISSAL.

**Voluntary Dismissal of Termination of Parental Rights Proceeding.** — Fact that county department of social services had dismissed a prior petition for termination of mother's parental rights did not preclude a subsequent petition since the best interests of the children was always the primary focus, with no procedural rule barring the court's continuing jurisdiction over such a matter. *In re L.O.K.*, — N.C. App. —, 621 S.E.2d 236, 2005 N.C. App. LEXIS 2476 (2005).

**First Voluntary Dismissal Not Adjudication on Merits.** —

In personal injury plaintiffs' action against an intoxicated driver who caused a traffic accident by driving a van across a highway median, and against a company that owned the van and against the occupants of a house who allegedly negligently entrusted the van to the driver, the company and the occupants were dismissed with prejudice following summary judgment in their favor; plaintiffs then entered a consent order dismissing, without prejudice, their remaining claims against the driver, thereby resolving all claims against all remaining defendants. The summary judgment order was not a final appealable order and the consent order against the driver did not render the dismissal order resulting from that summary judgment a final judgment as contemplated by G.S. 1A-1, N.C. R. Civ. P. 54.(2005); the court dismissed plaintiffs appeal of that dismissal order on the reasoning that G.S. 1A-1, N.C. R. Civ. P. 41(a)(1) (2005), allowed plaintiffs to take one voluntary dismissal against the driver without finally resolving the claims against the driver, so there was no final judgment that would allow an appeal of the summary judgment in favor of the company and the occupants. *Hill v. West*, — N.C. App. —, 627 S.E.2d 662, 2006 N.C. App. LEXIS 692 (2006).

**Re-filed Suit Barred By Statute of Limitations.** — Trial court properly dismissed an estate's medical malpractice suit against the hospital defendants, the medical practice defendants, and a doctor where a first complaint that was voluntarily dismissed did not contain a G.S. 1A-1, N.C. R. Civ. P. 9(j) certification, and the re-filed complaint was filed after the statute of limitations expired and the 120-day extension, if it had been sought, would have expired; there was no expert review prior to the commencement of the original action, which was

contrary to the North Carolina legislature's intent in enacting Rule 9(j). *Estate of Barksdale v. Duke Univ. Med. Ctr.*, — N.C. App. —, 623 S.E.2d 51, 2005 N.C. App. LEXIS 2753 (2005).

**Medical Malpractice Complaint Had to Comply with G.S. 1A-1, N.C. R. Civ. P. 9(j).**

— Estate's claim that at the time its original complaint was filed, it was not required to comply with G.S. 1A-1, N.C. R. Civ. P. 9(j) under *Anderson v. Assimos*, 553 S.E.2d 63 (2001), was rejected because: (1) the North Carolina Supreme Court vacated the ruling in *Anderson* to the extent that it concluded that Rule 9(j) was unconstitutional before the estate voluntarily dismissed its complaint, (2) once the North Carolina Supreme Court's decision became controlling, the estate was required to comply with Rule 9(j), and (3) the estate had the opportunity to amend its complaint to include the Rule 9(j) certification and to have the amendment relate back to the original filing date, but it did not do so. *Estate of Barksdale v. Duke Univ. Med. Ctr.*, — N.C. App. —, 623 S.E.2d 51, 2005 N.C. App. LEXIS 2753 (2005).

**Attempt at Voluntary Dismissal Ineffective Where Second Summons Did Not Relate Back to Original Summons Directed to Other Defendant.** — Since the original summons was not directed to the corporation but to a different defendant, a later summons against the corporation did not relate back to the original summons, and since there was not a properly directed summons that was merely not served, G.S. 1A-1-4(d) did not apply and the later summons was not a valid alias or pluries summons; thus, service on the corporation fell outside of the authorized time and the case was not filed within the one year period required by G.S. 1A-1-41(a)(1). *Stack v. Union Reg'l Mem'l Med. Ctr., Inc.*, 171 N.C. App. 322, 614 S.E.2d 378, 2005 N.C. App. LEXIS 1255 (2005), cert. denied, 360 N.C. 66, 621 S.E.2d 877 (2005).

**Action against insurer was not barred by the injured party's voluntary dismissal of claims against the insurer** where the claims in the first action were based in tort but the claims in the subsequent action were based in contract and unfair insurance practices arising from the failure to satisfy another state's judgment. *Sawyers v. Farm Bureau Ins. Co. of N.C., Inc.*, 170 N.C. App. 17, 612 S.E.2d 184, 2005 N.C. App. LEXIS 893 (2005).

## III. INVOLUNTARY DISMISSAL.

### A. In General.

**Section 1A-1, Rule 50 has no application to trials before the judge without a jury, etc.** —

In the landlord and tenant dispute where there was no jury trial, the trial court erroneously granted a directed verdict under G.S. 1A-1-50 in favor of the landlord; in such cases,

involuntary dismissal under G.S. 1A-1-41(b) was the appropriate method for disposing of the case. *Dean v. Hill*, 171 N.C. App. 479, 615 S.E.2d 699, 2005 N.C. App. LEXIS 1275 (2005).

**Dismissal with Prejudice Upheld. —**

Trial judge did not abuse his discretion in dismissing the borrowers' declaratory judgment action against a lender with prejudice, rather than without prejudice under G.S. 1A-1-41(b), because the trial judge's dismissal of the action with prejudice was not manifestly unsupported by reason. *Trent v. Place, LLC*, — N.C. App. —, 632 S.E.2d 529, 2006 N.C. App. LEXIS 1683 (2006).

**B. Failure to Prosecute or to Comply with Rules or Orders.**

**When Dismissal for Failure to Prosecute Not Proper. —**

Decision not to dismiss for failure to prosecute was not an abuse of discretion where the supplier was engaged in settlement discussion and document gathering, and the delay, while substantial and unusual, was not deliberate or for an improper motive or purpose, and no material prejudice was caused to defendants. *James River Equip., Inc v. Tharpe's Excavating, Inc.*, — N.C. App. —, 634 S.E.2d 548, 2006 N.C. App. LEXIS 1897 (2006).

**Dismissal for Discovery Violations. —**

Trial judge did not abuse his discretion by dismissing plaintiff's personal injury suit for discovery violations because the plaintiff failed to produce a 2001 tax return critical to his assertion of damages involving lost profits and lost earning capacity, and made false representations regarding his profits from the sale of a house, which was central to the issue of damages. By failing to comply with the trial court's order to compel and then asserting his Fifth Amendment right against self-incrimination in a court-ordered deposition, the plaintiff opened himself up to dismissal of his civil case since, despite less severe sanctions being available, the defendants were deprived of necessary discovery. *In re Pedestrian Walkway Failure*, 173 N.C. App. 237, 618 S.E.2d 819, 2005 N.C. App. LEXIS 2032 (2005).

**C. Failure to Show Right to Relief.**

**Different Test Applied Under Motions for Directed Verdict and Involuntary Dismissal. —**

Defendants' motion to dismiss in an action tried before the judge without a jury was actually a motion to dismiss made under G.S. 1A-1-41(b), not G.S. 1A-1-50(a); the distinction was significant because, under G.S. 1A-1-41(b), the trial judge did not consider the evidence in the light most favorable to the plaintiff, as he would have when considering a G.S. 1A-1-50(a) motion for a directed verdict in a trial before a jury. *Hammonds v. Lumbee River Elec. Mbrshp. Corp.*, — N.C. App. —, 631 S.E.2d 1, 2006 N.C. App. LEXIS 1301 (2006).

**Dismissal Properly Denied. —**

Because the trial court carefully laid out in sequential order the facts regarding the father's relationship with a married woman, resulting in him resigning from his job, and culminating in his separation from his wife who provided at least 50 percent of the minor child's care, including helping the child with his homework, and then found that the child's grades had suffered as a result, it provided a nexus between the substantial change in circumstances and the effect on the child's welfare to overrule the father's motion to dismiss the mother's custody modification action; moreover, when balanced against the mother's attainment of both a stable living environment and a vast improvement in health after suffering from a brain tumor, the trial court's custody modification order in favor of the mother was proper. *Karger v. Wood*, — N.C. App. —, 622 S.E.2d 197, 2005 N.C. App. LEXIS 2609 (2005).

Trial court did not err in denying a mother's motion to dismiss a petition by the county department of social services, seeking to have her three-month-old son adjudicated as abused, dependent, and neglected, at the close of the department's case as the motion under G.S. 1A-1-41(b) was moot as to the abuse allegation because the trial court dismissed it after the close of all evidence; further, pursuant to G.S. 1A-1-41(b), the trial court had discretion to deny such a motion until the close of all evidence. *In re J.A.G.*, 172 N.C. App. 708, 617 S.E.2d 325, 2005 N.C. App. LEXIS 1785 (2005).

## Rule 42. Consolidation; separate trials.

### CASE NOTES

#### III. Separate Trials.

##### III. SEPARATE TRIALS.

**Separation Held Proper. —**

Issues concerning the validity of a testator's 1995 will and the revocation of the testator's 2002 will were separate, distinct, and compari-

mentalized, and a trial court's order trifurcating the issues of the trial was not improper. *In re Will of McFayden*, — N.C. App. —, 632 S.E.2d 520, 2006 N.C. App. LEXIS 1635 (2006).



## Rule 43. Evidence.

### CASE NOTES

- I. In General.
- IV. Record of Excluded Evidence.
- V. Evidence on Motions.

#### I. IN GENERAL.

**Applied** in *Deer Corp. v. Carter*, — N.C. App. —, 629 S.E.2d 159, 2006 N.C. App. LEXIS 968 (2006).

**Cited** in *Banc of Am. Secs. LLC v. Evergreen Int'l Aviation, Inc.*, 169 N.C. App. 690, 611 S.E.2d 179, 2005 N.C. App. LEXIS 799 (2005).

#### IV. RECORD OF EXCLUDED EVIDENCE.

**Judge Need Not be Present for Record to be Made.** — Where the trial court allowed the ex-husband to introduce the excluded evidence into the record, and there was no binding authority that required a trial court to personally take an offer of proof, the trial court's failure to personally consider the ex-husband's offer of proof was not prejudicial. *Rhew v.*

*Felton*, — N.C. App. —, 631 S.E.2d 859, 2006 N.C. App. LEXIS 1560 (2006).

#### V. EVIDENCE ON MOTIONS.

**Affidavit Not Based on Personal Knowledge Held Insufficient.** — Where appellants sought a bond under G.S. 1-292 for a stay pending appeal of an order requiring them to sell land to appellee, an affidavit stating that appellee would incur damages of about \$1.369 million per year if delayed in developing the land did not support the trial court's \$1 million bond requirement, as there was no showing the affidavit was based on the affiant's personal knowledge. *Currituck Assocs. Residential P'ship v. Hollowell*, 170 N.C. App. 399, 612 S.E.2d 386, 2005 N.C. App. LEXIS 1000 (2005).

## Rule 44. Proof of official record.

### CASE NOTES

#### **Presumption of Validity.** —

Foreign judgment that the judgment creditor obtained in New York was entitled to a presumption that the judgment was entitled to full faith and credit, as the judgment creditor met its burden of showing that entitlement by filing a properly authenticated judgment; however, the general contractor timely moved for relief from the foreign judgment by raising the defense that the New York trial court that entered it did not have personal jurisdiction over the

general contractor, and because the trial court did not make any findings of fact or conclusions of law regarding the motion to enforce the judgment, the conclusion that the foreign judgment was enforceable in North Carolina was not supported by competent evidence and the case had to be remanded to the trial court for further proceedings. *Quantum Corporate Funding, Ltd. v. B.H. Bryan Bldg. Co.*, — N.C. App. —, 623 S.E.2d 793, 2006 N.C. App. LEXIS 187 (2006).

## Rule 45. Subpoena.

### CASE NOTES

**Mental Health Records Previously Admitted Into Evidence.** — Trial court did not err by considering mental health records of a mother contained within the underlying file and previously admitted into evidence in proceedings to terminate her parental rights, be-

cause the mental health records challenged by the mother were originally admitted into evidence during a permanency planning review hearing and were not challenged by the mother at that time. *In re J.B.*, 172 N.C. App. 1, 616 S.E.2d 264, 2005 N.C. App. LEXIS 1589 (2005).



## Rule 46. Objections and exceptions.

### CASE NOTES

#### I. In General.

##### I. IN GENERAL.

**Failure to Object to Substitution Order.** — Because defendants did not specifically reference the trial court's order of substitution in the notice of appeal and because the record contained no indication that they had objected

to the entry of that order, the appellate court lacked jurisdiction to review their contentions regarding the order. *Dixon v. Hill*, 174 N.C. App. 252, 620 S.E.2d 715, 2005 N.C. App. LEXIS 2393 (2005).

## Rule 50. Motion for a directed verdict and for judgment notwithstanding the verdict.

### CASE NOTES

- I. In General.
- II. Directed Verdict.
  - A. In General.
- III. Judgment Notwithstanding The Verdict And New Trial.

##### I. IN GENERAL.

##### Motions Properly Denied. —

Where defendants claimed adverse possession of a cemetery lot under G.S. 1-40, plaintiffs' motions for a directed verdict and for JNOV were properly denied; evidence that defendants had been farming the lot since the 1960's and that there had not been a burial in the lot in nearly 60 years provided more than a scintilla of evidence that defendants had made exclusive use of the lot as farmland for the requisite period; there was no evidence that plaintiffs had used the lot. *Jernigan v. Herring*, — N.C. App. —, 633 S.E.2d 874, 2006 N.C. App. LEXIS 1901 (2006).

City did not preserve its claims of error in the denial of its motions for a directed verdict and for a judgment notwithstanding the verdict as it failed to renew its motion for a directed verdict at the close of the evidence. *City of Charlotte v. Hurlahe*, — N.C. App. —, 631 S.E.2d 28, 2006 N.C. App. LEXIS 1296 (2006).

**Issue Not Considered on Appeal.** — Neighbors' claim in their directed verdict motion that there was insufficient evidence as to whether the property owners had an easement by prescription over the neighbors' property was not considered on appeal as the jury did not reach the issue and the neighbors failed to raise the issue in their brief on appeal. *Bogges v. Spencer*, 173 N.C. App. 614, 620 S.E.2d 10, 2005 N.C. App. LEXIS 2114 (2005).

**Applied** in *Castle McCulloch, Inc. v. Freedman*, 169 N.C. App. 497, 610 S.E.2d 416, 2005 N.C. App. LEXIS 604 (2005), *aff'd*, 360 N.C. 57,

620 S.E.2d 674 (2005); *Hill v. Taylor*, — N.C. App. —, 621 S.E.2d 284, 2005 N.C. App. LEXIS 2474 (2005); *Cockerham-Ellerbe v. Town of Jonesville*, — N.C. App. —, 626 S.E.2d 685, 2006 N.C. App. LEXIS 533 (2006).

**Cited** in *D.W.H. Painting Co. v. D.W. Ward Constr. Co.*, 174 N.C. App. 327, 620 S.E.2d 887, 2005 N.C. App. LEXIS 2366 (2005); *Formyduval v. Britt*, — N.C. App. —, 630 S.E.2d 192, 2006 N.C. App. LEXIS 1222 (2006).

##### II. DIRECTED VERDICT.

##### A. In General.

**A motion for directed verdict is appropriate only to a case tried before a jury.**

In the landlord and tenant dispute where there was no jury trial, the trial court erroneously granted a directed verdict under G.S. 1A-1-50 in favor of the landlord; in such cases, involuntary dismissal under G.S. 1A-1-41(b) was the appropriate method for disposing of the case. *Dean v. Hill*, 171 N.C. App. 479, 615 S.E.2d 699, 2005 N.C. App. LEXIS 1275 (2005).

Defendants' motion to dismiss in an action tried before the judge without a jury was actually a motion to dismiss made under G.S. 1A-1-41(b), not G.S. 1A-1-50(a); the distinction was significant because, under G.S. 1A-1-41(b), the trial judge did not consider the evidence in the light most favorable to the plaintiff, as he would have when considering a G.S. 1A-1-50(a) motion for a directed verdict in a trial before a jury. *Hammonds v. Lumbee River Elec. Mbrshp. Corp.*, — N.C. App. —, 631 S.E.2d 1, 2006 N.C. App. LEXIS 1301 (2006).

**When Defendant Entitled to Directed Verdict in a Negligence Action. —**

Directed verdict was properly granted to a store in a customer's suit against the store to recover for injuries sustained when he fell over a stock cart parked in a store aisle, and thus, the trial court improperly set aside its earlier order granting a directed verdict and, instead, granted the customer's motion for a new trial, because the customer presented no evidence regarding who left the stock cart in the position which caused the customer to fall, when it was placed there, or how long it remained; additionally, the customer did not present evidence that the store failed to correct a dangerous condition after it received actual or constructive notice of the condition. *Herring v. Food Lion, LLC*, — N.C. App. —, 623 S.E.2d 281, 2005 N.C. App. LEXIS 2754 (2005).

**Determination of Validity of Will. —**

Caveators presented sufficient evidence to overcome the presumption that a testator destroyed his 2002 will with the intent to revoke it, and a directed verdict against the caveators was error. In re *Will of McFayden*, — N.C. App. —, 632 S.E.2d 520, 2006 N.C. App. LEXIS 1635 (2006).

**By introducing evidence, etc. —**

Any error in the denial of neighbors' motion for a directed verdict at the close of the property owners' case was waived as the neighbors presented evidence. *Bogges v. Spencer*, 173 N.C. App. 614, 620 S.E.2d 10, 2005 N.C. App. LEXIS 2114 (2005).

**Motion for Directed Verdict Properly Granted. —**

Where an employer's independent contractor assaulted victims after breaking into their house, but the contractor did not meet the victims as a result of his relationship with the employer, and the employer received no benefit from "meeting" between the contractor and the victims, the employer owed no duty to the victims, the victims' negligent hiring claim against the employer was not proven, and the trial court properly granted the employer's motion for a directed verdict. *Little v. Omega Meats I, Inc.*, 171 N.C. App. 583, 615 S.E.2d 45, 2005 N.C. App. LEXIS 1318 (2005), *aff'd*, 360 N.C. 164, 622 S.E.2d 494 (2005).

Directed verdict in favor of a manufacturing plant, a maintenance company, and its successor on the issue of punitive damages was upheld on appeal, because plaintiff workers failed to demonstrate any willful or wanton misconduct with regard to their exposure to asbestos when they removed insulation. The trial court's reduction of the workers' compensatory damages awards was also upheld on appeal, because the workers received prior workers' compensation claim settlements and prior third-party settlement amounts and were entitled to only one recovery for their asbestos exposure.

*Schenk v. HNA Holdings, Inc.*, 170 N.C. App. 555, 613 S.E.2d 503, 2005 N.C. App. LEXIS 1067 (2005).

**Motion for Directed Verdict Improperly Granted. —**

In a medical malpractice action based on the negligence of the labor and delivery nurses and the neonatal nurse practitioners, the hospital was not entitled to a directed verdict, as the hospital did not show, as a matter of law, that the neonatal nurses were the intervening cause of the infant's injuries due to their failure to timely order a blood transfusion, as the labor and delivery nurses did not tell neonatal nurses about blood loss. *Pope v. Cumberland County Hosp. Sys.*, 171 N.C. App. 748, 615 S.E.2d 715, 2005 N.C. App. LEXIS 1357 (2005).

**Motion for Directed Verdict Properly Denied. —**

Trial court properly denied employers' motion for directed verdict because the employee proffered sufficient evidence to support his causes of action for breach of contract and violation of the North Carolina Wage and Hour Act, G.S. 95-25.1 et seq. The evidence offered by the employee was that: (1) the employers' representative orally agreed to pay the employee an annual bonus as part of a contract; (2) the employers modified the employee's bonus formula without his consent; and (3) the employers failed to give the employee notice of the change in the bonus formula. *Arndt v. First Union Nat'l Bank*, 170 N.C. App. 518, 613 S.E.2d 274, 2005 N.C. App. LEXIS 1080 (2005).

Denial of neighbors' motion for a directed verdict at the close of all of the evidence was proper as: (1) the properties were severed from common ownership in 1943; (2) there was no evidence that the owners' predecessors had public road access to their parcel by means other than a gravel road over the neighbors' property; (3) the road over the neighbors' property had been used by all of the owners' predecessors as a means of ingress and egress; (4) the owners met their burden of showing that an easement by necessity arose upon the severance of their parcel from common ownership; and (5) the jury found that the common owners intended the owners' predecessors and their successors to have a right to use the road in the same manner and to the same extent as the owners' predecessors used it. *Bogges v. Spencer*, 173 N.C. App. 614, 620 S.E.2d 10, 2005 N.C. App. LEXIS 2114 (2005).

**III. JUDGMENT NOTWITHSTANDING THE VERDICT AND NEW TRIAL.**

**And Where Defendants Were Entitled to Judgment as a Matter of Law. —**

Trial court decision denying JNOV to a city, one of its police officers, and its police department was reversed on appeal because the plain-



tiff, an arrestee injured in a squad car, failed to prove gross negligence and only showed simple negligence by evidence that the police officer drove 30 to 35 miles above the legal speed limit although he knew that plaintiff was not wearing a seat belt and had to brake suddenly to avoid a collision causing plaintiff to propel into the metal screen in the squad car. *Clayton v. Branson*, 170 N.C. App. 438, 613 S.E.2d 259, 2005 N.C. App. LEXIS 1070 (2005).

**Inadequate Award of Damages.** — In breach of contract action against university, trial court erred in denying professor's motion for judgment notwithstanding the verdict or for a new trial based upon a jury award of inadequate damages; the trial court's failure to instruct the jury on whether the professor was ready, willing, and able to perform the contract meant that the jury did not decide that issue, which was critical to determining whether the professor was entitled to nominal damages or

substantial damages after the jury found that the university breached the agreement. *Munn v. N.C. State Univ.*, 173 N.C. App. 144, 617 S.E.2d 335, 2005 N.C. App. LEXIS 1931 (2005).

**Denial of JNOV Upheld.** —

Trial court properly denied employers' motion for judgment notwithstanding the verdict because the employee proffered sufficient evidence to support his causes of action for breach of contract and violation of the North Carolina Wage and Hour Act, G.S. 95-25.1 et seq. The evidence offered by the employee was that: (1) the employers' representative orally agreed to pay the employee an annual bonus as part of a contract; (2) the employers modified the employee's bonus formula without his consent; and (3) the employers also failed to give the employee notice of the change in the bonus formula. *Arndt v. First Union Nat'l Bank*, 170 N.C. App. 518, 613 S.E.2d 274, 2005 N.C. App. LEXIS 1080 (2005).

## Rule 51. Instructions to jury.

### CASE NOTES

#### II. Charge to the Jury.

##### A. Generally.

#### II. CHARGE TO THE JURY.

##### A. Generally.

**Charge to the Jury Upheld.** — In an employee's causes of action against his employers for breach of contract and violation of the North Carolina Wage and Hour Act, G.S. 95-25.1 et seq., the trial court properly instructed the jury: (1) as to the existence of a contract; (2) that the employers were required to prove that

the employee acquiesced to a change in his bonus formula; and (3) as to the spoliation of the evidence. Additionally, the trial court did not err by not instructing the jury as to estoppel because the trial court's instructions to the jury, when viewed in their entirety, sufficiently presented the employers' arguments to the jury. *Arndt v. First Union Nat'l Bank*, 170 N.C. App. 518, 613 S.E.2d 274, 2005 N.C. App. LEXIS 1080 (2005).

## Rule 52. Findings by the court.

### CASE NOTES

- I. In General.
- II. Findings and Conclusions, Generally.
- III. Findings and Conclusions on Grant or Denial of Motions, Preliminary Injunctions, etc.
- V. Review on Appeal.

#### I. IN GENERAL.

**Applied** in *Banc of Am. Secs. LLC v. Evergreen Int'l Aviation, Inc.*, 169 N.C. App. 690, 611 S.E.2d 179, 2005 N.C. App. LEXIS 799 (2005); *Currituck Assocs. Residential P'ship v. Hollowell*, 170 N.C. App. 399, 612 S.E.2d 386, 2005 N.C. App. LEXIS 1000 (2005).

#### II. FINDINGS AND CONCLUSIONS, GENERALLY.

##### Findings Held Insufficient.

In the landlord-tenant case, the trial court did not violate G.S. 1A-1, N.C. R. Civ. P. 52(a)(1) by failing to make certain findings of fact and conclusions of law; the trial court was only



required to find the ultimate facts, and, as required, the trial court made detailed findings of ultimate fact and conclusions of law support its decision. *Kroger Ltd. P'ship I v. Guastello*, — N.C. App. —, 628 S.E.2d 841, 2006 N.C. App. LEXIS 967 (2006).

**Compliance with Subsection (a)(1) Held Sufficient. —**

In the termination of parental rights proceeding, where the mother argued that the trial court erred by failing to make findings of fact but by simply reciting the testimony of witnesses at the hearing and making findings that were contradictory, the trial court did not violate G.S. 1A-1-52(a)(1); while the trial court included findings of fact that summarized the testimony, the trial court made the necessary findings of fact, as there was nothing impermissible about describing testimony as long as the trial court ultimately made its own findings resolving any material disputes. In re C.L.C., 171 N.C. App. 438, 615 S.E.2d 704, 2005 N.C. App. LEXIS 1316 (2005).

**III. FINDINGS AND CONCLUSIONS ON GRANT OR DENIAL OF MOTIONS, PRELIMINARY INJUNCTIONS, ETC.**

**When Findings and Conclusions Are Required on Motion to Dismiss. —**

When a trial court in a bench trial grants a motion to dismiss under G.S. 1A-1-41(b), the judge must make detailed findings of fact and separate conclusions of law in accordance with G.S. 1A-1-52(a); the trial court's findings of fact are conclusive on appeal if they are supported by competent evidence, even if there is evidence to the contrary. *Hammonds v. Lumbee River Elec. Mbrshp. Corp.*, — N.C. App. —, 631 S.E.2d 1, 2006 N.C. App. LEXIS 1301 (2006).

**V. REVIEW ON APPEAL.**

**Review Even Where Defendant Failed to Request Specific Findings. —**

Foreign judgment that the judgment creditor obtained in New York was entitled to a presumption that the judgment was entitled to full faith and credit, as the judgment creditor met its burden of showing that entitlement by filing a properly authenticated judgment; however, the general contractor timely moved for relief from the foreign judgment by raising the defense that the New York trial court that entered it did not have personal jurisdiction over the general contractor, and because the trial court did not make any findings of fact or conclusions of law regarding the motion to enforce the judgment, the conclusion that the foreign judgment was enforceable in North Carolina was not supported by competent evidence and the case had to be remanded to the trial court for further proceedings. *Quantum Corporate Funding, Ltd. v. B.H. Bryan Bldg. Co.*, — N.C. App. —, 623 S.E.2d 793, 2006 N.C. App. LEXIS 187 (2006).

**Conclusory Findings Were Insufficient.**

— Judgment granting a summary judgment divorce was vacated as a conclusory finding was made that a wife had been properly served and that the trial court had jurisdiction over her, without making the findings necessary to support the conclusions, despite the facts that: (1) the husband attempted to serve the complaints on the wife at two different addresses, (2) the husband's affidavit of service by publication failed to state that the husband mailed a notice of service by publication to the wife before the first publication, and (3) the husband mailed the notice of hearing to the wife at a different address than he used during the second attempt at service of the complaint; no findings were made as to the use of service by publication by the husband or his due diligence in attempting to serve the wife, or that the husband was not required to mail notice of the service by publication to the wife before the first publication. *Agbemavor v. Keteku*, — N.C. App. —, 629 S.E.2d 337, 2006 N.C. App. LEXIS 1074 (2006).

**ARTICLE 7.**

*Judgment.*

**Rule 54. Judgments.**

**CASE NOTES**

- I. In General.
- II. Judgment on Multiple Claims or Involving Multiple Parties.

**I. IN GENERAL.**

**Final Judgment Defined. —**

Under G.S. 1A-1, N.C. R. Civ. P. 54(a), a

judgment is either interlocutory or a final determination of the rights of the parties, and a final judgment is one which disposes of the cause as to all parties, leaving nothing to be

judicially determined between them in the trial court; generally, there is no right of immediate appeal from interlocutory orders and judgments. *State v. Sanchez*, — N.C. App. —, 623 S.E.2d 780, 2005 N.C. App. LEXIS 2705 (2005).

**Failure to Certify.** — Although a trial court's entry of summary judgment in favor of a real estate transferee failed to dispose of the cause as to all the parties, and the trial court did not certify the order under N.C. R. Civ. P. 54(b), since the interlocutory order concerned title to the real estate, it involved substantial rights adversely affected and was appealable. *Watson v. Millers Creek Lumber Co.*, — N.C. App. —, 631 S.E.2d 839, 2006 N.C. App. LEXIS 1563 (2006).

**Appeal Dismissed as Interlocutory.** —

Because a trial court's order on a motion in limine was interlocutory and was not immediately appealable, the court dismissed the appeal even though the trial court had certified the issue for appeal under G.S. 1A-1-54(b); that certification could not bind the court to review a non-appealable interlocutory order. *DOT v. Olinger*, 172 N.C. App. 848, 616 S.E.2d 672, 2005 N.C. App. LEXIS 1807 (2005).

Appeal by corporation, president, and vice president from the denial of the motion to dismiss pursuant to G.S. 1A-1-12(b)(1), (6) was interlocutory and did not affect a substantial right pursuant to G.S. 1-277(a) and G.S. 7A-27(d); the appeal, therefore, was dismissed in accordance with G.S. 1A-1-54(b). *Capps v. NW Sign Indus. of N.C., Inc.*, 171 N.C. App. 409, 614 S.E.2d 552, 2005 N.C. App. LEXIS 1203 (2005).

Because the trial court did not rule on the merits of an employee's claim for unemployment benefits, but found that the Employment Security Commission's order did not address all of the relevant issues raised by the record, and the findings were incomplete and failed to set out the sequence of events regarding the timing and notification of the employee's discharge, the order was clearly interlocutory; hence, without evidence that the employee's substantial rights were affected, or that any criteria for an immediate appeal was required, the employee's appeal was dismissed. *Reeves v. Yellow Transp., Inc.*, 170 N.C. App. 610, 613 S.E.2d 350, 2005 N.C. App. LEXIS 1076 (2005), review denied, — N.C. —, 619 S.E.2d 511 (2005).

Order allowing estates to amend their complaint in medical malpractice suit was not immediately appealable where issues of hospital's claimed loss of substantial rights were not brought before the trial court, and no substantial right was lost by failure to allow immediate review; estates were also entitled to sanctions against the hospital. *Estate of Spell v. Ghanem*, — N.C. App. —, 622 S.E.2d 725, 2005 N.C. App. LEXIS 2717 (2005).

Where the trial court did not certify the order denying construction company's motion to dis-

miss an action brought by homeowners association as immediately appealable pursuant to G.S. 1A-1, Rule 54, and the construction company did not appear to be deprived of any substantial right which could not be protected by timely appeal from the ultimate disposition of the controversy on its merits, the appeal was dismissed. *Pineville Forest Homeowners Ass'n v. Portrait Homes Constr. Co.*, — N.C. App. —, 623 S.E.2d 620, 2006 N.C. App. LEXIS 71 (2006).

Interlocutory appeal that was not certified under G.S. 1A-1-54(b) was dismissed because the state arts school and its dean did not establish that they possessed a substantial right warranting immediate review of their interlocutory appeal. *McClennahan v. N.C. Sch. of the Arts*, — N.C. App. —, 630 S.E.2d 197, 2006 N.C. App. LEXIS 1175 (2006).

**Interlocutory Discovery Order With Sanctions Appealable.** — Order imposing sanctions for discovery violations and ordering the production of documents was an interlocutory order that was appealable because of the portion of the order that imposed sanctions pursuant to G.S. 1A-1, Rule 37(b). Such an appeal tests the validity of both the discovery order and the sanctions imposed. In re *Pedestrian Walkway Failure*, 173 N.C. App. 254, 618 S.E.2d 796, 2005 N.C. App. LEXIS 2022 (2005).

**Questions Affecting Title to Property Immediately Reviewable.** — Possible existence of an easement, the basis upon which a trial court ordered joinder of individual unit owners in a townhome development, was a question affecting title, and thus the trial court's joinder order in a suit seeking a condemnation of a homeowners' association's common area was subject to immediate review. *N.C. DOT v. Stagecoach Vill.*, 360 N.C. 46, 619 S.E.2d 495, 2005 N.C. LEXIS 996 (2005).

**Substantial Right.** —

Interlocutory appeal of the denial of defendants' motion for summary judgment in a constructive trust action was allowed; the basis of the motion for summary judgment was that res judicata barred the constructive trust action and in such a case, the failure to allow an appeal might affect a substantial right in that the possibility existed that without an immediate appeal, they would be required to twice defend against the same claim by plaintiffs. *Tiber Holding Corp. v. DiLoreto*, 170 N.C. App. 662, 613 S.E.2d 346, 2005 N.C. App. LEXIS 1081 (2005), cert. denied, — N.C. —, 623 S.E.2d 263 (2005).

Because a corporation asserted that ordered documents were protected from discovery under G.S. 90-21.22A, and that assertion was not frivolous or insubstantial, the discovery order compelling production of the documents affected a substantial right and the appeal fell under an exception to the rule that there was



no right to appeal from an interlocutory order. *Windman v. Britthaven, Inc.*, 173 N.C. App. 630, 619 S.E.2d 522, 2005 N.C. App. LEXIS 2113 (2005).

**Trial court's denial of a motion to enforce a settlement did not resolve the underlying personal injury claim, and the order of denial was therefore interlocutory;** since the trial court did not certify that there was no just reason to delay the appeal, and the denial did not affect a substantial right, there was no right to an immediate appeal since an appeal of the denial was still allowed once there was a final judgment. *Milton v. Thompson*, 170 N.C. App. 176, 611 S.E.2d 474, 2005 N.C. App. LEXIS 903 (2005).

**Applied** in *Wolfe v. Villines*, 169 N.C. App. 483, 610 S.E.2d 754, 2005 N.C. App. LEXIS 690 (2005).

**Cited** in *Autec, Inc. v. Southlake Holdings, LLC*, 171 N.C. App. 147, 613 S.E.2d 727, 2005 N.C. App. LEXIS 1162 (2005); *Brown v. City of Winston-Salem*, 171 N.C. App. 266, 614 S.E.2d 599, 2005 N.C. App. LEXIS 1266 (2005); *Jacobs v. Physicians Weight Loss Ctr. of Am., Inc.*, 173 N.C. App. 663, 620 S.E.2d 232, 2005 N.C. App. LEXIS 2280 (2005); *Mitchell v. Broadway*, — N.C. App. —, 628 S.E.2d 847, 2006 N.C. App. LEXIS 980 (2006); *Barnes v. Kochhar*, — N.C. App. —, 633 S.E.2d 474, 2006 N.C. App. LEXIS 1574 (2006); *James River Equip., Inc. v. Mecklenburg Utils., Inc.*, — N.C. App. —, 634 S.E.2d 557, 2006 N.C. App. LEXIS 1898 (2006).

## II. JUDGMENT ON MULTIPLE CLAIMS OR INVOLVING MULTIPLE PARTIES.

### **Appeal Is Permitted Where a Substantial Right Would Be Affected. —**

Where a trial court granted plaintiff summary judgment as to liability on a criminal conversation claim, and granted defendant summary judgment as to an alienation of affections claim, though no final judgment was entered as to the issue of damages for the criminal conversation claim, nor was certification granted under G.S. 1A-1, N.C. R. Civ. P. 54(b) as to the alienation of affections claim, the appeal affected a substantial right that would be lost absent immediate review, because the elements of damages were so closely related that they did not support separate awards for each tort. *McCutchen v. McCutchen*, 170 N.C. App. 1, 612 S.E.2d 162, 2005 N.C. App. LEXIS 904 (2005).

While an order granting summary judgment was interlocutory, it was appealable because the cause of action for criminal conversation, which was still before the trial court, was so connected with the claim for alienation of affections that only one issue of damages should be submitted to the jury, and thus, a substantial right was at stake to have the same jury hear the wife's two claims. *McCutchen v.*

*McCutchen*, 360 N.C. 280, 624 S.E.2d 620, 2006 N.C. LEXIS 2 (2006).

### **Finding of No Just Reason for Delay as Certification That Judgment Is Final and Appealable. —**

When a patient sued a pharmacy for negligence, breach of implied warranties, liability under G.S. 99B-6, and to pierce the pharmacy's corporate veil and hold its president liable, and the warranty claim and claim to pierce the corporate veil were dismissed, and the trial court orally certified that there was no just reason to delay an appeal of the dismissal when there was no written order in the appellate record reflecting the trial court's oral certification, the patient's interlocutory appeal of the dismissal was reviewed for whether the patient would lose a substantial right absent an immediate appeal. *Rauch v. Urgent Care Pharm., Inc.*, — N.C. App. —, 632 S.E.2d 211, 2006 N.C. App. LEXIS 1566 (2006).

### **Judgment Held Appealable. —**

Dismissal of a partner's claims against an attorney under G.S. 1A-1, N.C. R. Civ. P. 12(b)(6) as the statute of limitations had passed was immediately appealable. *Carlisle v. Keith*, 169 N.C. App. 674, 614 S.E.2d 542, 2005 N.C. App. LEXIS 800 (2005).

Because the appeal was final as to the appealing defendants, and the trial court certified the appeal, the appellate court was required to review plaintiff's appeal on the merits. *James River Equip., Inc. v. Tarpe's Excavating, Inc.*, — N.C. App. —, 634 S.E.2d 548, 2006 N.C. App. LEXIS 1897 (2006).

### **Judgments Held Nonappealable. —**

Corporation's appeal was dismissed as interlocutory in that it concerned only one claim against one defendant in a suit involving multiple claims against multiple defendants; the trial court's off-hand comment that "the way to get rid of what (the court had) done (was) to appeal" did not meet the "no just reason for delay" certification requirements of G.S. 1A-1, N.C. R. Civ. P. 54(b) and was not binding on the appellate court. *White v. Carver*, — N.C. App. —, 622 S.E.2d 718, 2005 N.C. App. LEXIS 2744 (2005).

Corporation's interlocutory appeal was dismissed as: (1) its claim that an order subjected every action taken by the corporation since its inception to legal challenge did not identify a substantial right for purposes of the substantial right exception, (2) the identification of any substantial right would be speculative as the order required the corporation to hold an organizational meeting, in which the executor was to be appointed a director and allowed to participate and provided that the claims against the corporation were to be dismissed upon organization of the corporation, and the corporation appealed before conducting the organizational meeting, and (3) that the parties "did



not like each other” did not require that the appeal be entertained under the substantial right exception. *White v. Carver*, — N.C. App. —, 622 S.E.2d 718, 2005 N.C. App. LEXIS 2744 (2005).

In personal injury plaintiffs’ action against an intoxicated driver who caused a traffic accident by driving a van across a highway median, and against a company that owned the van and against the occupants of a house who allegedly negligently entrusted the van to the driver, the company and the occupants were dismissed with prejudice following summary judgment in their favor; plaintiffs then entered a consent order dismissing, without prejudice, their remaining claims against the driver, thereby resolving all claims against all remaining defen-

dants. The summary judgment order was not a final appealable order and the consent order against the driver did not render the dismissal order resulting from that summary judgment a final judgment as contemplated by G.S. 1A-1, N.C. R. Civ. P. 54; the court dismissed plaintiffs’ appeal of that dismissal order on the reasoning that G.S. 1A-1, N.C. R. Civ. P. 41(a)(1), allowed plaintiffs to take one voluntary dismissal against the driver without finally resolving the claims against the driver, so there was no final judgment that would allow an appeal of the summary judgment in favor of the company and the occupants. *Hill v. West*, — N.C. App. —, 627 S.E.2d 662, 2006 N.C. App. LEXIS 692 (2006).

## Rule 55. Default.

### CASE NOTES

- I. In General.
- III. Entry of Judgment by Default.
  - A. By Clerk.

#### I. IN GENERAL.

**Cited** in *Autec, Inc. v. Southlake Holdings, LLC*, 171 N.C. App. 147, 613 S.E.2d 727, 2005 N.C. App. LEXIS 1162 (2005).

#### III. ENTRY OF JUDGMENT BY DEFAULT.

##### A. By Clerk.

**Complaint Not for “Sum Certain”, etc. —**

Although a trial court did not abuse its discretion by finding that a failure to file an extension of time did not constitute a mistake since there was no explanation for a law firm’s actions, a motion to set aside a default judgment should have been granted under G.S. 1A-1, N.C. R. Civ. P. 60(b) because a judgment was void since a clerk was unable to enter a default where there was no sum certain. *Basnight Constr. Co. v. Peters & White Constr. Co.*, 169 N.C. App. 619, 610 S.E.2d 469, 2005 N.C. App. LEXIS 605 (2005).

## Rule 56. Summary judgment.

### CASE NOTES

- I. In General.
- III. Propriety of Summary Judgment.
  - B. Particular Types of Actions, etc.
  - C. Cases in Which Summary Judgment Held Proper.
  - D. Cases in Which Summary Judgment Held Improper.
- IV. Burden on Motion for Summary Judgment.
- V. Function of Trial Court.
- VI. Evidence on Motion.
  - A. In General.

#### I. IN GENERAL.

**Conversion of § 1A-1, Rule 12(b)(6) and 12(c) Motions to Motions for Summary Judgment. —**

Trial court converted a G.S. 1A-1, N.C. R. Civ. P. 12(b)(6) motion into a motion for summary judgment because the court considered matters

outside of the pleadings in the form of exhibits, depositions, affidavits and discovery responses. *Bailey v. Handee Hugo’s, Inc.*, 173 N.C. App. 723, 620 S.E.2d 312, 2005 N.C. App. LEXIS 2302 (2005).

**Notice Requirement. —** Where the trial court entered an order substituting estate ad-

ministrator as defendant on the same day it granted summary judgment to plaintiffs, the administrator did not receive timely notice of the motion for summary judgment motion as provided for in G.S. 1A-1, Rule 56(e), and the grant of summary judgment was error. *Dixon v. Hill*, 174 N.C. App. 252, 620 S.E.2d 715, 2005 N.C. App. LEXIS 2393 (2005).

#### **Interlocutory Appeals. —**

In a defamation action, the appeal of the candidate and campaign from the trial court's denial of their G.S. 1A-1, N.C. R. Civ. P. 12(b)(6) motion was interlocutory, and the denial did not challenge a substantial right that was to be lost absent immediate appellate review pursuant to G.S. 1-277(a); the instant case was akin to a previous case in which an appeal from a motion for judgment on pleadings pursuant to G.S. 1A-1, N.C. R. Civ. P. 12(c) was dismissed, and the instant case was distinguishable from a previous case in which an appeal on a ruling on a motion for summary judgment pursuant to G.S. 1A-1, N.C. R. Civ. P. 56 was allowed, as a motion under G.S. 1A-1, N.C. R. Civ. P. 12(c) was more similar to a G.S. 1A-1, N.C. R. Civ. P. 12(b)(6) motion. *Grant v. Miller*, 170 N.C. App. 184, 611 S.E.2d 477, 2005 N.C. App. LEXIS 902 (2005).

In a case involving specific performance, an appellate court considered an appeal from the granting of a motion for partial summary judgment because it was not interlocutory since it disposed of all of the claims brought before the trial court. *Wolfe v. Villines*, 169 N.C. App. 483, 610 S.E.2d 754, 2005 N.C. App. LEXIS 690 (2005).

**Applied** in *Harleysville Mut. Ins. Co. v. Berkley Ins. Co.*, 169 N.C. App. 556, 610 S.E.2d 215, 2005 N.C. App. LEXIS 602 (2005); *Carlisle v. Keith*, 169 N.C. App. 674, 614 S.E.2d 542, 2005 N.C. App. LEXIS 800 (2005); *Iadanza v. Harper*, 169 N.C. App. 776, 611 S.E.2d 217, 2005 N.C. App. LEXIS 808 (2005), cert. denied, 360 N.C. 63, 621 S.E.2d 624 (2005); *First Commerce Bank v. Dockery*, 171 N.C. App. 297, 615 S.E.2d 314, 2005 N.C. App. LEXIS 1202 (2005); *Youse v. Duke Energy Corp.*, 171 N.C. App. 187, 614 S.E.2d 396, 2005 N.C. App. LEXIS 1209 (2005); *In re Will of Priddy*, 171 N.C. App. 395, 614 S.E.2d 454, 2005 N.C. App. LEXIS 1213 (2005); *McCutchen v. McCutchen*, 170 N.C. App. 1, 612 S.E.2d 162, 2005 N.C. App. LEXIS 904 (2005); *ABL Plumbing & Heating Corp. v. Bladen County Bd. of Educ.*, — N.C. App. —, 623 S.E.2d 57, 2005 N.C. App. LEXIS 2728 (2005); *Brown v. City of Winston-Salem*, 171 N.C. App. 266, 614 S.E.2d 599, 2005 N.C. App. LEXIS 1266 (2005); *Roberts v. Roberts*, 173 N.C. App. 354, 618 S.E.2d 761, 2005 N.C. App. LEXIS 2030 (2005); *Atl. Coast Mech., Inc. v. Arcadis, Geraghty & Miller of N.C., Inc.*, — N.C. App. —, 623 S.E.2d 334, 2006 N.C. App. LEXIS 58 (2006); *Purvis v. Moses H. Cone*

*Mem'l Hosp. Serv. Corp.*, — N.C. App. —, 624 S.E.2d 380, 2006 N.C. App. LEXIS 128 (2006); *Shavitz v. City of High Point*, — N.C. App. —, 630 S.E.2d 4, 2006 N.C. App. LEXIS 1080 (2006); *Haynes v. B & B Realty Group, LLC*, — N.C. App. —, 633 S.E.2d 691, 2006 N.C. App. LEXIS 1625 (2006); *King v. Windsor Capital Group, Inc.*, — N.C. App. —, 632 S.E.2d 557, 2006 N.C. App. LEXIS 1643 (2006).

**Cited** in *Page v. Bald Head Ass'n*, 170 N.C. App. 151, 611 S.E.2d 463, 2005 N.C. App. LEXIS 890 (2005); *Sawyers v. Farm Bureau Ins. Co. of N.C., Inc.*, 170 N.C. App. 17, 612 S.E.2d 184, 2005 N.C. App. LEXIS 893 (2005); *Granville Farms, Inc. v. County of Granville*, 170 N.C. App. 109, 612 S.E.2d 156, 2005 N.C. App. LEXIS 906 (2005); *Jacobs v. Physicians Weight Loss Ctr. of Am., Inc.*, 173 N.C. App. 663, 620 S.E.2d 232, 2005 N.C. App. LEXIS 2280 (2005); *Am. Gen. Fin. Servs. v. Barnes*, — N.C. App. —, 623 S.E.2d 617, 2006 N.C. App. LEXIS 54 (2006); *Lohrmann v. Iredell Mem'l Hosp., Inc.*, 174 N.C. App. 63, 620 S.E.2d 258, 2005 N.C. App. LEXIS 2287 (2005); *White v. Cross Sales & Eng'g Co.*, — N.C. App. —, 629 S.E.2d 898, 2006 N.C. App. LEXIS 1225 (2006); *Duke Energy Corp. v. Malcolm*, — N.C. App. —, 630 S.E.2d 693, 2006 N.C. App. LEXIS 1300 (2006).

### **III. PROPRIETY OF SUMMARY JUDGMENT.**

#### **B. Particular Types of Actions, etc.**

##### **Summary Judgment on a Claim for Damages. —**

No prohibition exists as to granting summary judgment on the issue of damages where there is no genuine issue of material fact as to those damages. *Sylva Shops, Ltd. P'ship v. Hibbard*, — N.C. App. —, 623 S.E.2d 785, 2006 N.C. App. LEXIS 181 (2006).

**Condemnation Proceedings. —** In condemnation proceeding brought pursuant to city's power of eminent domain under G.S. 160A-240.1, partial summary judgment was properly granted precluding property owners from recovering for diminution in value caused by the city's construction of a median restricting access to lanes in only one direction of travel; the separation of lanes of traffic was an exercise of police power, and the means used to accomplish the legitimate objective were reasonable in light of the fact that the owners still had free ingress and egress to their property, and injury to property caused by such an exercise of police power was not compensable. *City of Concord v. Stafford*, 173 N.C. App. 201, 618 S.E.2d 276, 2005 N.C. App. LEXIS 1915 (2005), cert. dismissed, — N.C. —, 625 S.E.2d 784 (2005), cert. denied, — N.C. —, 625 S.E.2d 785 (2005).



### C. Cases in Which Summary Judgment Held Proper.

**Where evidence against a check cashing business established that it executed contracts for usurious loans,** it used its alternative business purpose of providing Internet access to consumers as a guise to cover this illegal activity, and no evidentiary basis existed upon which a reasonable fact-finder could reach a contrary conclusion, the State's claims of usury and violations of the Consumer Finance Act were established as a matter of law; moreover, the contracts which customers had with the business were cancelled pursuant to G. S. 75-15.1, requiring all funds collected by the business pursuant to such contracts to be refunded to the customers. *State ex rel. Cooper v. NCCS Loans, Inc.*, — N.C. App. —, 624 S.E.2d 371, 2005 N.C. App. LEXIS 2588 (2005).

#### **Breach of Contract Claim. —**

Summary judgment was properly granted to buyers on their breach of contract suit against a seller because, under the plain language of the agreement entered into between the parties, which stated that the seller would "cause" enumerated repairs to be made, the seller was required to fully complete the enumerated repairs, not just pay for them; since it was undisputed that the repairs had not been performed and since the buyers had not frustrated any effort made by the seller to complete the repairs, the evidence showed that the seller was in breach despite the fact that she had deposited a sum for the repairs in escrow. *Cater v. Barker*, 172 N.C. App. 441, 617 S.E.2d 113, 2005 N.C. App. LEXIS 1799 (2005), *aff'd*, — N.C. —, 625 S.E.2d 778 (2006).

**Defense of Laches. —** Summary judgment was properly granted to buyers on a seller's defense of laches alleged in the buyers' breach of contract suit because the defense was not applicable in that the trial court's entry of summary judgment awarded the buyers damages, a legal remedy, not specific performance; laches is not available in an action at law. *Cater v. Barker*, 172 N.C. App. 441, 617 S.E.2d 113, 2005 N.C. App. LEXIS 1799 (2005), *aff'd*, — N.C. —, 625 S.E.2d 778 (2006).

#### **Summary Judgment Properly Entered for Defendants. —**

As the evidence before the trial court on a motion for summary judgment filed by a police department did not raise a genuine issue of material fact as to whether numerous current police officers were entitled to a pay increase, because the city council had not approved any pay raise for existing employees of the police department with post-secondary degrees, the trial court properly granted summary judgment in favor of the department and against the contesting officers. *City of Asheville v. Bowman*, 172 N.C. App. 586, 616 S.E.2d 669, 2005

N.C. App. LEXIS 1808 (2005).

#### **No Duty Owed to Plaintiff. —**

Summary judgment was properly granted to a property owner, dismissing a pedestrian's suit to recover for injuries sustained when she slipped and fell in the owner's icy parking lot, because the pedestrian's own testimony demonstrated that she knew of the hazardous condition of the parking lot, and thus, there was no issue of genuine fact that the owner owed her no duty. *Grayson v. High Point Dev. L.P.*, — N.C. App. —, 625 S.E.2d 591, 2006 N.C. App. LEXIS 270 (2006).

### D. Cases in Which Summary Judgment Held Improper.

**Alienation of Affections. —** Summary judgment was improperly granted dismissing a former wife's claim for alienation of affections filed in April 2003 on the ground that it was barred by the statute of limitations in G.S. 1-52(5) because, while the husband and the wife separated in 1998, the wife's allegations in her sworn affidavit and verified complaint, to the effect that the husband expressed his desire to return to the marriage multiple times in October 1999 and September 2000, that the couple purchased a car together in May 1999, that the couple maintained joint finances after their separation, that they participated in marriage counseling until February 2001, and that the husband told the wife during their last counseling session that he was not planning on divorcing her, presented a genuine issue of material fact as to whether there was love and affection following the wife's separation from the husband. Since a jury could determine that alienation did not occur until as late as February 2001 when the husband made the final decision to end the marriage and because the wife filed her complaint within three years of his decision, her claim for alienation of affections was not barred by § 1-52(5). *McCutchen v. McCutchen*, 360 N.C. 280, 624 S.E.2d 620, 2006 N.C. LEXIS 2 (2006).

**Premises Liability. —** Summary judgment was improperly granted to a store, dismissing a customer's suit to recover for injuries she sustained when she was struck by a buffer machine being operated in the store, because there were genuine issues of fact pertaining to whether the store properly warned the customer of the presence of the machine and whether the customer exercised care for her own safety. *Freeman v. Food Lion, LLC*, 173 N.C. App. 207, 617 S.E.2d 698, 2005 N.C. App. LEXIS 1919 (2005).

Summary judgment was properly granted to two contractors, dismissing a store customer's suit to recover for injuries sustained when she was struck by a buffer machine being operated in the store by an employee of a floor cleaning



company, because neither contractor owned or operated the store in which the customer's injury occurred and because the customer failed to allege that the contractors were agents of the store; thus, the contractors had no duty to the customer and could not be held liable under a theory of premises liability. *Freeman v. Food Lion, LLC*, 173 N.C. App. 207, 617 S.E.2d 698, 2005 N.C. App. LEXIS 1919 (2005).

#### IV. BURDEN ON MOTION FOR SUMMARY JUDGMENT.

##### **Movant Must Establish Lack of a Triable Issue. —**

Insurance and securities broker was properly granted summary judgment on investors' vicarious liability claims against the broker because, assuming *arguendo* that an agent and a sub-agent committed torts in selling investments to the investors, the investors could not show that the broker was vicariously liable for the torts as the agent and subagent were independent contractors of the broker, and the investors knew that the agent and the subagent were not acting as agents of the broker. *Estate of Redding v. Welborn*, 170 N.C. App. 324, 612 S.E.2d 664, 2005 N.C. App. LEXIS 1001 (2005).

**Denials In Unverified Answer Insufficient To Withstand Motion For Summary Judgment. —** As defendant's answer to the complaint was not verified, the denials contained in that answer were insufficient to defeat plaintiffs' motion for summary judgment. *Dixon v. Hill*, 174 N.C. App. 252, 620 S.E.2d 715, 2005 N.C. App. LEXIS 2393 (2005).

**Unverified Responses to Request for Admissions Do Not Constitute Affidavit. —** Where defendant's responses to plaintiffs' request for admissions were not verified, they could not be deemed to be an affidavit; and as they were not in the category of "depositions, answers to interrogatories, and admissions on file" specified in G.S. 1A-1, Rule 56 as material that could be considered, they were insufficient to defeat plaintiffs' motion for summary judgment. *Dixon v. Hill*, 174 N.C. App. 252, 620 S.E.2d 715, 2005 N.C. App. LEXIS 2393 (2005).

##### **Defendant's Response Held Inadequate. —**

Affiliated corporations' general denial as to the amount owed to a services provider contained in their answer, coupled with their general denial in their affidavit that they owed the provider anything, was insufficient to raise a genuine issue of material fact as to the amount of the debt; the trial court, therefore, did not err in granting partial summary judgment in favor of the services provider on its breach of contract claim and awarding damages. *Excel Staffing Serv. v. HP Reidsville*, 172 N.C. App. 281, 616 S.E.2d 349, 2005 N.C. App. LEXIS 1582 (2005).

#### V. FUNCTION OF TRIAL COURT.

**Granting of a Continuance. —** Review of the record failed to reveal an abuse of discretion on the part of the trial court in denying defendants' motion for continuance. *HSI N.C., LLC v. Diversified Fire Prot. of Wilmington, Inc.*, 169 N.C. App. 767, 611 S.E.2d 224, 2005 N.C. App. LEXIS 805 (2005).

#### VI. EVIDENCE ON MOTION.

##### A. In General.

##### **Affidavits Must Be Served Prior to Hearing. —**

Trial court did not abuse its discretion by excluding an affidavit that was submitted less than two business days before the hearing on the summary judgment motion. *HSI N.C., LLC v. Diversified Fire Prot. of Wilmington, Inc.*, 169 N.C. App. 767, 611 S.E.2d 224, 2005 N.C. App. LEXIS 805 (2005).

**Not All Parts of Distributer's Affidavits and Complaint Were Based on Personal Knowledge. —** Despite a distributor's claims that his manufacturer's export agent, who lived in Great Britain, had tortiously interfered with the distributor-manufacturer relationship, in that the agent hired the distributor's salesman with the intention of establishing his own distributorship, a trial court did not err in ruling that under the Due Process Clause, no personal jurisdiction existed over the manager. The personal knowledge requirement for documents and affidavits, as contained in G.S. 1A-1, N.C. R. Civ. P. 56(e), applied to motions to dismiss under G.S. 1A-1, N.C. R. Civ. P. 12(b)(2), not all parts of the distributor's affidavits and complaint were based on personal knowledge, and only those parts based on personal knowledge, which were insufficient to show personal jurisdiction, could be considered. *Deer Corp. v. Carter*, — N.C. App. —, 629 S.E.2d 159, 2006 N.C. App. LEXIS 968 (2006).

**Affidavit Statements Based on Hearsay Would Not be Admissible. —** Trial court erred in granting summary judgment to an employer because the statements in the affidavits made by three affiants to establish an employee's on-call pay rate, and in the exhibits submitted in support of their affidavits, were hearsay under G.S. 8C-1, N.C. R. Evid. 801(c) and were inadmissible under G.S. 1A-1, N.C. R. Civ. P. 56(e) to prove the employee's on-call pay rate. Further, none of the affidavits addressed the foundational requirements for the admission of evidence through a business record, and thus did not present personal knowledge setting forth facts admissible in evidence under G.S. 8C-1, N.C. R. Evid. 803(6). *Gilreath v. N.C. HHS*, — N.C. App. —, 629 S.E.2d 293, 2006 N.C. App. LEXIS 1077 (2006).

##### **Striking of Affidavits and Deposition. —**

Testimony contained in four affidavits and a deposition submitted by the decedent's son regarding the intent of the decedent to disinherit one of the other beneficiaries in a will was properly stricken under G.S. 1A-1 because the

declarations in the affidavits were incompetent to establish the decedent's intent and were inadmissible for that purpose. *Hammer v. Hammer*, — N.C. App. —, 633 S.E.2d 878, 2006 N.C. App. LEXIS 1906 (2006).

## Rule 57. Declaratory judgments.

### CASE NOTES

**Declaratory Judgment Held Proper.** — Trial court properly entered declaratory judgment in favor of a corporation and found that the sale of pre-paid phone cards with game pieces was not an illegal lottery where the inclusion of game pieces was merely a marketing system, the phone card was sufficiently compatible with the price being charged and

had sufficient value and utility to support the conclusion that it, and not the associated game of chance, was the object being purchased, and consumers could receive free game pieces via written request without purchasing the phone card. *Am. Treasures, Inc. v. State*, 173 N.C. App. 170, 617 S.E.2d 346, 2005 N.C. App. LEXIS 1928 (2005).

## Rule 58. Entry of judgment.

### CASE NOTES

**Announcement in Open Court Is Not Entry of Judgment.** —

Trial court erred in granting a husband's motion to dismiss a wife's motion for equitable distribution, pursuant to G.S. 50-20, in a divorce action where the wife filed the motion on the day before the judgment was signed by the judge and filed, at which point the judgment became final pursuant to G.S. 1A-1-58; there-

fore, G.S. 50-11(e) did not destroy the wife's right to seek equitable distribution as the motion was filed before an absolute divorce was granted. *Santana v. Santana*, 171 N.C. App. 432, 614 S.E.2d 438, 2005 N.C. App. LEXIS 1204 (2005).

**Applied in** *In re J.B.*, 172 N.C. App. 1, 616 S.E.2d 264, 2005 N.C. App. LEXIS 1589 (2005).

## Rule 59. New trials; amendment of judgments.

### CASE NOTES

- I. In General.
- III. Altering or Amending Judgments.

#### I. IN GENERAL.

**Discretion of Trial Judge.** —

Trial court did not err in denying the airport operators' post-trial motions claiming that they had newly-discovered evidence that the adjoining property owners, who had brought a private nuisance claim against the airport operators, bought additional property adjoining their property and the airport following the jury trial in the private nuisance case; the fact that the adjoining property owners purchased additional property could not be the basis for a new trial because the purchase did not occur until after the trial was completed and, thus, the trial court's denial of the post-trial motions was not an abuse of discretion. *Broadbent v. Allison*, — N.C. App. —, 626 S.E.2d 758, 2006 N.C. App. LEXIS 524 (2006).

**Refusal to Award New Trial Upheld.** —

Trial judge's discretionary order made pursuant to G.S. 1A-1, N.C. R. Civ. P. 59 for or against a new trial may be reversed only when an abuse of discretion is clearly shown; a trial court's exclusion of the testimony of four witnesses as to the value of property in a condemnation proceeding was proper, and so the trial court did not abuse its discretion by denying the landowners' motion for a new trial. *City of Charlotte v. Ertel*, 170 N.C. App. 346, 612 S.E.2d 438, 2005 N.C. App. LEXIS 1009 (2005).

In determining whether a school board properly determined not to renew a teacher's contract under G.S. 115C-325(m)(2), the trial court had looked at all of the evidence and determined that there was substantial evidence to support the board's determination, even without inaccurate information contained in a mem-



orandum; in doing so, it had properly applied the whole record test to the evidence presented to the board, and this justified its later denial of the teacher's motion for reconsideration. *Davis v. Macon County Bd. of Educ.*, — N.C. App. —, 632 S.E.2d 590, 2006 N.C. App. LEXIS 1644 (2006).

**Motion for new trial on the grounds of newly discovered evidence is addressed to trial court's sound discretion, etc. —**

Because a mother raised only evidence that did not exist when a custody trial occurred, there was no abuse of discretion in a denial of her motion for a new trial under G.S. 1A-1, N.C. R. Civ. P. 59(a)(4). *Faulkenberry v. Faulkenberry*, 169 N.C. App. 428, 610 S.E.2d 237, 2005 N.C. App. LEXIS 688 (2005).

**And Court May Not Order New Trial While Appeal Is Pending. —**

Where, in support of its petition for certiorari, a bond company sought to include documents, which included a federal indictment and a county district attorney's dismissal of state charges against defendant, that were never presented to the trial court until after it entered its bond forfeiture order, and the bonding company did not make a motion pursuant to either G.S. 1A-1, N.C. R. Civ. P. 59 or 60 to bring the material to the trial court's attention, but rather sought to bring the material to light for the first time while this case was already pending on appeal, the court found that it was further evidence of the bond company's lack of diligence and denied its petition for writ of certiorari. *State v. Gonzalez-Fernandez*, 170 N.C. App. 45, 612 S.E.2d 148, 2005 N.C. App. LEXIS 900 (2005).

**Motion for New Trial Improperly Granted. —** Directed verdict was properly granted to a store in a customer's suit against the store to recover for injuries sustained when he fell over a stock cart parked in a store aisle, and thus, the trial court improperly set aside its earlier order granting a directed verdict and, instead, granted the customer's motion for a new trial, because the customer presented no evidence regarding who left the stock cart in the position which caused the customer to fall, when it was placed there, or how long it remained; additionally, the customer did not present evidence that the store failed to correct a dangerous condition after it received actual or constructive notice of the condition. *Herring v. Food Lion, LLC*, — N.C. App. —, 623 S.E.2d 281, 2005 N.C. App. LEXIS 2754 (2005).

**Child Custody Matters. —**

Because a mother raised only evidence that did not exist when a custody trial occurred, there was no abuse of discretion in a denial of her motion for a new trial under G.S. 1A-1, N.C.

R. Civ. P. 59(a)(4). *Faulkenberry v. Faulkenberry*, 169 N.C. App. 428, 610 S.E.2d 237, 2005 N.C. App. LEXIS 688 (2005).

**Private Nuisance. —** Trial court did not err in denying the airport operators' post-trial motion based on the claim that the adjoining property owners did not admit sufficient evidence to prove their claim that operation of the airport was a private nuisance; the adjoining property owners admitted sufficient evidence that the airport had a substantial and unreasonable impact on the adjoining property owners' enjoyment of their property. *Broadbent v. Allison*, — N.C. App. —, 626 S.E.2d 758, 2006 N.C. App. LEXIS 524 (2006).

**Applied** in *Trent v. Place, LLC*, — N.C. App. —, 632 S.E.2d 529, 2006 N.C. App. LEXIS 1683 (2006).

**Cited** in *Rhew v. Felton*, — N.C. App. —, 631 S.E.2d 859, 2006 N.C. App. LEXIS 1560 (2006).

### III. ALTERING OR AMENDING JUDGMENTS.

**Plaintiff Entitled to New Trial on Issue of Damages. —** In breach of contract action against university, professor was entitled to a new trial on the issue of damages only where the trial court erred in denying his motion for judgment notwithstanding the verdict or for a new trial based upon a jury award of inadequate damages; the trial court's failure to instruct the jury on whether the professor was ready, willing, and able to perform the contract meant that the jury did not decide that issue, which was critical to determining whether the professor was entitled to nominal damages or substantial damages after the jury found that the university breached the agreement. *Munn v. N.C. State Univ.*, 173 N.C. App. 144, 617 S.E.2d 335, 2005 N.C. App. LEXIS 1931 (2005).

**JNOV Granted on Appeal Mooted New Trial Motion. —** Trial court decision denying JNOV to a city, one of its police officers, and its police department was reversed on appeal, because the plaintiff, an arrestee injured in a squad car, failed to prove gross negligence and only showed simple negligence by evidence that the police officer drove 30 to 35 miles above the legal speed limit although he knew that plaintiff was not wearing a seat belt and had to brake suddenly to avoid a collision causing plaintiff to propel into the metal screen in the squad car. City also did not waive governmental immunity by its voluntary settlement with plaintiff since the city had a liability policy and none of the conditions of waiver, as provided by G.S. 160A-485(a), were met. *Clayton v. Branson*, 170 N.C. App. 438, 613 S.E.2d 259, 2005 N.C. App. LEXIS 1070 (2005).



## Rule 60. Relief from judgment or order.

### CASE NOTES

- I. In General.
- III. Relief under Subsection (b).
  - A. In General.
  - B. Mistake, Inadvertence, Surprise and Excusable Neglect.
    - 1. In General.
    - 2. Relief Held Proper.
    - 3. Relief Held Improper.
  - C. Newly Discovered Evidence.
  - F. Void Judgments.

#### I. IN GENERAL.

**Denial of Relief Proper.** — In determining whether a school board properly determined not to renew a teacher's contract under G.S. 115C-325(m)(2), the trial court had looked at all of the evidence and determined that there was substantial evidence to support the board's determination, even without inaccurate information contained in a memorandum; in doing so, it had properly applied the whole record test to the evidence presented to the board, and this justified its later denial of the teacher's motion for reconsideration. *Davis v. Macon County Bd. of Educ.*, — N.C. App. —, 632 S.E.2d 590, 2006 N.C. App. LEXIS 1644 (2006).

**G.S. 1A-1, N.C. R. Civ. P. 60(b) did not apply to an interlocutory order denying a motion to dismiss a medical malpractice case**, and a trial court lacked the authority to grant relief from that denial and to dismiss the case; in any event, a decision ruling that G.S. 1A-1, N.C. R. Civ. P. 9(j) was constitutional did not affect rights acquired in an earlier holding that the rule was invalid, and the trial court erred in dismissing the malpractice on the basis of G.S. 1A-1, N.C. R. Civ. P. 9(j). *Rupe v. Hucks-Follis*, 170 N.C. App. 188, 611 S.E.2d 867, 2005 N.C. App. LEXIS 901 (2005).

**Burden of Proof.** — Trial court did not err in denying the airport operators' post-trial motions claiming that they had newly-discovered evidence that the adjoining property owners, who had brought a private nuisance claim against the airport operators, bought additional property adjoining their property and the airport following the jury trial in the private nuisance case; the fact that the adjoining property owners purchased additional property could not be the basis for a new trial because the purchase did not occur until after the trial was completed and, thus, the trial court's denial of the post-trial motions was not an abuse of discretion. *Broadbent v. Allison*, — N.C. App. —, 626 S.E.2d 758, 2006 N.C. App. LEXIS 524 (2006).

**Appeal Dismissed Due to Trial Court's Inclination to Grant N.C. R. Civ. P. 60(b)(3)**

**Motion.** — Appeal was dismissed and the case was remanded to the trial court for the entry of a final order on defendant's N.C. R. Civ. P. 60(b)(3) motion because the trial court entered an inclination to rule in favor of defendant and grant the Rule 60(b) motion. *Hall v. Cohen*, — N.C. App. —, 628 S.E.2d 469, 2006 N.C. App. LEXIS 977 (2006).

**Cited in** *Lovin v. Byrd*, — N.C. App. —, 631 S.E.2d 58, 2006 N.C. App. LEXIS 1395 (2006).

#### III. RELIEF UNDER SUBSECTION (B).

##### A. In General.

**Power to Set Aside Judgment or Order Entered by Another Judge.** —

Judge who heard the borrowers' motion to amend, or for alternative relief after the dismissal with prejudice of their complaint, erred in denying the borrowers' motion for relief because the judge's denial of the motion on the grounds that he believed it was more properly in front of the judge who ruled on the motion to dismiss the complaint was a failure to exercise the discretion conferred on him by law; thus, the borrowers did not have the proper hearing on their G.S. 1A-1-60(b) motion to which they were entitled. *Trent v. Place, LLC*, — N.C. App. —, 632 S.E.2d 529, 2006 N.C. App. LEXIS 1683 (2006).

##### B. Mistake, Inadvertence, Surprise and Excusable Neglect.

###### 1. In General.

**No Clerical Mistake.** — Since a trial court's amendment of an earlier order gave legal custody to the Department of Social Services and physical custody to the relatives, where the earlier order gave legal custody to the relatives prior to filing of the petition to terminate the mother's parental rights, any error could not be said to be clerical. *In re D.D.J.*, — N.C. App. —, 628 S.E.2d 808, 2006 N.C. App. LEXIS 933 (2006).

###### 2. Relief Held Proper.

**No Error in Denial of Motion.** — Despite a distributor's claims that his manufacturer's ex-

port agent, who lived in Great Britain, had tortiously interfered with the distributor-manufacturer relationship, in that the agent hired the distributor's salesman with the intention of establishing his own distributorship, a trial court did not err in denying the distributor's motion, made pursuant to G.S. 1A-1, N.C. R. Civ. P. 60(b), to vacate its order in which it had dismissed the complaint on the ground that under the Due Process Clause, the trial court had no personal jurisdiction over the manager. Review under a Rule 60(b) motion was limited to determining whether a trial court had abused its discretion, the documents submitted with the motion would not have changed the trial court's ruling on the motion to dismiss, and the distributor had been given the opportunity to obtain and present the documents in the evidentiary hearing on the Rule 60(b) motion but had failed to do so. *Deer Corp. v. Carter*, — N.C. App. —, 629 S.E.2d 159, 2006 N.C. App. LEXIS 968 (2006).

### 3. Relief Held Improper.

**Failure to Consult an Attorney.** — Denial of a landlord's motion to set aside a default judgment against him pursuant to N.C. R. Civ. P. 60(b) was upheld on appeal, because the landlord's failure to consult an attorney or any alleged lack of legal knowledge did not constitute excusable neglect under N.C. R. Civ. P. 60(b). *Scoggins v. Jacobs*, 169 N.C. App. 411, 610 S.E.2d 428, 2005 N.C. App. LEXIS 684 (2005).

**Subdivision (b)(6) of this rule is not a catch-all rule, etc.**

Trial court erred in treating father's motion to amend a written order to comply with the trial court's oral custody decree as a motion for relief made under G.S. 1A-1, Rule 60(b)(6), and granting it; rather than seeking relief from the effect of the custody order, the father sought to amend the effect of that order to reduce the mother's weeknight visitation privilege. *Black v. Black*, 174 N.C. App. 361, 620 S.E.2d 924, 2005 N.C. App. LEXIS 2395 (2005).

### C. Newly Discovered Evidence.

**Failure to Produce Evidence Earlier Must Not Be Due to Lack of Diligence.** —

Where, in support of its petition for certiorari, a bond company sought to include documents, amounting to evidence of a federal indictment and county district attorney's

dismissal of state charges against defendant, that were never presented to the trial court until after it entered its bond forfeiture order, and the bonding company did not make a motion pursuant to either G.S. 1A-1, N.C. R. Civ. P. 59 or 60 to bring the material to the trial court's attention, but rather sought to bring the material to light for the first time while this case was already pending on appeal, the court found that it was further evidence of the bond company's lack of diligence and denied its petition for writ of certiorari. *State v. Gonzalez-Fernandez*, 170 N.C. App. 45, 612 S.E.2d 148, 2005 N.C. App. LEXIS 900 (2005).

### F. Void Judgments.

**A judgment is not void, etc.**

Where the person who was served with a summons directed to a corporation attended the Small Claims Division proceedings and fully participated on the corporation's behalf, the corporation made a general appearance and thus waived its right to challenge proper service of process; the trial court erred in reversing judgment entered by a Small Claims Division magistrate based on invalid service. *Woods v. Billy's Auto.*, — N.C. App. —, 622 S.E.2d 193, 2005 N.C. App. LEXIS 2595 (2005).

**Judgment Was Void Where Trial Court Lacked Personal Jurisdiction Over The Father.** —

Trial court erred in denying the father's motion to set aside an order terminating his parental rights; since the father was not served within the time limit for serving process once a summons was issued and no extension of time was obtained, the trial court did not obtain personal jurisdiction over him in a case where the mother filed a petition to terminate the father's parental rights. *In re A.B.D.*, 173 N.C. App. 77, 617 S.E.2d 707, 2005 N.C. App. LEXIS 1925 (2005).

**Improper Entry of Default By Clerk.** —

Although a trial court did not abuse its discretion by finding that a failure to file an extension of time did not constitute a mistake since there was no explanation for a law firm's actions, a motion to set aside a default judgment should have been granted under G.S. 1A-1, N.C. R. Civ. P. 60(b) because a judgment was void since a clerk was unable to enter a default where there was no sum certain. *Basnight Constr. Co. v. Peters & White Constr. Co.*, 169 N.C. App. 619, 610 S.E.2d 469, 2005 N.C. App. LEXIS 605 (2005).

## Rule 63. Disability of a judge.

### CASE NOTES

**Successor Judge Authorized to Reconsider Original Judge's Order.** — Notwith-

standing the original judge's absence from the bench due to retirement, the successor judge

erred in denying the motion to reconsider an original expungement order for lack of jurisdiction because he was statutorily authorized to address the motion to reconsider the order for expungement and, in accordance with the dic-

tates of G.S. 15A-146(a), to amend the earlier order. In re Expungement for Kearney, 174 N.C. App. 213, 620 S.E.2d 276, 2005 N.C. App. LEXIS 2294 (2005).

## ARTICLE 8.

### *Miscellaneous.*

## Rule 65. Injunctions.

### CASE NOTES

#### V. Form and Scope of Injunction or Restraining Order.

#### V. FORM AND SCOPE OF INJUNCTION OR RESTRAINING ORDER.

**Permanent Injunction Held Proper.** — Trial court properly entered a permanent injunction prohibiting the State from interfering with corporation's sale of pre-paid phone cards with game pieces where the inclusion of game pieces was merely a marketing system, the phone card was sufficiently compatible with the

price being charged and had sufficient value and utility to support the conclusion that it, and not the associated game of chance, was the object being purchased, and consumers could receive free game pieces via written request without purchasing the phone card. Am. Treasures, Inc. v. State, 173 N.C. App. 170, 617 S.E.2d 346, 2005 N.C. App. LEXIS 1928 (2005).

## Rule 68. Offer of judgment and disclaimer.

### CASE NOTES

#### I. In General.

##### I. IN GENERAL.

**Offer for Division of Marital Estate Was Insufficient.** — Where a wife's offer in a divorce case related only to the distribution of the marital residence, but failed to address the division of the entire marital estate, thus allowing the remaining separate and marital assets to be subjected to further litigation, the offer

was insufficient to create a binding final judgment and thus failed to meet the requirements of G.S. 1A-1, N.C. R. Civ. P. 68. Lauterbach v. Weiner, 174 N.C. App. 201, 620 S.E.2d 317, 2005 N.C. App. LEXIS 2297 (2005).

**Cited** in Morgan v. Steiner, 173 N.C. App. 577, 619 S.E.2d 516, 2005 N.C. App. LEXIS 2105 (2005).

## Rule 68.1. Confession of judgment.

### CASE NOTES

#### I. In General.

##### I. IN GENERAL.

**Cited** in Am. Gen. Fin. Servs. v. Barnes, —

N.C. App. —, 623 S.E.2d 617, 2006 N.C. App. LEXIS 54 (2006).



**Rule 70. Judgment for specific acts; vesting title.****CASE NOTES****Consent Order Was Not a Conveyance.**

— Dismissal of assignee's motion to subject real estate to execution sale was reversed as the assignee's judgment lien attached to a husband's undivided interest in property formerly held as a tenancy by the entirety upon the date of his divorce, when the property was converted by law to a tenancy in common, and when he conveyed his interest to his former wife, she

took title subject to the judgment lien; a consent order providing for a future transfer of the property was not a conveyance as it provided for a future transfer of the property, did not provide a legal description or state the location of the property, and was not filed with the register of deeds. *Martin v. Roberts*, — N.C. App. —, 628 S.E.2d 812, 2006 N.C. App. LEXIS 964 (2006).

**Chapter 1B.**  
**Contribution.**

ARTICLE 1.

*Uniform Contribution Among Tort-Feasors Act.*

**§ 1B-4. Release or covenant not to sue.**

CASE NOTES

**Judgment Against One Tort-Feasor Reduced by Amount of Settlement with Another. —**

In a wrongful death action based on the medical specialist’s malpractice, the trial court did not err in requiring the specialist to pay all pre-judgment interest and costs because the medical specialist failed to make any objection on the record as to the imposition of costs and

pre-judgment interest or the apportionment thereof as required by G.S. 1A-1, Rule 10(b)(1), and the trial court properly determined costs and interest before entitling the specialist to set-off for the settlement amount involving the other treating doctor, a former codefendant. *Boykin v. Kim*, 174 N.C. App. 278, 620 S.E.2d 707, 2005 N.C. App. LEXIS 2396 (2005).

## Chapter 1C.

### Enforcement of Judgments.

#### ARTICLE 16.

#### *Exempt Property.*

### § 1C-1601. What property exempt; waiver; exceptions.

#### CASE NOTES

##### **Legislative Intent.** —

North Carolina General Assembly's purpose in enacting G.S. 1C-1601(a)(9) was to protect a debtor's right to receive retirement benefits and not to limit the exemption to a specific class of retirement plans or trusts. Rather than give a blanket exemption to all "retirement" plans, the General Assembly limited the exemption to any retirement tool that was treated in the same manner as an individual retirement plan under the Internal Revenue Code. In re Grubbs, 325 B.R. 151, 2005 Bankr. LEXIS 1101 (Bankr. M.D.N.C. 2005).

**Construction with 11 U.S.C.S. § 522(f).** — Implication in G.S. 1C-1601(c) that exemptions can be waived by conveyance of the property must not be applied in preference to the avoidance power of 11 U.S.C.S. § 522(f). In re Bowes, — Bankr. —, 2005 Bankr. LEXIS 1089 (Bankr. M.D.N.C. Feb. 11, 2005).

**Involuntary Absence Did Not Constitute Abandonment of Residence.** — Claimed homestead exemption was allowed, pursuant to G.S. 1C-1601(a)(1), over a trustee's objection because the debtor was forced to vacate and did not voluntarily abandon her damaged home as a result of hurricanes and she paid property taxes, stored personalty there, lived in temporary housing, and intended to use the home as a residence as soon as repairs were practicable. In re Foster, 348 B.R. 58, 2006 Bankr. LEXIS 1833 (Bankr. E.D.N.C. 2006).

**Applicability to Tax-Sheltered Annuities.** — Given the close similarity between the tax treatment of tax-sheltered annuities and individual retirement plans and the common purpose of both types of plans, the United States Bankruptcy Court for the Middle District of North Carolina, Greensboro Division, is convinced that the Supreme Court of North Carolina Court would conclude that 26 U.S.C.S. § 403(b) tax-sheltered annuities are "treated in the same manner as" individual retirement plans and therefore would construe G.S. 1C-1601(a)(9) as encompassing such tax-sheltered annuities as property that may be exempted under that statute. Accordingly, the debtor was

allowed to claim an exemption in this type of retirement plan. In re Garner, — Bankr. —, 2005 Bankr. LEXIS 1118 (Bankr. M.D.N.C. Apr. 29, 2005).

**Applicability to Alimony.** — Since G.S. 1C-1601(e)(9) did not apply to claims for alimony, the trial court properly denied the ex-husband's motion to exempt his retirement account. Rhew v. Felton, — N.C. App. —, 631 S.E.2d 859, 2006 N.C. App. LEXIS 1560 (2006).

**Trial Court's Findings As to Value of Stock Unsupported by Evidence.** — In a G.S. 1C-1603(e) proceeding on an objection to a debtor's claimed exemption, a trial court failed to make sufficient findings as to how or by what methodology it concluded that the value of the debtor's stock in a development company was zero; there was no evidence supporting the trial court's finding that, purely as a result of pending litigation, the company had no value, and no authority permitted the trial court to base its allowance of a party's claim of exemption on the court's assessment of the equities between the parties rather than on the actual value of the property. Susi v. Aubin, 173 N.C. App. 608, 620 S.E.2d 682, 2005 N.C. App. LEXIS 2093 (2005).

##### **What Property Exempt in Bankruptcy.**

— Where North Carolina, pursuant to G.S. 1C-1601(f), opted out of 11 U.S.C.S. § 522, any bankruptcy property exemptions were controlled by state law; thus, a North Carolina debtor could not use § 522 to exempt disability insurance policy payments from his bankruptcy estate and the payments were not exempt under G.S. 1-362 because such payments were not earnings for performance of personal services but resulted from nonperformance. In re Dillon, — Bankr. —, 2005 Bankr. LEXIS 1314 (Bankr. M.D.N.C. July 8, 2005).

**Debtor's Intent in Determining Homestead Exemption.** — Debtor's intent must be the focus in determining whether an involuntary absence constitutes abandonment for the purposes of G.S. 1C-1601(a)(1); a narrow interpretation of the statute would be contrary to



the North Carolina Supreme Court's prior decisions regarding state law exemptions and a liberal construction is consistent with the Court's efforts to embrace all persons fairly within the exemptions statutes. In re Foster, 348 B.R. 58, 2006 Bankr. LEXIS 1833 (Bankr. E.D.N.C. 2006).

**Conveyance of Part of Homestead Did Not Bar Lien Avoidance Action.** — Debtors' conveyance of part of their homestead to their daughter, post-petition, did not impair their homestead exemption, bar them from seeking relief under 11 U.S.C.S. § 522(f), or bar them from claiming the conveyed property as exempt pursuant to G.S. 1C-1601(c). They did not have to have an interest in the property when they filed their motion to avoid creditor's judicial lien against the property, and the implication in G.S. 1C-1601(c) that exemptions could be waived by conveyance of the property could not

be applied in preference to the avoidance power of 11 U.S.C.S. § 522(f). In re Bowes, — Bankr. —, 2005 Bankr. LEXIS 1089 (Bankr. M.D.N.C. Feb. 11, 2005).

**I.R.C. § 403(b) Annuity Exempt.** — Annuity created pursuant to I.R.C. § 403(b) is exempt under North Carolina law because a § 403(b) annuity, at least within the meaning of the exemption statute, is treated in the same manner as an individual retirement plan under the Internal Revenue Code. Exemption statute governing retirement plans, G.S. 1C-1601(a)(9), was applicable to debtor's annuity. In re Grubbs, 325 B.R. 151, 2005 Bankr. LEXIS 1101 (Bankr. M.D.N.C. 2005).

**Cited in** In re Young, — Bankr. —, 2001 Bankr. LEXIS 2184 (Bankr. M.D.N.C. July 12, 2001); In re Rice, — Bankr. —, 2006 Bankr. LEXIS 1511 (Bankr. M.D.N.C. June 21, 2006).

## § 1C-1603. Procedure for setting aside exempt property.

### CASE NOTES

**Findings As to Value of Stock Unsupported by Evidence.** — In a G.S. 1C-1603(e) proceeding on an objection to a debtor's claimed exemption, a trial court failed to make sufficient findings as to how or by what methodology it concluded that the value of the debtor's stock in a development company was zero; there was no evidence supporting the trial court's finding that, purely as a result of pend-

ing litigation, the company had no value, and no authority permitted the trial court to base its allowance of a party's claim of exemption on the court's assessment of the equities between the parties rather than on the actual value of the property. Susi v. Aubin, 173 N.C. App. 608, 620 S.E.2d 682, 2005 N.C. App. LEXIS 2093 (2005).

## ARTICLE 17.

### *Uniform Enforcement of Foreign Judgments Act.*

## § 1C-1703. Filing and status of foreign judgments.

### CASE NOTES

**Enforcement of Foreign Judgments.** — Foreign judgment that the judgment creditor obtained in New York was entitled to a presumption that the judgment was entitled to full faith and credit, as the judgment creditor met its burden of showing that entitlement by filing a properly authenticated judgment; however, the general contractor timely moved for relief from the foreign judgment by raising the defense that the New York trial court that entered it did not have personal jurisdiction over the

general contractor, and because the trial court did not make any findings of fact or conclusions of law regarding the motion to enforce the judgment, the conclusion that the foreign judgment was enforceable in North Carolina was not supported by competent evidence and the case had to be remanded to the trial court for further proceedings. Quantum Corporate Funding, Ltd. v. B.H. Bryan Bldg. Co., — N.C. App. —, 623 S.E.2d 793, 2006 N.C. App. LEXIS 187 (2006).

## § 1C-1705. Defenses; procedure; stay.

### CASE NOTES

#### **Grounds for Attacking Foreign Judgment. —**

Once a creditor establishes, under G.S. 1C-1705(b), that a foreign judgment is entitled to full faith and credit, the judgment may only be attacked on the grounds of fraud, public policy, or lack of jurisdiction; no authority permitted a district court to base its allowance of a party's claim of exemption on the court's assessment of the equities between the parties rather than on the actual value of the property. *Susi v. Aubin*, 173 N.C. App. 608, 620 S.E.2d 682, 2005 N.C. App. LEXIS 2093 (2005).

#### **Contesting Jurisdictional Issues. —**

Foreign judgment that the judgment creditor obtained in New York was entitled to a presumption that the judgment was entitled to full faith and credit, as the judgment creditor met

its burden of showing that entitlement by filing a properly authenticated judgment; however, the general contractor timely moved for relief from the foreign judgment by raising the defense that the New York trial court that entered it did not have personal jurisdiction over the general contractor, and because the trial court did not make any findings of fact or conclusions of law regarding the motion to enforce the judgment, the conclusion that the foreign judgment was enforceable in North Carolina was not supported by competent evidence and the case had to be remanded to the trial court for further proceedings. *Quantum Corporate Funding, Ltd. v. B.H. Bryan Bldg. Co.*, — N.C. App. —, 623 S.E.2d 793, 2006 N.C. App. LEXIS 187 (2006).

### ARTICLE 18.

#### *North Carolina Foreign Money Judgments Recognition Act.*

## § 1C-1804. Grounds for nonrecognition.

### CASE NOTES

#### **Factual Findings by Trial Court; Insufficient. —**

Foreign judgment that the judgment creditor obtained in New York was entitled to a presumption that the judgment was entitled to full faith and credit, as the judgment creditor met its burden of showing that entitlement by filing a properly authenticated judgment; however, the general contractor timely moved for relief from the foreign judgment by raising the defense that the New York trial court that entered it did not have personal jurisdiction over the

general contractor, and because the trial court did not make any findings of fact or conclusions of law regarding the motion to enforce the judgment, the conclusion that the foreign judgment was enforceable in North Carolina was not supported by competent evidence and the case had to be remanded to the trial court for further proceedings. *Quantum Corporate Funding, Ltd. v. B.H. Bryan Bldg. Co.*, — N.C. App. —, 623 S.E.2d 793, 2006 N.C. App. LEXIS 187 (2006).

## § 1C-1805. Basis for personal jurisdiction.

### CASE NOTES

**Consent to Personal Jurisdiction. —** Foreign judgment that the judgment creditor obtained in New York was entitled to a presumption that the judgment was entitled to full faith and credit, as the judgment creditor met its burden of showing that entitlement by filing a properly authenticated judgment; however, the general contractor timely moved for relief from the foreign judgment by raising the defense that the New York trial court that entered it did not have personal jurisdiction over the general

contractor, and because the trial court did not make any findings of fact or conclusions of law regarding the motion to enforce the judgment, the conclusion that the foreign judgment was enforceable in North Carolina was not supported by competent evidence and the case had to be remanded to the trial court for further proceedings. *Quantum Corporate Funding, Ltd. v. B.H. Bryan Bldg. Co.*, — N.C. App. —, 623 S.E.2d 793, 2006 N.C. App. LEXIS 187 (2006).

## Chapter 1D.

### Punitive Damages.

#### § 1D-5. Definitions.

##### CASE NOTES

##### **“Willful or Wanton Conduct”, etc. —**

Directed verdict in favor of a manufacturing plant, a maintenance company, and its successor on the issue of punitive damages was upheld on appeal, because plaintiff workers failed to demonstrate any willful or wanton misconduct with regard to their exposure to asbestos when they removed insulation. The trial court’s reduction of the workers’ compensatory dam-

ages awards was also upheld on appeal, because the workers received prior workers’ compensation claim settlements and prior third-party settlement amounts and were entitled to only one recovery for their asbestos exposure. *Schenk v. HNA Holdings, Inc.*, 170 N.C. App. 555, 613 S.E.2d 503, 2005 N.C. App. LEXIS 1067 (2005).

#### § 1D-15. Standards for recovery of punitive damages.

##### CASE NOTES

##### **Applicability of Section. —**

On interlocutory appeal, prisoner’s Eighth Amendment Bivens claim for alleged inadequate medical care did not extend to defendants, who were individual employees of a privately operated prison, because the actions of the employees were not fairly attributable to the federal government and because the prisoner had adequate remedies under state law, G. S. 1D-15, for his alleged injuries. *Holly v. Scott*, 434 F.3d 287, 2006 U.S. App. LEXIS 685 (4th Cir. 2006).

##### **Evidence Insufficient. —**

Directed verdict in favor of a manufacturing plant, a maintenance company, and its successor on the issue of punitive damages was upheld on appeal, because plaintiff workers failed to demonstrate any willful or wanton misconduct with regard to their exposure to asbestos when they removed insulation. The trial court’s reduction of the workers’ compensatory damages awards was also upheld on appeal, because the workers received prior workers’ compensation claim settlements and prior third-party settlement amounts and were entitled to only one recovery for their asbestos exposure. *Schenk v. HNA Holdings, Inc.*, 170 N.C. App. 555, 613 S.E.2d 503, 2005 N.C. App. LEXIS 1067 (2005).

Where plaintiff’s complaint did not allege any facts that would have tended to show fraud, malice, or willful or wanton conduct in relation to the alleged breach of fiduciary duty,

the omission strongly suggested that plaintiff’s claim for punitive damages was without basis and had been asserted solely to confer jurisdiction on the court. *Southstar Funding, L.L.C. v. Warren, Perry & Anthony, P.L.L.C.*, 445 F. Supp. 2d 583, 2006 U.S. Dist. LEXIS 61500 (E.D.N.C. 2006).

**Discovery of Financial Information Where Prima Facie Showing Is Made. —** Franchisees’ motion to compel was granted in part, to the extent that they sought to compel three corporate officers to respond to an interrogatory by providing personal financial information about themselves, as: (1) the information was relevant because the franchisees had made a prima facie showing of their entitlement to punitive damages under G.S. 1D-15; (2) the officers were not required to produce documents under Fed. R. Civ. P. 33(d), in response to the franchisees’ interrogatory; and (3) the production of the requested information, concerning the officers’ financial assets, liabilities, and monthly income as of December 31, 2001, did not rise to the level of burden contemplated by Fed. R. Civ. P. 26(b)(2). *Rich Food Servs. v. Rich Plan Corp.*, — F. Supp. 2d —, 2002 U.S. Dist. LEXIS 27791 (E.D.N.C. June 17, 2002).

**Cited in** *Perkins v. Watson*, — F. Supp. 2d —, 2005 U.S. Dist. LEXIS 11192 (M.D.N.C. June 3, 2005); *Scarborough v. Dillard’s, Inc.*, — N.C. App. —, 632 S.E.2d 800, 2006 N.C. App. LEXIS 1652 (2006).



§ 1D-50. Judicial review of award.

CASE NOTES

**Remand for Compliance with this Section.** — Action was remanded because the trial court's order granting the former employer's motion for judgment notwithstanding verdict contained no reasons as to why the trial court

set aside the jury's verdict on the former employee's punitive damages claim. *Scarborough v. Dillard's, Inc.*, — N.C. App. —, 632 S.E.2d 800, 2006 N.C. App. LEXIS 1652 (2006).

## Chapter 6.

### Liability for Court Costs.

#### Article 3.

#### Civil Actions and Proceedings.

Sec.

6-21.5. Attorney's fees in nonjusticiable cases.

#### ARTICLE 1.

#### *Generally.*

### § 6-1. Items allowed as costs.

#### CASE NOTES

#### I. General Consideration.

##### I. GENERAL CONSIDERATION.

**No Costs in Mistrial.** — Trial court had no discretion to award witness expenses to the doctors as a cost from the first malpractice trial which ended in a mistrial. *Smith v. Cregan*, — N.C. App. —, 632 S.E.2d 206, 2006 N.C. App. LEXIS 1568 (2006).

**Applied** in *Miller v. Forsyth Mem'l Hosp., Inc.*, 173 N.C. App. 385, 618 S.E.2d 838, 2005 N.C. App. LEXIS 2040 (2005).

**Cited** in *Morgan v. Steiner*, 173 N.C. App. 577, 619 S.E.2d 516, 2005 N.C. App. LEXIS 2105 (2005).

#### ARTICLE 3.

#### *Civil Actions and Proceedings.*

### § 6-18. When costs allowed as of course to plaintiff.

#### CASE NOTES

#### I. General Consideration.

##### I. GENERAL CONSIDERATION.

**G.S. 6-20 Governs Where This Section Inapplicable.** —

Negligence cases were not listed among the types of actions in which costs had to be awarded to a prevailing party pursuant to either G.S. 6-18 or G.S. 6-19; therefore, the trial

court's costs ruling was governed by G.S. 6-20, and costs could be allowed or not, in the discretion of the court. *Smith v. Cregan*, — N.C. App. —, 632 S.E.2d 206, 2006 N.C. App. LEXIS 1568 (2006).

**Cited** in *Morgan v. Steiner*, 173 N.C. App. 577, 619 S.E.2d 516, 2005 N.C. App. LEXIS 2105 (2005).

### § 6-19. When costs allowed as of course to defendant.

#### CASE NOTES

**Not Applicable to Negligence Actions.** — Negligence cases were not listed among the types of actions in which costs had to be

awarded to a prevailing party pursuant to either G.S. 6-18 or G.S. 6-19; therefore, the trial court's costs ruling was governed by G.S. 6-20,

and costs could be allowed or not, in the discretion of the court. *Smith v. Cregan*, — N.C. App. —, 632 S.E.2d 206, 2006 N.C. App. LEXIS 1568 (2006).

**Cited** in *Morgan v. Steiner*, 173 N.C. App. 577, 619 S.E.2d 516, 2005 N.C. App. LEXIS 2105 (2005).

**§ 6-19.1. Attorney’s fees to parties appealing or defending against agency decision.**

**CASE NOTES**

**Administrative Hearings. —**

G.S. 6-19.1 authorizes a superior court to award fees to the employee of a county Department of Social Services who has prevailed under the State Personnel Act, G.S. 126-1 et seq.; therefore, a trial court was authorized to award fees for representation of a plaintiff during the administrative proceedings contesting her termination while on medical leave, which was adjudged without cause and wrongful. *Early v. County of Durham Dep’t of Soc. Servs.*, 172 N.C. App. 344, 616 S.E.2d 553, 2005 N.C. App. LEXIS 1788 (2005).

**Plaintiffs Not Entitled to Attorneys’ Fees. —** Plaintiffs were not entitled to attorneys’ fees under G.S. 6-19.1 and 42 U.S.C.S. § 1988, or the private attorney general doc-

trine as in the absence of express statutory authority, attorneys’ fees were not allowable as part of the court costs in civil actions; *Bailey v. State*, 500 S.E.2d 54 (1998), was distinguishable as: (1) there was no common fund resulting from the litigation; (2) Bailey involved a class action in which the attorneys’ fees borne by the class representatives were shared or equally distributed to the class from the recovery; and (3) plaintiffs sought to shift the burden of attorney fees to the State, instead of to a resulting fund. *Stephenson v. Bartlett*, — N.C. App. —, 628 S.E.2d 442, 2006 N.C. App. LEXIS 870 (2006).

**Cited** in *Gordon v. N.C. Dep’t of Corr.*, 173 N.C. App. 22, 618 S.E.2d 280, 2005 N.C. App. LEXIS 1918 (2005).

**§ 6-20. Costs allowed or not, in discretion of court.**

**Editor’s Note. —** Session Laws 2006-248, ss. 12.1 through 12.5, provide: “12.1. A House of Representatives Task Force on the Recovery of Costs in Civil Cases is established to review and recommend a resolution to the conflict in North Carolina law regarding the recovery of costs in a civil case. Specifically, the Task Force on the Recovery of Costs in Civil Cases shall study the conflict that exists between G.S. 6-20 and G.S. 7A-305, and the appellate cases interpreting those statutes, and recommend revisions to one or both statutes to resolve that conflict.

“12.2. The Speaker of the House of Representatives shall appoint to serve on the Task Force six members of the House of Representatives and three public members: one member of the North Carolina Academy of Trial Lawyers, one member of the North Carolina Association of Defense Attorneys, and one member of the North Carolina Bar Association. The Speaker shall appoint a chair from the Task Force membership. The Task Force shall meet upon the call of its chair. A quorum of the Committee shall be a majority of its members.

“12.3. Members of the Task Force shall receive per diem, subsistence, and travel allowances in accordance with G.S. 120-3.1, 138-5, or 138-6, as appropriate. Upon the prior approval

of the Legislative Services Commission, the Legislative Services Officer shall assign professional and clerical staff to the Task Force to aid in its work. The Task Force may contract for professional, clerical, or consultant services as provided by G.S. 120-32.02. The Task Force may meet at various locations around the State to promote greater public participation in its deliberations. Subject to the approval of the Legislative Services Commission, the Task Force may meet in the Legislative Building or the Legislative Office Building. The Task Force, while in the discharge of its official duties, may exercise all the powers provided under the provisions of G.S. 120-19 and G.S. 120-19.1 through G.S. 120-19.4, including the power to request all officers, agents, agencies, and departments of the State to provide any information, data, or documents within their possession, ascertainable from their records, or otherwise available to them and the power to subpoena witnesses.

“12.4. The Task Force shall report the results of its review and its recommended resolution to the conflict to the Speaker of the House of Representatives by December 31, 2006.

“12.5. From funds appropriated to the General Assembly, the Legislative Services Commission shall allocate funds for the purpose of conducting the study provided for in this Part.”



## CASE NOTES

**Award of Costs Discretionary, Not Mandatory. —**

Negligence cases were not listed among the types of actions in which costs had to be awarded to a prevailing party pursuant to either G.S. 6-18 or G.S. 6-19; therefore, the trial court's costs ruling was governed by G.S. 6-20, and costs could be allowed or not, in the discretion of the court. *Smith v. Cregan*, — N.C. App. —, 632 S.E.2d 206, 2006 N.C. App. LEXIS 1568 (2006).

**Discretion Not Reviewable. —**

Appellate court did not review a trial court's decision to award costs as that award was made in the trial court's discretion. *Castle McCulloch, Inc. v. Freedman*, 169 N.C. App. 497, 610 S.E.2d 416, 2005 N.C. App. LEXIS 604 (2005), *aff'd*, 360 N.C. 57, 620 S.E.2d 674 (2005).

**Taxing Costs in Personal Injury Cases. —**

Trial court erred in awarding numerous costs not authorized for medical reports, deposition costs, filing fees, travel costs, trial exhibits, color copies, and photocopies; there was statutory authority, however, for the following awards: mediation fees pursuant to G.S. 7A-

305(d)(7); expert witness fees pursuant to G.S. 7A-305(d)(1); and service of process fees pursuant to G.S. 7A-305(d)(6). *Oakes v. Wooten*, 173 N.C. App. 506, 620 S.E.2d 39, 2005 N.C. App. LEXIS 2100 (2005).

**Deposition Expenses. —**

In a negligence case, deposition costs were recoverable as trial expenses under G.S. 6-20 because they were established by case law prior to the enactment of G.S. 7A-320 in 1983. *Morgan v. Steiner*, 173 N.C. App. 577, 619 S.E.2d 516, 2005 N.C. App. LEXIS 2105 (2005).

**Denial of Costs for Expert Witnesses. —**

Since the trial court's costs ruling was governed by G.S. 6-20, and thus could be allowed at the discretion of the court, and the doctors had not alleged, and there appeared to the appellate court to be no abuse of discretion in the denial of their request to be reimbursed for the expert witness fees where the verdict was in their favor, the judgment was affirmed. *Smith v. Cregan*, — N.C. App. —, 632 S.E.2d 206, 2006 N.C. App. LEXIS 1568 (2006).

**Applied** in *Miller v. Forsyth Mem'l Hosp., Inc.*, 173 N.C. App. 385, 618 S.E.2d 838, 2005 N.C. App. LEXIS 2040 (2005).

## § 6-21.1. Allowance of counsel fees as part of costs in certain cases.

## CASE NOTES

## I. General Consideration.

**I. GENERAL CONSIDERATION.**

**Cited** in *Calhoun v. WHA Med. Clinic, PLLC*,

— N.C. App. —, 632 S.E.2d 563, 2006 N.C. App. LEXIS 1654 (2006).

## § 6-21.2. Attorneys' fees in notes, etc., in addition to interest.

## CASE NOTES

**Fees in Amount Less than 15 Percent of Damages Award Proper. —** Trial court did not err in granting attorney fees in an amount less than 15 percent of the damages award under a stock sales contract; attorney testi-

mony, affidavits, and billing statements supported the attorney fees award. *Bombardier Capital, Inc. v. Lake Hickory Watercraft, Inc.*, — N.C. App. —, 632 S.E.2d 192, 2006 N.C. App. LEXIS 1570 (2006).

## § 6-21.5. Attorney's fees in nonjusticiable cases.

In any civil action, special proceeding, or estate or trust proceeding, the court, upon motion of the prevailing party, may award a reasonable attorney's fee to the prevailing party if the court finds that there was a complete absence of a justiciable issue of either law or fact raised by the losing party in any pleading. The filing of a general denial or the granting of any preliminary

motion, such as a motion for judgment on the pleadings pursuant to G.S. 1A-1, Rule 12, a motion to dismiss pursuant to G.S. 1A-1, Rule 12(b)(6), a motion for a directed verdict pursuant to G.S. 1A-1, Rule 50, or a motion for summary judgment pursuant to G.S. 1A-1, Rule 56, is not in itself a sufficient reason for the court to award attorney's fees, but may be evidence to support the court's decision to make such an award. A party who advances a claim or defense supported by a good faith argument for an extension, modification, or reversal of law may not be required under this section to pay attorney's fees. The court shall make findings of fact and conclusions of law to support its award of attorney's fees under this section. (1983 (Reg. Sess., 1984), c. 1039, s. 1; 2006-259, s. 13(l).)

**Editor's Note.** — Session Laws 2006-259, s. 13(s), provides: "This section becomes effective October 1, 2006, and applies to (i) all trusts created before, on, or after that date; (ii) all judicial proceedings concerning trusts commenced on or after that date; and (iii) all judicial proceedings concerning trusts commenced before that date unless the court finds that application of a particular provision of this act would substantially interfere with the effective

conduct of the judicial proceedings or prejudice the rights of the parties, in which case the law as it existed on September 30, 2006, shall apply."

**Effect of Amendments.** — Session Laws 2006-259, s. 13(l), effective October 1, 2006, substituted "civil action, special proceeding, or estate or trust proceeding," for "civil action or special proceeding" in the first sentence. For applicability provisions, see Editor's note.

## CASE NOTES

### **Justiciable Issue Found.** —

Denial of attorney fees to a former employee after the employer voluntarily dismissed its action for breach of a non-competition agreement against him with prejudice was not an

abuse of discretion; the employee did not establish the lack of any justiciable issues of law and fact in the action. *Kohler Co. v. McIvor*, — N.C. App. —, 628 S.E.2d 817, 2006 N.C. App. LEXIS 981 (2006).

## Chapter 7A.

### Judicial Department.

#### SUBCHAPTER II. APPELLATE DIVISION OF THE GENERAL COURT OF JUSTICE.

##### Article 5.

##### Jurisdiction.

Sec.

7A-29. Appeals of right from certain administrative agencies.

7A-38.6. Report on community mediation centers.

7A-39. Cancellation of court sessions and closing court offices; extension of statutes of limitations in catastrophic conditions.

#### SUBCHAPTER III. SUPERIOR COURT DIVISION OF THE GENERAL COURT OF JUSTICE.

##### Article 7.

##### Organization.

7A-41. Superior court divisions and districts; judges.

7A-49.5. Statewide electronic filing in courts.

##### Article 9.

##### District Attorneys and Judicial Districts.

7A-60. District attorneys and prosecutorial districts.

7A-69. Investigatorial assistants.

##### Article 12.

##### Clerk of Superior Court.

7A-101. Compensation.

7A-102. Assistant and deputy clerks; appointment; number; salaries; duties.

7A-109.2. (Contingent effective date — see notes) Records of dispositions in criminal cases; impaired driving integrated data system.

7A-109.4. Records of offenses involving impaired driving.

#### SUBCHAPTER IV. DISTRICT COURT DIVISION OF THE GENERAL COURT OF JUSTICE.

##### Article 13.

##### Creation and Organization of the District Court Division.

7A-132. Judges, district attorneys, full-time assistant district attorneys and

Sec.

magistrates for district court districts.

7A-133. Numbers of judges by districts; numbers of magistrates and additional seats of court, by counties.

##### Article 16.

##### Magistrates.

7A-171. Numbers; appointment and terms; vacancies.

7A-171.1. Duty hours, salary, and travel expenses within county.

7A-177. Training course in duties of magistrate.

#### SUBCHAPTER VI. REVENUES AND EXPENSES OF THE JUDICIAL DEPARTMENT.

##### Article 28.

##### Uniform Costs and Fees in the Trial Divisions.

7A-312. Uniform fees for jurors; meals.

7A-314. Uniform fees for witnesses; experts; limit on number.

7A-321. Collection of offender fines and fees assessed by the court.

#### SUBCHAPTER VII. ADMINISTRATIVE MATTERS.

##### Article 29.

##### Administrative Office of the Courts.

7A-343. Duties of Director.

7A-343.2. Court Information Technology Fund.

7A-346.3. (Contingent effective date — see editor's note) Impaired driving integrated data system report.

7A-349. Criminal history record check; denial of employment, contract, or volunteer opportunity.

##### Article 30.

##### Judicial Standards Commission.

7A-374.1. Purpose.

7A-374.2. Definitions.

7A-375. Judicial Standards Commission.

7A-376. Grounds for discipline by Commission; censure, suspension, or removal by the Supreme Court.

7A-377. Procedures.

7A-378. Censure, suspension, or removal of justice of Supreme Court.



**Article 31A.**  
**State Judicial Council.**

Sec.  
7A-409.1. Duties of the State Judicial Council.

**SUBCHAPTER VIII. CONFERENCE OF  
DISTRICT ATTORNEYS.**

**Article 32.**

**Conference of District Attorneys.**

7A-413. Powers of Conference.

**SUBCHAPTER XII. ADMINISTRATIVE  
HEARINGS.**

**Article 60.**

**Office of Administrative Hearings.**

7A-760. Number and status of employees; staff assignments; role of State Personnel Commission.

**SUBCHAPTER XIII. SENTENCING  
SERVICES PROGRAM.**

**Article 61.**

**Sentencing Services Program.**

Sec.  
7A-775. Sentencing services board.

**SUBCHAPTER XV. CONFERENCE OF  
CLERKS OF SUPERIOR COURT.**

**Article 63.**

**Conference of Clerks of Superior Court.**

7A-806. Annual meetings; organization; election of officers.

**SUBCHAPTER I. GENERAL COURT OF JUSTICE.**

**ARTICLE 1.**

*Judicial Power and Organization.*

**§ 7A-4. Composition and organization.**

**CASE NOTES**

**Cited** in United States v. Allen, 446 F.3d 522, 2006 U.S. App. LEXIS 11193 (4th Cir. 2006).

**SUBCHAPTER II. APPELLATE DIVISION OF THE  
GENERAL COURT OF JUSTICE.**

**ARTICLE 3.**

*The Supreme Court.*

**§ 7A-10. Organization; compensation of justices.**

**Editor’s Note.** — Session Laws 2006-253, s. 29, provides: “The North Carolina General Assembly requests that the Chief Justice of the North Carolina Supreme Court encourage the judges of this State to obtain continuing legal

education on the laws of this State relating to driving while impaired offenses and related issues, and to promulgate any rules necessary to ensure that the judiciary receives necessary training and education on these laws.”

## ARTICLE 5.

*Jurisdiction.*

## § 7A-27. Appeals of right from the courts of the trial divisions.

## CASE NOTES

- I. General Consideration.
- IV. Interlocutory Orders.
  - A. Generally.
  - B. Particular Orders.

## I. GENERAL CONSIDERATION.

**Substantial evidence in the record supported an administrative law judge's findings** and its dismissal of a day care's petition for a contested case hearing where the day care filed nothing in nearly six months following the filing of the petition, despite receiving several orders from the administrative law judge to file and serve prehearing statements and other responses to motions. *Lincoln v. N.C. HHS*, 172 N.C. App. 567, 616 S.E.2d 622, 2005 N.C. App. LEXIS 1804 (2005).

**Steps on Appeal.** — While convictions that result in a judgment of death are automatically appealable to the Supreme Court of North Carolina, all other convictions are properly appealed to the Court of Appeals pursuant to G.S. 7A-27 and N.C. R. App. P. 4(d), and while neither party filed a motion to bypass the Court of Appeals as to defendant's non-capital conviction for burglary, when he appealed his conviction for murder and his death sentence, the Supreme Court of North Carolina, on its own initiative, and consistently with N.C. R. App. P. 2, considered defendant's assignments of error that concerned his burglary conviction under G.S. 14-51 because the issue also related to one of his arguments regarding an aggravating circumstance. *State v. Elliott*, 360 N.C. 400, 628 S.E.2d 735, 2006 N.C. LEXIS 46 (2006).

**Applied** in *State v. Duke*, 360 N.C. 110, 623 S.E.2d 11, 2005 N.C. LEXIS 1314 (2005); *State v. Augustine*, 359 N.C. 709, 616 S.E.2d 515, 2005 N.C. LEXIS 836 (2005).

**Cited** in *State v. Brown*, 170 N.C. App. 601, 613 S.E.2d 284, 2005 N.C. App. LEXIS 1069 (2005), cert. denied, 360 N.C. 68, 621 S.E.2d 882 (2005); *State v. Allen*, 359 N.C. 425, 615 S.E.2d 256, 2005 N.C. LEXIS 695 (2005); *State v. Campbell*, 359 N.C. 644, 617 S.E.2d 1, 2005 N.C. LEXIS 842 (2005); *State v. Hurst*, 360 N.C. 181, 624 S.E.2d 309, 2006 N.C. LEXIS 7 (2006); *State v. Forte*, 360 N.C. 427, 629 S.E.2d 137, 2006 N.C. LEXIS 45 (2006).

## IV. INTERLOCUTORY ORDERS.

## A. Generally.

**Separation of Property in Divorce Cases.** — Because a partial summary judgment giving a wife two parcels of land, before the divorcing parties' property was equitably divided, was an interlocutory order, a husband was not required to file an appeal from the interlocutory order; no substantial right of either party was involved, and the partial summary judgment was appealable when the husband filed his appeal from the equitable distribution judgment. *Davis v. Davis*, 360 N.C. 518, 631 S.E.2d 114, 2006 N.C. LEXIS 593 (2006).

**Appeal Is Permitted Where a Substantial Right Would Be Affected.** — Where a trial court granted plaintiff summary judgment as to liability on a criminal conversation claim, and granted defendant summary judgment as to an alienation of affections claim, though no final judgment was entered as to the issue of damages for the criminal conversation claim, nor was certification granted under G.S. 1A-1, N.C. R. Civ. P. 54(b) as to the alienation of affections claim, the appeal affected a substantial right that would be lost absent immediate review, because the elements of damages were so closely related that they did not support separate awards for each tort. *McCutchen v. McCutchen*, 170 N.C. App. 1, 612 S.E.2d 162, 2005 N.C. App. LEXIS 904 (2005).

Because a physician's assertions of statutory privilege related directly to the matters to be disclosed under a trial court's interlocutory discovery order, the challenged discovery order affected a substantial right and the physician's interlocutory appeal was properly before the appellate court under G.S. 1-277(a) and G.S. 7A-27(d)(1). *Armstrong v. Barnes*, 171 N.C. App. 287, 614 S.E.2d 371, 2005 N.C. App. LEXIS 1262 (2005), cert. denied, 360 N.C. 60, 621 S.E.2d 173 (2005).

North Carolina Court of Appeals accepted the appeal brought by third-party defendants, the North Carolina Division of Forest Resources and North Carolina Department of Environment and Natural Resources, in a wrongful death suit, asserting negligence on the third-party defendants with regard to a forest fire obscuring the vision of travelers on a highway, which led to a multiple vehicle accident, killing a passenger, because the trial court's denial of the third-party defendants' motions to dismiss raised the issues of sovereign immunity and the public duty doctrine, which affected a substantial right sufficient to warrant immediate appellate review. *Myers v. McGrady*, 170 N.C. App. 501, 613 S.E.2d 334, 2005 N.C. App. LEXIS 1087 (2005).

**Dismissal of Interlocutory Appeals. —**

Because the trial court did not rule on the merits of an employee's claim for unemployment benefits, but found that the Employment Security Commission's order did not address all of the relevant issues raised by the record, and the findings were incomplete and failed to set out the sequence of events regarding the timing and notification of the employee's discharge, the order was clearly interlocutory; hence, without evidence that the employee's substantial rights were affected, or that any criteria for an immediate appeal was required, the employee's appeal was dismissed. *Reeves v. Yellow Transp., Inc.*, 170 N.C. App. 610, 613 S.E.2d 350, 2005 N.C. App. LEXIS 1076 (2005), review denied, — N.C. —, 619 S.E.2d 511 (2005).

**B. Particular Orders.**

**Order Denying Motion for Change of Venue. —**

In cases where a trial court's decision deprives an appellant of a substantial right which would be lost absent immediate review, an appellate court was allowed to review the appeal; motions for change of venue because the county designated was not proper affected a substantial right and were immediately appealable. *Hawley v. Hobgood*, — N.C. App. —, 622 S.E.2d 117, 2005 N.C. App. LEXIS 2478 (2005).

**Denial of Motion to Dismiss. —**

Appeal by corporation, president, and vice president from the denial of the motion to dismiss pursuant to G.S. 1A-1-12(b)(1), (6) was interlocutory and did not affect a substantial right pursuant to G.S. 1-277(a) and G.S. 7A-27(d); the appeal, therefore, was dismissed in accordance with G.S. 1A-1-54(b). *Capps v. NW Sign Indus. of N.C., Inc.*, 171 N.C. App. 409, 614 S.E.2d 552, 2005 N.C. App. LEXIS 1203 (2005).

**Order allowing estates to amend their complaint in a medical malpractice suit** was not immediately appealable where the issues of a hospital's claim that, without imme-

diately review, it lost the right to avoid trial altogether by (1) raising the statute of limitations, (2) raising "estoppel by laches" as an affirmative defense, or (3) having the amended complaint dismissed for failure to comply with G.S. 1A-1, N.C. R. Civ. P. 9(j), were not brought before the trial court, and no substantial right was lost by the failure to allow immediate review; the estates were also entitled to sanctions against the hospital. *Estate of Spell v. Ghanem*, — N.C. App. —, 622 S.E.2d 725, 2005 N.C. App. LEXIS 2717 (2005).

**Possibility of Inconsistent Verdicts. —**

When a patient sued a pharmacy for negligence, breach of implied warranties, liability under G.S. 99B-6, and to pierce the pharmacy's corporate veil and hold its president liable, and the warranty claim and claim to pierce the corporate veil were dismissed, the patient did not show, in an interlocutory appeal of that dismissal, that she would lose a substantial right if she could not immediately appeal the dismissal. *Rauch v. Urgent Care Pharm., Inc.*, — N.C. App. —, 632 S.E.2d 211, 2006 N.C. App. LEXIS 1566 (2006).

**Order Granting Summary Judgment. —**

While an order granting summary judgment was interlocutory, it was appealable because the cause of action for criminal conversation, which was still before the trial court, was so connected with the claim for alienation of affections that only one issue of damages should be submitted to the jury, and thus, a substantial right was at stake to have the same jury hear the wife's two claims. *McCutchen v. McCutchen*, 360 N.C. 280, 624 S.E.2d 620, 2006 N.C. LEXIS 2 (2006).

**Denial of a motion for summary judgment based on the defense of res judicata, etc.**

Interlocutory appeal of the denial of defendants' motion for summary judgment in a constructive trust action was allowed; the basis of the motion for summary judgment was that res judicata barred the constructive trust action and in such a case, the failure to allow an appeal might affect a substantial right in that the possibility existed that without an immediate appeal, they would be required to twice defend against the same claim by plaintiffs. *Tiber Holding Corp. v. DiLoreto*, 170 N.C. App. 662, 613 S.E.2d 346, 2005 N.C. App. LEXIS 1081 (2005), cert. denied, — N.C. —, 623 S.E.2d 263 (2005).

**Interlocutory Appeal From Denial of Appointment of Receiver. —** Shareholders were entitled to an interlocutory appeal of the trial court's denial of their motion for the appointment of a receiver because they established a substantial right to the preservation of what they alleged were their corporation's assets and opportunities under G.S. 1-277(a) and G.S. 7A-27(d)(1), which right was substantially affected



by the trial court's denial of the appointment of a receiver. *Barnes v. Kochhar*, — N.C. App. —, 633 S.E.2d 474, 2006 N.C. App. LEXIS 1574 (2006).

**Trial court's denial of a motion to enforce a settlement did not resolve the underlying personal injury claim, and the order of denial was therefore interlocu-**

**tory;** since the trial court did not certify that there was no just reason to delay the appeal, and the denial did not affect a substantial right, there was no right to an immediate appeal since an appeal of the denial was still allowed once there was a final judgment. *Milton v. Thompson*, 170 N.C. App. 176, 611 S.E.2d 474, 2005 N.C. App. LEXIS 903 (2005).

## § 7A-29. Appeals of right from certain administrative agencies.

(a) From any final order or decision of the North Carolina Utilities Commission not governed by subsection (b) of this section, the Department of Health and Human Services under G.S. 131E-188(b), the North Carolina Industrial Commission, the North Carolina State Bar under G.S. 84-28, the Property Tax Commission under G.S. 105-290 and G.S. 105-342, the Commissioner of Insurance under G.S. 58-2-80, the State Board of Elections under G.S. 163-127.6, or the Secretary of Environment and Natural Resources under G.S. 104E-6.2 or G.S. 130A-293, appeal as of right lies directly to the Court of Appeals.

(b) From any final order or decision of the Utilities Commission in a general rate case, appeal as of right lies directly to the Supreme Court. (1967, c. 108, s. 1; 1971, c. 703, s. 5; 1975, c. 582, s. 12; 1979, c. 584, s. 1; 1981, c. 704, s. 28; 1983, c. 526, s. 1; c. 761, s. 188; 1983 (Reg. Sess., 1984), c. 1000, s. 2; c. 1087, s. 2; c. 1113, s. 2; 1985, c. 462, s. 3; 1987, c. 850, s. 2; 1991, c. 546, s. 2; c. 679, s. 2; 1993, c. 501, s. 2; 1995, c. 115, s. 1; c. 504, s. 2; c. 509, s. 2; 1997-443, ss. 11A.118(a), 11A.119(a); 2003-63, s. 1; 2006-155, s. 1.1.)

### Editor's Note. —

Session Laws 2006-155, s. 6, provides: "The North Carolina Supreme Court is respectfully requested to adopt rules necessary to implement the provisions as to appeal in G.S. 163-127.6."

Session Laws 2006-155, s. 7, is a severability clause.

**Effect of Amendments.** — Session Laws 2006-155, s. 1.1, effective January 1, 2007, and applicable to actions filed on or after that date, inserted "the State Board of Elections under G.S. 163-127.6" near the end of subsection (a).

## § 7A-30. Appeals of right from certain decisions of the Court of Appeals.

### CASE NOTES

- I. In General.
- III. Dissent.

#### I. IN GENERAL.

**Applied** in *State v. Alexander*, 359 N.C. 824, 616 S.E.2d 914, 2005 N.C. LEXIS 843 (2005); *Coley v. State*, 360 N.C. 493, 631 S.E.2d 121, 2006 N.C. LEXIS 594 (2006).

**Cited** in *In re Estate of Lunsford*, 359 N.C. 382, 610 S.E.2d 366, 2005 N.C. LEXIS 358 (2005); *In re T.E.F.*, 359 N.C. 570, 614 S.E.2d 296, 2005 N.C. LEXIS 642 (2005); *State ex rel. Utils. Comm'n v. Carolina Power & Light Co.*,

359 N.C. 516, 614 S.E.2d 281, 2005 N.C. LEXIS 648 (2005); *State v. Allen*, 359 N.C. 425, 615 S.E.2d 256, 2005 N.C. LEXIS 695 (2005); *State v. Harris*, 360 N.C. 145, 622 S.E.2d 615, 2005 N.C. LEXIS 1320 (2005); *Newberne v. Dep't of Crime Control & Pub. Safety*, 359 N.C. 782, 618 S.E.2d 201, 2005 N.C. LEXIS 835 (2005); *McCutchen v. McCutchen*, 360 N.C. 280, 624 S.E.2d 620, 2006 N.C. LEXIS 2 (2006); *State v. Lawrence*, 360 N.C. 368, 627 S.E.2d 609, 2006 N.C. LEXIS 30 (2006).

### III. DISSENT.

#### **Dissent Allows Appeal as a Matter of Right. —**

Supreme Court of North Carolina found that it could hear an appeal from a decision of the Court of Appeals of North Carolina that a

defendant be resentenced because G.S. 7A-30(2) provided the state with an appeal of right as there was a dissent in the Court of Appeals. *State v. Norris*, 360 N.C. 507, 630 S.E.2d 915, 2006 N.C. LEXIS 592 (2006).

## § 7A-31. Discretionary review by the Supreme Court.

### CASE NOTES

**Improvvidently Allowed.** — Discretionary review, pursuant to G.S. 7A-31, of three protective orders was improvvidently allowed; under N.C. R. App. P. 15(b), a husband's petition for review of those orders was not timely filed. *Davis v. Davis*, 360 N.C. 518, 631 S.E.2d 114, 2006 N.C. LEXIS 593 (2006).

#### **Constitutional Questions. —**

While G.S. 15A-1422(f) normally barred collateral review of a resentencing decision, the statute could not interfere with the court's power under N.C. Const. art. IV, § 12, cl. 1 to issue a decision where the lower appellate court's decision was of constitutional magnitude and widespread effect; since the lower appellate court's decision applied to hold unconstitutional provisions of a widely used statute that was used to aggravate sentences for crimes, discretionary review was granted. *State v. Allen*, 359 N.C. 425, 615 S.E.2d 256, 2005 N.C. LEXIS 695 (2005).

**Applied** in *Jonesboro United Methodist Church v. Mullins-Sherman Architects, L.L.P.*, 359 N.C. 593, 614 S.E.2d 268, 2005 N.C. LEXIS 643 (2005); *State v. Beck*, 359 N.C. 611, 614

S.E.2d 274, 2005 N.C. LEXIS 644 (2005); *In re R.T.W.*, 359 N.C. 539, 614 S.E.2d 489, 2005 N.C. LEXIS 646 (2005); *State v. Ivey*, 360 N.C. 562, 633 S.E.2d 459, 2006 N.C. LEXIS 844 (2006).

**Cited** in *State v. Speight*, 359 N.C. 602, 614 S.E.2d 262, 2005 N.C. LEXIS 645 (2005); *State v. Bryant*, 359 N.C. 554, 614 S.E.2d 479, 2005 N.C. LEXIS 647 (2005); *State v. Lewis*, 360 N.C. 1, 619 S.E.2d 830, 2005 N.C. LEXIS 1000 (2005); *State v. Philip Morris USA Inc.*, 359 N.C. 763, 618 S.E.2d 219, 2005 N.C. LEXIS 834 (2005); *State v. Jones*, 359 N.C. 832, 616 S.E.2d 496, 2005 N.C. LEXIS 845 (2005); *State v. Blackwell*, 359 N.C. 814, 618 S.E.2d 213, 2005 N.C. LEXIS 846 (2005); *State v. Lewis*, 360 N.C. 1, 619 S.E.2d 830, 2005 N.C. LEXIS 1000 (2005); *In re Anderson*, 360 N.C. 271, 624 S.E.2d 626, 2006 N.C. LEXIS 5 (2006); *Diaz v. Div. of Soc. Servs.*, 360 N.C. 384, 628 S.E.2d 1, 2006 N.C. LEXIS 31 (2006); *In re J.S.L.*, — N.C. App. —, 628 S.E.2d 387, 2006 N.C. App. LEXIS 883 (2006); *In re A.K.*, 360 N.C. 449, 628 S.E.2d 753, 2006 N.C. LEXIS 44 (2006); *Armstrong v. Ledges Homeowners Ass'n*, 360 N.C. 547, 633 S.E.2d 78, 2006 N.C. LEXIS 845 (2006).

## § 7A-38.1. Mediated settlement conferences in superior court civil actions.

### CASE NOTES

**Summary Judgment Proper Upon Reaching Settlement Agreement.** — Where the parties to a real estate commission dispute reached a settlement agreement at mediation, but the brokerage did not sign the written settlement agreement, and never moved the trial court to enforce the settlement agreement, the trial court did not err in granting summary judgment dismissing the case rather than entering an order enforcing the agreement. *Cohen*

*Schatz Assocs. v. Perry*, 169 N.C. App. 834, 611 S.E.2d 229, 2005 N.C. App. LEXIS 807 (2005).

**Costs of Mediation Recoverable.** — In a medical malpractice case, trial court erred in denying motion seeking to recover mediation costs because mediation was ordered in all civil actions, and the cost was recoverable under G.S. 7A-305(d)(7). *Miller v. Forsyth Mem'l Hosp., Inc.*, 173 N.C. App. 385, 618 S.E.2d 838, 2005 N.C. App. LEXIS 2040 (2005).

## § 7A-38.6. Report on community mediation centers.

(a) All community mediation centers currently receiving State funds shall report annually to the Mediation Network of North Carolina on the program's funding and activities, including:

- (1) Types of dispute settlement services provided;



- (2) Clients receiving each type of dispute settlement service;
- (3) Number and type of referrals received, cases actually mediated (identified by docket number), cases resolved in mediation, and total clients served in the cases mediated;
- (4) Total program funding and funding sources;
- (5) Itemization of the use of funds, including operating expenses and personnel;
- (6) Itemization of the use of State funds appropriated to the center;
- (7) Level of volunteer activity; and
- (8) Identification of future service demands and budget requirements.

The Mediation Network of North Carolina shall compile and summarize the information provided pursuant to this subsection and shall provide the information to the Chairs of the House of Representatives and Senate Appropriations Committees and the Chairs of the House of Representatives and Senate Appropriations Subcommittees on Justice and Public Safety by February 1 of each year.

The Mediation Network of North Carolina shall also submit a copy of its report to the Administrative Office of the Courts. The receipt and review of this report by the Administrative Office of the Courts shall satisfy any program monitoring, evaluation, and contracting requirements imposed on the Administrative Office of the Courts by G.S. 143-6.2 and any rules adopted under that section.

(b) A community mediation center requesting State funds for the first time shall provide the General Assembly with the information enumerated in subsection (a) of this section, or projections where historical data are not available, as well as a detailed statement justifying the need for State funding.

(c) Each community mediation center receiving State funds for the first time shall document in the information provided pursuant to this section that, after the second year of receiving State funds, at least ten percent (10%) of total funding comes from non-State sources.

(d) Each community mediation center receiving State funds for the third, fourth, or fifth year shall document that at least twenty percent (20%) of total funding comes from non-State sources.

(e) Each community mediation center receiving State funds for six or more years shall document that at least fifty percent (50%) of total funding comes from non-State sources.

(f) Each community mediation center currently receiving State funds that has achieved a funding level from non-State sources greater than that provided for that center by subsection (c), (d), or (e) of this section shall make a good faith effort to maintain that level of funding.

(g) The percentage that State funds comprise of the total funding of each community mediation center shall be determined at the conclusion of each fiscal year with the information provided pursuant to this section and is intended as a funding ratio and not a matching funds requirement. Community mediation centers may include the market value of donated office space, utilities, and professional legal and accounting services in determining total funding.

(h) A community mediation center having difficulty meeting the funding ratio provided for that center by subsection (c), (d), or (e) of this section may request a waiver or special consideration through the Mediation Network of North Carolina for consideration by the Senate and House of Representatives Appropriations Subcommittees on Justice and Public Safety.

(i) **(Effective until July 1, 2007)** The provisions of G.S. 143-31.4 do not apply to community mediation centers receiving State funds.

(i) **(Effective July 1, 2007)** The provisions of G.S. 143C-4-5 do not apply to community mediation centers receiving State funds.



(j) Each community mediation center receiving State funds shall function as, or as part of, a nonprofit organization or local government entity. A community mediation center functioning as a nonprofit organization shall have a governing board of directors that consists of a significant number of citizens from the surrounding community. State funds may not be used for indirect costs associated with contracts between the community mediation center and another entity for the provision of management-related services. (2001-424, s. 22.2; 2003-284, s. 13.15(c); 2006-66, s. 14.12; 2006-203, s. 10.)

**Subsection (i) is set out twice.** — The first version of subsection (i) set out above is effective until July 1, 2007. The second version of subsection (i) set out above is effective July 1, 2007.

**Editor's Note.** —

Session Laws 2006-66, s. 1.2, provides: "This act shall be known as 'The Current Operations and Capital Improvements Appropriations Act of 2006'."

Session Laws 2006-66, s. 28.6 is a severability clause.

Session Laws 2006-203, s. 126, provides, in part: "Prosecutions for offenses committed be-

fore the effective date of this act are not abated or affected by this act, and the statutes that would be applicable but for this act remain applicable to those prosecutions."

**Effect of Amendments.** — Session Laws 2006-66, s. 14.12, effective July 1, 2006, added the third paragraph of subsection (a).

Session Laws 2006-203, s. 10, effective July 1, 2007, and applicable to the budget for the 2007-2009 biennium and each subsequent biennium thereafter, substituted "G.S. 143C-4-5" for "G.S. 143-31.4" in subsection (i).

## § 7A-39. Cancellation of court sessions and closing court offices; extension of statutes of limitations in catastrophic conditions.

(a) *Cancellation of Court Sessions, Closing Court Offices.* — In response to adverse weather or other emergency situations, any session of any court of the General Court of Justice may be cancelled, postponed, or altered by judicial officials, and court offices may be closed by judicial branch hiring authorities, pursuant to uniform statewide guidelines prescribed by the Director of the Administrative Office of the Courts.

(b) *Authority of Chief Justice.* — When the Chief Justice of the North Carolina Supreme Court determines and declares that catastrophic conditions exist or have existed in one or more counties of the State, the Chief Justice may by order entered pursuant to this subsection extend, to a date certain no fewer than 10 days after the effective date of the order, the time or period of limitation within which pleadings, motions, notices, and other documents and papers may be timely filed and other acts may be timely done in civil actions, criminal actions, estates, and special proceedings in each county named in the order.

(1) *Catastrophic conditions defined.* — As used in this subsection, "catastrophic conditions" means any set of circumstances that make it impossible or extremely hazardous for judicial officials, employees, parties, witnesses, or other persons with business before the courts to reach a courthouse, or that create a significant risk of physical harm to persons in a courthouse, or that would otherwise convince a reasonable person to avoid travelling to or being in the courthouse.

(2) *Entry of order.* — The Chief Justice may enter an order under this subsection at any time after catastrophic conditions have ceased to exist. The order shall be in writing and shall become effective for each affected county upon the date set forth in the order, and if no date is set forth in the order, then upon the date the order is signed by the Chief Justice.

(c) *In Chambers Jurisdiction Not Affected.* — Nothing in this section prohibits a judge or other judicial officer from exercising, during adverse

weather or other emergency situations, any in chambers or ex parte jurisdiction conferred by law upon that judge or judicial officer, as provided by law. The effectiveness of any such exercise shall not be affected by a determination by the Chief Justice that catastrophic conditions existed at the time it was exercised. (2000-166, s. 1; 2006-187, s. 6.)

**Effect of Amendments.** — Session Laws 2006-187, s. 6, effective August 3, 2006, in the section heading, substituted “Cancellation” for “Adverse weather cancellation”; in subsection (a), deleted “comparable” preceding “emergency situations”; in subsection (b), substituted “Justice” for “Justice to Extend Statutes of Limitations” in the subheading, and added “or period of limitation”; in subdivision (b)(1), deleted “in-

cluding conditions that may result from hurricane, tornado, flood, snowstorm, ice storm, other severe natural disaster, fire, or riot” from the end; and in subdivision (b)(2), substituted “the date set forth in the order, and if no date is set forth in the order, then upon the date the order is signed by the Chief Justice” for “being filed in the office of the clerk of superior court of that county.”

## SUBCHAPTER III. SUPERIOR COURT DIVISION OF THE GENERAL COURT OF JUSTICE.

### ARTICLE 7.

#### *Organization.*

#### § 7A-41. Superior court divisions and districts; judges.

(a) **(Contingent expiration — see Editor’s Note.)** The counties of the State are organized into judicial divisions and superior court districts, and each superior court district has the counties, and the number of regular resident superior court judges set forth in the following table, and for districts of less than a whole county, as set out in subsection (b) of this section:

Judicial Division	Superior Court District	Counties	No. of Resident Judges
First	1	Camden, Chowan, Currituck, Dare, Gates, Pasquotank, Perquimans	2
First	2	Beaufort, Hyde, Martin, Tyrrell, Washington	1
First	3A	Pitt	2
Second	3B	Carteret, Craven, Pamlico	3
Second	4A	Duplin, Jones, Sampson	1
Second	4B	Onslow	1
Second	5A	(part of New Hanover, part of Pender see subsection (b))	1
	5B	(part of New Hanover,	1

**G.S. 7A-41(a) is set out three times. See note.**

Judicial Division	Superior Court District	Counties	No. of Resident Judges
		part of Pender	
		see subsection (b))	
	5C	(part of New Hanover, see subsection (b))	1
First	6A	Halifax	1
First	6B	Bertie, Hertford, Northampton	1
First	7A	Nash	1
First	7B	(part of Wilson, part of Edgecombe, see subsection (b))	1
First	7C	(part of Wilson, part of Edgecombe, see subsection (b))	1
Second	8A	Lenoir and Greene	1
Second	8B	Wayne	1
Third	9	Franklin, Granville, Vance, Warren	2
Third	9A	Person, Caswell	1
Third	10A	(part of Wake, see subsection (b))	2
Third	10B	(part of Wake, see subsection (b))	2
Third	10C	(part of Wake, see subsection (b))	1
Third	10D	(part of Wake, see subsection (b))	1
Fourth	11A	Harnett, Lee	1
Fourth	11B	Johnston	1
Fourth	12A	(part of Cumberland, see subsection (b))	1
Fourth	12B	(part of Cumberland, see subsection (b))	1
Fourth	12C	(part of Cumberland, see subsection (b))	2
Fourth	13	Bladen, Brunswick, Columbus	2
Third	14A	(part of Durham, see subsection (b))	1
Third	14B	(part of Durham, see subsection (b))	3
Third	15A	Alamance	2
Third	15B	Orange, Chatham	2
Fourth	16A	Scotland, Hoke	1



**G.S. 7A-41(a) is set out three times. See note.**

Judicial Division	Superior Court District	Counties	No. of Resident Judges
Fourth	16B	Robeson	2
Fifth	17A	Rockingham	2
Fifth	17B	Stokes, Surry	2
Fifth	18A	(part of Guilford, see subsection (b))	1
Fifth	18B	(part of Guilford, see subsection (b))	1
Fifth	18C	(part of Guilford, see subsection (b))	1
Fifth	18D	(part of Guilford, see subsection (b))	1
Fifth	18E	(part of Guilford, see subsection (b))	1
Sixth	19A	Cabarrus	1
Fifth	19B	Montgomery, Randolph	1
Sixth	19C	Rowan	1
Fifth	19D	Moore	1
Sixth	20A	Anson, Richmond, Stanley	2
Sixth	20B	Union	1
Fifth	21A	(part of Forsyth, see subsection (b))	1
Fifth	21B	(part of Forsyth, see subsection (b))	1
Fifth	21C	(part of Forsyth, see subsection (b))	1
Fifth	21D	(part of Forsyth, see subsection (b))	1
Sixth	22	Alexander, Davidson, Davie, Iredell	3
Fifth	23	Alleghany, Ashe, Wilkes, Yadkin	1
Eighth	24	Avery, Madison, Mitchell, Watauga, Yancey	2
Seventh	25A	Burke, Caldwell	2
Seventh	25B	Catawba	2
Seventh	26A	(part of Mecklenburg, see subsection (b))	2
Seventh	26B	(part of Mecklenburg, see subsection (b))	3
Seventh	26C	(part of Mecklenburg, see subsection (b))	2
Seventh	27A	Gaston	2
Seventh	27B	Cleveland, Lincoln	2

G.S. 7A-41(a) is set out three times. See note.

Judicial Division	Superior Court District	Counties	No. of Resident Judges
Eighth	28	Buncombe	2
Eighth	29A	McDowell, Rutherford	1
Eighth	29B	Henderson, Polk, Transylvania	1
Eighth	30A	Cherokee, Clay, Graham, Macon, Swain	1
Eighth	30B	Haywood, Jackson	1.

(a) **(Contingent effective date — see Editor’s Note.)** The counties of the State are organized into judicial divisions and superior court districts, and each superior court district has the counties, and the number of regular resident superior court judges set forth in the following table, and for districts of less than a whole county, as set out in subsection (b) of this section:

Judicial Division	Superior Court District	Counties	No. of Resident Judges
First	1	Camden, Chowan, Currituck, Dare, Gates, Pasquotank, Perquimans	2
First	2	Beaufort, Hyde, Martin, Tyrrell, Washington	1
First	3A	Pitt	2
Second	3B	Carteret, Craven, Pamlico	3
Second	4A	Duplin, Jones, Sampson	1
Second	4B	Onslow	1
Second	5A	(part of New Hanover, part of Pender see subsection (b))	1
	5B	(part of New Hanover, part of Pender see subsection (b))	1
	5C	(part of New Hanover, see subsection (b))	1
First	6A	Halifax	1
First	6B	Bertie, Hertford, Northampton	1

**G.S. 7A-41(a) is set out three times. See note.**

Judicial Division	Superior Court District	Counties	No. of Resident Judges
First	7A	Nash	1
First	7B	(part of Wilson, part of Edgecombe, see subsection (b))	1
First	7C	(part of Wilson, part of Edgecombe, see subsection (b))	1
Second	8A	Lenoir and Greene	1
Second	8B	Wayne	1
Third	9	Franklin, Granville, Vance, Warren	2
Third	9A	Person, Caswell	1
Third	10A	(part of Wake, see subsection (b))	2
Third	10B	(part of Wake, see subsection (b))	2
Third	10C	(part of Wake, see subsection (b))	1
Third	10D	(part of Wake, see subsection (b))	1
Fourth	11A	Harnett, Lee	1
Fourth	11B	Johnston	1
Fourth	12A	(part of Cumberland, see subsection (b))	1
Fourth	12B	(part of Cumberland, see subsection (b))	1
Fourth	12C	(part of Cumberland, see subsection (b))	2
Fourth	13A	Bladen, Columbus	1
Fourth	13B	Brunswick	1
Third	14A	(part of Durham, see subsection (b))	1
Third	14B	(part of Durham, see subsection (b))	3
Third	15A	Alamance	2
Third	15B	Orange, Chatham	2
Fourth	16A	Scotland, Hoke	1
Fourth	16B	Robeson	2
Fifth	17A	Rockingham	2
Fifth	17B	Stokes, Surry	2
Fifth	18A	(part of Guilford, see subsection (b))	1
Fifth	18B	(part of Guilford, see subsection (b))	1



**G.S. 7A-41(a) is set out three times. See note.**

Judicial Division	Superior Court District	Counties	No. of Resident Judges
Fifth	18C	(part of Guilford, see subsection (b))	1
Fifth	18D	(part of Guilford, see subsection (b))	1
Fifth	18E	(part of Guilford, see subsection (b))	1
Sixth	19A	Cabarrus	1
Fifth	19B	Montgomery, Randolph	1
Sixth	19C	Rowan	1
Fifth	19D	Moore	1
Sixth	20A	Anson, Richmond, Stanley	2
Sixth	20B	Union	1
Fifth	21A	(part of Forsyth, see subsection (b))	1
Fifth	21B	(part of Forsyth, see subsection (b))	1
Fifth	21C	(part of Forsyth, see subsection (b))	1
Fifth	21D	(part of Forsyth, see subsection (b))	1
Sixth	22	Alexander, Davidson, Davie, Iredell	3
Fifth	23	Alleghany, Ashe, Wilkes, Yadkin	1
Eighth	24	Avery, Madison, Mitchell, Watauga, Yancey	2
Seventh	25A	Burke, Caldwell	2
Seventh	25B	Catawba	2
Seventh	26A	(part of Mecklenburg, see subsection (b))	2
Seventh	26B	(part of Mecklenburg, see subsection (b))	3
Seventh	26C	(part of Mecklenburg, see subsection (b))	2
Seventh	27A	Gaston	2
Seventh	27B	Cleveland, Lincoln	2
Eighth	28	Buncombe	2
Eighth	29A	McDowell, Rutherford	1
Eighth	29B	Henderson, Polk, Transylvania	1
Eighth	30A	Cherokee, Clay, Graham, Macon, Swain	1

G.S. 7A-41(a) is set out three times. See note.

Judicial Division	Superior Court District	Counties	No. of Resident Judges
Eighth	30B	Haywood, Jackson	1.

(a) **(Contingent effective date January 1, 2011 — see notes)** The counties of the State are organized into judicial divisions and superior court districts, and each superior court district has the counties, and the number of regular resident superior court judges set forth in the following table, and for districts of less than a whole county, as set out in subsection (b) of this section:

Judicial Division	Superior Court District	Counties	No. of Resident Judges
First	1	Camden, Chowan, Currituck, Dare, Gates, Pasquotank, Perquimans	2
First	2	Beaufort, Hyde, Martin, Tyrrell, Washington	1
First	3A	Pitt	2
Second	3B	Carteret, Craven, Pamlico	3
Second	4A	Duplin, Jones, Sampson	1
Second	4B	Onslow	1
Second	5A	(part of New Hanover, part of Pender see subsection (b))	1
	5B	(part of New Hanover, part of Pender see subsection (b))	1
	5C	(part of New Hanover, see subsection (b))	1
First	6A	Halifax	1
First	6B	Bertie, Hertford, Northampton	1
First	7A	Nash	1
First	7B	(part of Wilson, part of Edgecombe, see subsection (b))	1
First	7C	(part of Wilson, part of Edgecombe, see subsection (b))	1

**G.S. 7A-41(a) is set out three times. See note.**

Judicial Division	Superior Court District	Counties	No. of Resident Judges
Second	8A	Lenoir and Greene	1
Second	8B	Wayne	1
Third	9	Franklin, Granville, Vance, Warren	2
Third	9A	Person, Caswell	1
Third	10A	(part of Wake, see subsection (b))	2
Third	10B	(part of Wake, see subsection (b))	2
Third	10C	(part of Wake, see subsection (b))	1
Third	10D	(part of Wake, see subsection (b))	1
Fourth	11A	Harnett, Lee	1
Fourth	11B	Johnston	1
Fourth	12A	(part of Cumberland, see subsection (b))	1
Fourth	12B	(part of Cumberland, see subsection (b))	1
Fourth	12C	(part of Cumberland, see subsection (b))	2
Fourth	13A	Bladen, Columbus	1
Fourth	13B	Brunswick	1
Third	14A	(part of Durham, see subsection (b))	1
Third	14B	(part of Durham, see subsection (b))	3
Third	15A	Alamance	2
Third	15B	Orange, Chatham	2
Fourth	16A	Scotland, Hoke	1
Fourth	16B	Robeson	2
Fifth	17A	Rockingham	2
Fifth	17B	Stokes, Surry	2
Fifth	18A	(part of Guilford, see subsection (b))	1
Fifth	18B	(part of Guilford, see subsection (b))	1
Fifth	18C	(part of Guilford, see subsection (b))	1
Fifth	18D	(part of Guilford, see subsection (b))	1
Fifth	18E	(part of Guilford, see subsection (b))	1
Sixth	19A	Cabarrus	1



**G.S. 7A-41(a) is set out three times. See note.**

Judicial Division	Superior Court District	Counties	No. of Resident Judges
Fifth	19B	Montgomery, Randolph	1
Sixth	19C	Rowan	1
Fifth	19D	Moore	1
Sixth	20A	Anson, Richmond, Stanley	2
Sixth	20B	Union	2
Fifth	21A	(part of Forsyth, see subsection (b))	1
Fifth	21B	(part of Forsyth, see subsection (b))	1
Fifth	21C	(part of Forsyth, see subsection (b))	1
Fifth	21D	(part of Forsyth, see subsection (b))	1
Sixth	22	Alexander, Davidson, Davie, Iredell	3
Fifth	23	Alleghany, Ashe, Wilkes, Yadkin	1
Eighth	24	Avery, Madison, Mitchell, Watauga, Yancey	2
Seventh	25A	Burke, Caldwell	2
Seventh	25B	Catawba	2
Seventh	26A	(part of Mecklenburg, see subsection (b))	2
Seventh	26B	(part of Mecklenburg, see subsection (b))	3
Seventh	26C	(part of Mecklenburg, see subsection (b))	2
Seventh	27A	Gaston	2
Seventh	27B	Cleveland, Lincoln	2
Eighth	28	Buncombe	2
Eighth	29A	McDowell, Rutherford	1
Eighth	29B	Henderson, Polk, Transylvania	1
Eighth	30A	Cherokee, Clay, Graham, Macon, Swain	1
Eighth	30B	Haywood, Jackson	1.

(b) For superior court districts of less than a whole county, or with part of one county with part of another, the composition of the district and the number of judges is as follows:

- (1) Superior Court District 7B consists of County Commissioner Districts 1, 2 and 3 of Wilson County, Blocks 127 and 128 of Census Tract 6 of

Wilson County, and Townships 12 and 14 of Edgecombe County. It has one judge.

- (2) Superior Court District 7C consists of the remainder of Edgecombe and Wilson Counties not in Judicial District 7B. It has one judge.
- (3) Superior Court District 10A consists of Wake County Precincts 01-12, 01-13, 01-14, 01-18, 01-19, 01-20, 01-22, 01-25, 01-26, 01-28, 01-34, 01-35, 01-40, 01-50, 17-03, and 17-07. It has two judges.
- (4) Superior Court District 10B consists of Wake County Precincts 01-01, 01-02, 01-03, 01-04, 01-05, 01-06, 01-07, 01-07A, 01-09, 01-10, 01-11, 01-16, 01-21, 01-23, 01-27, 01-29, 01-31, 01-32, 01-33, 01-36, 01-41, 01-48, 01-49, 03-00, 04-01, 04-02, 04-03, 04-04, 04-05, 04-06, 04-07, 04-08, 04-09, 04-10, 04-11, 04-12, 04-13, 04-14, 04-15, 04-16, 04-17, 04-18, 04-19, 04-20, 05-01, 05-02, 06-01, 06-02, 06-03, 07-01, 07-10, 11-01, 11-02, 12-01, 12-02, 12-03, 12-04, 12-05, 12-06, 18-01, 18-02, 18-03, 18-04, 18-05, 18-06, 18-07, 18-08, 20-01, 20-02, 20-03, 20-04, 20-05, 20-06, 20-07, 20-08, 20-09, and 20-10. It has two judges.
- (5) Superior Court District 10C consists of Wake County Precincts 02-01, 02-02, 02-03, 02-04, 02-05, 02-06, 07-02, 07-12, 08-01, 08-02, 08-03, 08-04, 08-05, 08-06, 08-07, 08-08, 09-01, 09-02, 09-03, 10-01, 10-02, 10-03, 10-04, 14-01, 14-02, 15-01, 15-02, 15-03, 15-04, 16-01, 16-02, 16-03, 16-04, 16-05, 16-06, 16-07, 19-01, 19-02, 19-03, 19-04, 19-05, 19-06, 19-07, and 19-08. It has one judge.
- (6) Superior Court District 10D consists of Wake County Precincts 01-15, 01-17, 01-30, 01-37, 01-38, 01-39, 01-42, 01-43, 01-44, 01-45, 01-46, 01-47, 01-51, 07-03, 07-04, 07-05, 07-06, 07-07, 07-07A, 07-09, 07-11, 13-01, 13-02, 13-03, 13-04, 13-05, 17-01, 17-02, 17-04, 17-05, 17-06, and 17-08. It has one judge.
- (7) Superior Court District 12A consists of that part of Cross Creek Precinct #18 north of Raeford Road, Montclair Precinct, that part of Precinct 71-1 not in Judicial District 12B, Precinct 71-2, Morganton #2 Precinct, Cottonade Precinct, Cumberland Precincts 1 and 2, and Brentwood Precinct. It has one judge.
- (8) Superior Court District 12B consists of all of State House of Representatives District 17, except for Westarea Precinct, and it also includes that part of Cross Creek Precinct #15 east of Village Drive. It has one judge.
- (9) Superior Court District 12C consists of the remainder of Cumberland County not in Superior Court Districts 12A or 12B. It has two judges.
- (10) Superior Court District 14A consists of Durham Precincts 9, 11, 12, 13, 14, 15, 18, 34, 40, 41, and 42, and that part of Durham Precinct 39 east of North Carolina Highway #751. It has one judge.
- (10a) Effective with the 2004 election, in addition to the boundaries provided for in this section, Superior Court District 14A also includes that portion of Durham Precinct 53 east of North Carolina Highway #751.
- (11) Superior Court District 14B consists of the remainder of Durham County not in Superior Court District 14A. It has three judges.
- (12) Superior Court District 18A consists of Fentress Precincts 1 and 2; Greensboro Precincts 4, 5, 6, 46, 52, 67, 68, 69, 70, 71, 72, 73, 74, and 75; North Clay Precinct; Pleasant Garden Precincts 1 and 2; and South Clay Precinct. It has one judge.
- (13) Superior Court District 18B consists of High Point Precincts 1, 2, 3, 4, 5, 6, 7, 8, 9, 10, 11, 12, 13, 14, 15, 16, 17, 18, 19, 20, 21, 22, 23, 24, 25, 26, and 27; HP Precinct; Jamestown Precincts 1 and 5; North Deep River Precinct; and South Deep River Precinct. It has one judge.
- (14) Superior Court District 18C consists of Center Grove Precincts 1, 2, and 3; Friendship Precincts 1, 2, 3, 4, and 5; Greensboro Precincts 17,

- 30, 31, 32, 33, 34, 36, 37, 38, 39, 40A, 40B, 41, 42, 43, 64, 65, and 66; Jamestown Precincts 2, 3, and 4; Monroe Precinct 3; North Center Grove Precinct; Oak Ridge Precincts 1 and 2; Summerfield Precincts 1, 2, 3, and 4; and Stokesdale Precinct. It has one judge.
- (15) Superior Court District 18D consists of Greensboro Precincts 1, 11, 12, 13, 14, 15, 16, 19, 35, 44, 45, 47, 48, 49, 50, 51, 53, 54, 55, 56, 57, 58, 59, 60, 61, 62, and 63; and Sumner Precincts 1, 2, 3, and 4. It has one judge.
- (16) Superior Court District 18E consists of Gibsonville Precinct; Greene Precinct; Greensboro Precincts 2, 3, 7, 8, 9, 10, 18, 20, 21, 22, 23, 24, 25, 26, 27, 28, and 29; Jefferson Precincts 1, 2, 3, and 4; Monroe Precincts 1 and 2; North Madison Precinct; North Washington Precinct; Rock Creek Precincts 1 and 2; South Madison Precinct; and South Washington Precinct. It has one judge.
- (17) Superior Court District 21A consists of Forsyth County Precincts 051, 052, 053, 054, 055, 071, 072, 073, 074, 075, 091, 092, 122, 123, 131, 132, 133, 701, 702, 703, 704, 705, 706, 707, 708, 709, 806, 807, and 808. It has one judge.
- (18) Superior Court District 21B consists of Forsyth County Precincts 042, 043, 501, 502, 503, 504, 505, 506, 507, 601, 602, 603, 604, 605, 606, 607, 901, 902, 903, 904, 905, and 907. It has one judge.
- (19) Superior Court District 21C consists of Forsyth County Precincts 011, 012, 013, 014, 015, 021, 031, 032, 033, 034, 061, 062, 063, 064, 065, 066, 067, 068, 101, 111, 112, 801, 802, 803, 804, 805, 809, 906, 908, and 909. It has one judge.
- (20) Superior Court District 21D consists of Forsyth County Precincts 081, 082, 083, 201, 203, 204, 205, 206, 207, 301, 302, 303, 304, 305, 306, 401, 402, 403, 404, and 405. It has one judge.
- (21) Superior Court District 26A consists of Charlotte Precincts 11, 12, 13, 14, 15, 16, 22, 23, 24, 25, 26, 27, 31, 33, 39, 41, 42, 46, 52, 54, 55, 56, 58, 60, 77, 78, and 82, and Long Creek Precinct #2 of Mecklenburg County. It has two judges.
- (22) Superior Court District 26B consists of Charlotte Precincts 1, 2, 3, 4, 5, 6, 7, 8, 9, 10, 17, 18, 20, 21, 28, 29, 30, 32, 34, 35, 36, 37, 38, 43, 44, 45, 47, 51, 61, 62, 63, 65, 66, 67, 68, 69, 71, 74, 83, 84, and 86, Crab Orchard Precincts 1 and 2, and Mallard Creek Precinct 1. It has two judges.
- (23) Superior Court District 26C consists of the remainder of Mecklenburg County not in Superior Court Districts 26A or 26B. It has two judges.
- (24), (25) Repealed by Session Laws 2003-284, s. 13.14.(b), effective July 1, 2003.
- (26) Superior Court District 5A consists of the New Hanover County precincts of Cape Fear #1, Cape Fear #2, Harnett #1, Harnett #4, Harnett #6, Wilmington #1, Wilmington #2, Wilmington #3, Wilmington #4, Wilmington #6, Wilmington #7, Wilmington #8, Wilmington #9, Wilmington #10, Wilmington #15, Wilmington #19, and the part of Harnett #7 that consists of the part of Block Group 6 of 1990 Census Tract 0116.02 containing Blocks 601B, 602B, 603, 611, 612, 613, 614, 615, 616, 617, 618, 619; and the Pender County precincts of Canetuck Caswell, Columbia, Grady, Upper Holly, and Upper Union. It has one judge.
- (27) Superior Court District 5B consists of the New Hanover County precincts of Cape Fear #3, Harnett #2, Harnett #5, the part of Harnett #7 that is not in Superior Court District 5A, Harnett #8, Wrightsville Beach, Wilmington #11, Wilmington #12, Wilmington #13, Wilming-



ton #22, Wilmington #24, and the part of Harnett #3 that consists of the part of Block Group 1 of 1990 Census Tract 0119.01 containing Blocks 102, 105, 106A, 106B, 107A, 107B, 107C, 107D, and 108, the part of Block Group 1 of 1990 Census Tract 0119.02 containing Blocks 103, 104, and 114, and the part of Block Group 1 of 1990 Census Tract 0120.01 containing Blocks 101A, 101B, 101C, 101D, 102A, 102B, 103, 104, 105A, 105B, 115A, and 115B; and the following precincts of Pender County: North Burgaw, South Burgaw, Middle Holly, Long Creek, Penderlea, Lower Union, Rocky Point, Lower Topsail, Upper Topsail, Scotts Hill, and Surf City. It has one judge.

- (28) Superior Court District 5C consists of the part of New Hanover County that is not in Superior Court Districts 5A or 5B. It has one judge.

(c) In subsection (b) above:

- (1) The names and boundaries of townships are as they were legally defined and in effect as of January 1, 1980, and recognized in the 1980 U.S. Census;
- (2) For Guilford County, the precincts are as they were legally defined and recognized as voting districts of the same name in the 2000 U.S. Census, except Greensboro Precincts 40A and 40B are as they were modified by the Guilford County Board of Elections and are as shown on the Legislative Services Office's redistricting computer database on May 1, 2001;
- (2a) For Wake County, the precincts are as they were adopted by the Wake County Board of Elections and in effect as of January 1, 2001;
- (3) For Mecklenburg and Durham Counties, precinct boundaries are as shown on the current maps in use by the appropriate county board of elections as of January 31, 1984, in accordance with G.S. 163-128(b);
- (4) For Wilson County, commissioner districts are those in use for election of members of the county board of commissioners as of January 1, 1987;
- (5) For Cumberland County, House District 17 is in accordance with the boundaries in effect on January 1, 1987. Precincts are in accordance with those as approved by the United States Department of Justice on February 28, 1986; and
- (6) For Forsyth County, the precincts are as they were legally defined and recognized in the 2000 U.S. Census as of January 1, 2001; and
- (7) The names and boundaries of precincts in Montgomery, Moore, and Randolph Counties are those in existence on March 15, 1999.
- (8) The names and boundaries of precincts in New Hanover and Pender Counties are those in existence on December 1, 1999.

If any changes in precinct boundaries, wards, commissioner districts, or House of Representative districts have been made since the dates specified, or are made, those changes shall not change the boundaries of the superior court districts; provided that if any of those boundaries have changed, a precinct is divided by a superior court judicial district boundary, and the precinct was not so divided at the time of enactment of this section in 1987, the boundaries of the superior court judicial district are changed to place the entirety of the precinct in the superior court judicial district where the majority of the residents of the precinct reside, according to the 1990 Federal Census if:

- (1) Such change does not result in placing a superior court judge in another superior court district;
- (2) Such change does not make a district that has an effective racial minority electorate not have an effective racial minority electorate; and
- (3) The change is approved by the county board of elections where the precinct is located, State Board of Elections and by the Secretary of State upon finding that the change:

- a. Will improve election administration; and
- b. Complies with subdivisions (1) and (2) of this subsection.

(d) The several judges, their terms of office, and their assignments to districts are as follows:

- (1) In the first superior court district, J. Herbert Small and Thomas S. Watts serve terms expiring December 31, 1994.
- (2) In the second superior court district, William C. Griffin serves a term expiring December 31, 1994.
- (3) In the third-A superior court district, David E. Reid serves a term expiring on December 31, 1992.
- (4) In the third-B superior court district, Herbert O. Phillips, III, serves a term expiring on December 31, 1994.
- (5) In the fourth-A superior court district, Henry L. Stevens, III, serves a term expiring December 31, 1994.
- (6) In the fourth-B superior court district, James R. Strickland serves a term expiring December 31, 1992.
- (7) In the fifth superior court district, no election shall be held in 1992 for the full term of the seat now occupied by Bradford Tillery, and the holder of that seat shall serve until a successor is elected in 1994 and qualifies. The succeeding term begins January 1, 1995. In the fifth superior court district, Napoleon B. Barefoot serves a term expiring December 31, 1994.
- (8) In the sixth-A superior court district, Richard B. Allsbrook serves a term expiring December 31, 1990.
- (9) In the sixth-B superior court district, a judge shall be elected in 1988 to serve an eight-year term beginning January 1, 1989.
- (10) In the seventh-A superior court district, Charles B. Winberry, serves a term expiring December 31, 1994.
- (11) In the seventh-B superior court district, a judge shall be elected in 1988 to serve an eight-year term beginning January 1, 1989.
- (12) In the seventh-C superior court district, Franklin R. Brown serves a term expiring December 31, 1990.
- (13) In the eighth-A superior court district, James D. Llewellyn serves a term expiring December 31, 1994.
- (14) In the eighth-B superior court district, Paul M. Wright serves a term expiring December 31, 1992.
- (15) In the ninth superior court district, Robert H. Hobgood and Henry W. Hight, Jr., serve terms expiring December 31, 1994.
- (16) In the tenth-A superior court district, a judge shall be elected in 1988 to serve an eight-year term beginning January 1, 1989.
- (17) In the tenth-B superior court district, Robert L. Farmer serves a term expiring December 31, 1992. In the tenth-B superior court district, no election shall be held in 1990 for the full term of the seat now occupied by Henry V. Barnette, Jr., and the holder of that seat shall serve until a successor is elected in 1992 and qualifies. The succeeding term begins January 1, 1993.
- (18) In the tenth-C superior court district, Edwin S. Preston, serves a term expiring December 31, 1990. In the tenth-D superior court district, Donald Stephens serves a term expiring December 31, 1988.
- (19) In the eleventh superior court district, Wiley F. Bowen serves a term expiring December 31, 1990.
- (20) In the twelfth-A superior court district, D.B. Herring, Jr., serves a term expiring December 31, 1990.
- (21) In the twelfth-B superior court district, a judge shall be elected in 1988 to serve an eight-year term beginning January 1, 1989.
- (22) In the twelfth-C superior court district, no election shall be held in 1992 for the full term of the seat now occupied by Coy E. Brewer, Jr.,



- and the holder of that seat shall serve until a successor is elected in 1994 and qualifies. The succeeding term begins January 1, 1995. In the twelfth-C superior court district, E. Lynn Johnson serves a term expiring December 31, 1994.
- (23) In the thirteenth superior court district, Giles R. Clark serves a term expiring December 31, 1994.
- (24) In the fourteenth-A superior court district, a judge shall be elected in 1988 to serve an eight-year term beginning January 1, 1989.
- (25) In the fourteenth-B superior court district, no election shall be held in 1992 for the full term of the seat now occupied by Anthony M. Brannon, and the holder of that seat shall serve until a successor is elected in 1994 and qualifies. The succeeding term begins July 1, 1995.
- (26) In the fourteenth-B superior court district, no election shall be held in 1990 for the full term of the seat now occupied by Thomas H. Lee, and the holder of that seat shall serve until a successor is elected in 1994 and qualifies. The succeeding term begins January 1, 1995. In the fourteenth-B superior court district, J. Milton Read, Jr., serves a term expiring December 31, 1994.
- (27) In the fifteenth-A superior court district, J.B. Allen, Jr., serves a term expiring December 31, 1994.
- (28) In the fifteenth-B superior court district, F. Gordon Battle serves a term expiring December 31, 1994.
- (29) In the sixteenth-A superior court district, B. Craig Ellis serves a term expiring December 31, 1994.
- (30) In the sixteenth-B superior court district, a judge shall be elected in 1988 to serve an eight-year term beginning January 1, 1989. In the sixteenth-B judicial [superior court] district, a judge shall be appointed by the Governor to serve until the results of the 1990 general election are certified. A person shall be elected in the 1990 general election to serve the remainder of the term expiring December 31, 1996.
- (31) In the seventeenth-A superior court district, Melzer A. Morgan, Jr., serves a term expiring December 31, 1990.
- (32) In the seventeenth-B superior court district, James M. Long serves a term expiring December 31, 1994.
- (33) In the eighteenth-A superior court district, a judge shall be elected in 1988 to serve an eight-year term beginning January 1, 1989.
- (34) In the eighteenth-B superior court district, Edward K. Washington's term expired December 31, 1986, but he is holding over because of a court order enjoining an election from being held in 1986. A successor shall be elected in 1988 to serve an eight-year term beginning January 1, 1989.
- (35) In the eighteenth-C superior court district, W. Douglas Albright serves a term expiring December 31, 1990.
- (36) In the eighteenth-D superior court district, Thomas W. Ross's term expired December 31, 1986, but he is holding over because of a court order enjoining an election from being held in 1986. A successor shall be elected in 1988 to serve an eight-year term beginning January 1, 1989.
- (37) In the eighteenth-E superior court district, Joseph John's term expired December 31, 1986, but he is holding over because of a court order enjoining an election from being held in 1986. A successor shall be elected in 1988 to serve an eight-year term beginning January 1, 1989.
- (38) In the nineteenth-A superior court district, James C. Davis serves a term expiring December 31, 1992.



- (39) In the nineteenth-B1 superior court district, Russell G. Walker, Jr., serves a term expiring December 31, 1990. No election shall be held in 1998 for the full term of the seat now occupied by Russell G. Walker, Jr., and the holder of that seat shall serve until a successor is elected in 2000 and qualifies. The succeeding term shall begin January 1, 2001. The superior court judgeship held on June 12, 1996, in Superior Court District 20A by a resident of Moore County (James M. Webb) is allocated to Superior Court District 19B2. The term of that judge expires December 31, 2000. The judge's successor shall be elected in the 2000 general election.
- (40) In the nineteenth-C superior court district, Thomas W. Seay, Jr., serves a term expiring December 31, 1990.
- (41) In the twentieth-A superior court district, F. Fetzer Mills serves a term expiring December 31, 1992.
- (42) In the twentieth-B superior court district, William H. Helms serves a term expiring December 31, 1990.
- (43) In the twenty-first-A superior court district, William Z. Wood serves a term expiring December 31, 1990.
- (44) In the twenty-first-B superior court district, Judson D. DeRamus, Jr., serves a term expiring December 31, 1988.
- (45) In the twenty-first-C superior court district, William H. Freeman serves a term expiring December 31, 1990.
- (46) In the twenty-first-D superior court district, a judge shall be elected in 1988 to serve an eight-year term beginning January 1, 1989.
- (47) In the twenty-second superior court district, no election shall be held in 1992 for the full term of the seat now occupied by Preston Cornelius, and the holder of that seat shall serve until a successor is elected in 1994 and qualifies. The succeeding term shall begin January 1, 1995. In the twenty-second superior court district, Robert A. Collier serves a term expiring December 31, 1994.
- (48) In the twenty-third superior court district, Julius A. Rousseau, Jr., serves a term expiring December 31, 1990.
- (49) In the twenty-fourth superior court district, Charles C. Lamm, Jr., serves a term expiring December 31, 1994.
- (50) In the twenty-fifth-A superior court district, Claude S. Sitton serves a term expiring December 31, 1994.
- (51) In the twenty-fifth-B superior court district, Forrest A. Ferrell serves a term expiring December 31, 1990.
- (52) In the twenty-sixth-A superior court district, no election shall be held in 1994 for the full term of the seat now occupied by W. Terry Sherrill, and the holder of that seat shall serve until a successor is elected in 1996 and qualifies. The succeeding term shall begin January 1, 1997. In the twenty-sixth-A superior court district, a judge shall be elected in 1988 to serve an eight-year term beginning January 1, 1989.
- (53) In the twenty-sixth-B superior court district, Frank W. Snapp, Jr., and Kenneth A. Griffin serve terms expiring December 31, 1990.
- (54) In the twenty-sixth-C superior court district, no election shall be held in 1992 for the full term of the seat now occupied by Chase Boone Saunders, and the holder of that seat shall serve until a successor is elected in 1994 and qualifies. The succeeding term shall begin January 1, 1995. In the twenty-sixth-C superior court district, Robert M. Burroughs serves a term expiring December 31, 1994.
- (55) In the twenty-seventh-A superior court district, no election shall be held in 1988 for the full term of the seat now occupied by Robert E. Gaines, and the holder of that seat shall serve until a successor is elected in 1990 and qualifies. The succeeding term begins January 1,

1991. In the twenty-seventh-A superior court district, Robert W. Kirby serves a term expiring December 31, 1990.
- (56) In the twenty-seventh-B superior court district, John M. Gardner serves a term expiring December 31, 1994.
- (57) In the twenty-eighth superior court district, Robert D. Lewis and C. Walter Allen serve terms expiring December 31, 1990.
- (58) In the twenty-ninth superior court district, Hollis M. Owens, Jr., serves a term expiring December 31, 1990.
- (59) In the thirtieth-A superior court district, James U. Downs serves a term expiring December 31, 1990.
- (60) In the thirtieth-B superior court district, Janet M. Hyatt serves a term expiring December 31, 1994. (1969, c. 1171, ss. 1-3; c. 1190, s. 4; 1971, c. 377, s. 5; c. 997; 1973, c. 47, s. 2; c. 646; c. 855, s. 1; 1975, c. 529; c. 956, ss. 1, 2; 1975, 2nd Sess., c. 983, s. 114; 1977, c. 1119, ss. 1, 3, 4; c. 1130, ss. 1, 2; 1977, 2nd Sess., c. 1238, s. 1; c. 1243, s. 4; 1979, c. 838, s. 119; c. 1072, s. 1; 1979, 2nd Sess., c. 1221, s. 1; 1981, c. 964, ss. 1, 2; 1981 (Reg. Sess., 1982), c. 1282, s. 71.2; 1983 (Reg. Sess., 1984), c. 1109, ss. 4, 4.1; 1985, c. 698, s. 11(a); 1987, c. 509, s. 1; c. 549, s. 6.6; c. 738, s. 124; 1987 (Reg. Sess., 1988), c. 1037, s. 1; c. 1056, ss. 14, 15; 1989, c. 795, s. 22(a); 1991, c. 746, s. 1; 1993, c. 321, ss. 200.4(a), 200.5(a), (d); 1995, c. 51, s. 1; c. 509, s. 3; 1995 (Reg. Sess., 1996), c. 589, s. 1(a), (c); 1998-212, s. 16.16A(a); 1998-217, s. 67.3(c); 1999-237, ss. 17.12(b), 17.19(a)-(d), 17.20(a)-(c); 1999-396, s. 1; 2000-67, s. 15.6(a); 2000-140, s. 36; 2001-333, ss. 1, 2; 2001-424, s. 22.4(b); 2001-507, ss. 3, 4; 2003-284, ss. 13.14(a), 13.14(b); 2004-124, s. 14.6(b); 2004-127, s. 2(a); 2005-276, ss. 14.2(a), 14.2(e1); 2006-96, s. 2.)

**Subsection (a) is set out three times. —**

The first version of subsection (a) set out above is effective until October 1, 2006, or the date on which Session Laws 2006-96 is approved under section 5 of the Voting Rights Act of 1965, whichever is later. The second version of subsection (a) is effective October 1, 2006, or the date on which Session Laws 2006-96 is approved under section 5 of the Voting Rights Act of 1965, whichever is later. The third version of subsection (a) is effective January 1, 2011, as amended by Session Laws 2006-276, s. 14.2(e1). It also includes amendments by 2006-96, which are contingent on approval under section 5 of the Voting Rights Act of 1965.

**Preclearance Under § 5 of the Voting Rights Act. —** For information on receipt of preclearance, please refer to the *North Carolina Register* (website at <http://www.oah.state.nc.us/rules/register>) or the Administrative Office of the Courts (website at <http://www.nccourts.org>) as described in Chapter 120, Article 6A, G.S. 120-30.9A et seq.

Session Laws 2005-276, s. 14.2(a), which amended subsection (a), was effective December 1, 2005, or the date upon which subsection (a) is approved under section 5 of the Voting Rights Act of 1965, whichever is later. Preclearance was received from the U.S. Department of Justice by letter dated January 5, 2006.

Session Laws 2005-276, s. 14.2(e1), which

also amended subsection (a), is effective January 1, 2011, or the date on which subsection (a) is approved under section 5 of the Voting Rights Act of 1965, whichever is later. Preclearance was received from the U.S. Department of Justice by letter dated January 5, 2006.

Session Laws 2006-96, s. 5, provides, in part: “Sections 2, 3, and 4 of the act become effective October 1, 2006, or the date upon which Section 2 of this act is approved under section 5 of the Voting Rights Act of 1965, whichever is later.”

**Editor’s Note. —** Session Laws 2006-96, s. 3, provides: “The superior court judgeship established for District 13A by Section 2 of this act shall be filled by the judge currently serving District 13 who resides in Bladen or Columbus County, who shall serve until the expiration of that judge’s current term.”

Session Laws 2006-96, s. 4, provides: “The superior court judgeship established for District 13B by Section 2 of this act shall be filled by the judge currently serving District 13 who resides in Brunswick County, who shall serve until the expiration of that judge’s current term.”

**Effect of Amendments. —**

Session Laws 2006-96, s. 2, effective October 1, 2006, or the date that this section is approved under Section 5 of the Voting Rights Act of 1965, whichever is later, redesignated District 13 as District 13A; in District 13A, deleted “Brunswick” following “Bladen” and substituted “1” for “2”; and added District 13B.



§ 7A-49.4. Superior court criminal case docketing.

CASE NOTES

**Cited** in State v. Fisher, 171 N.C. App. 201, 614 S.E.2d 428, 2005 N.C. App. LEXIS 1214 (2005).

§ 7A-49.5. Statewide electronic filing in courts.

(a) The General Assembly finds that the electronic filing of pleadings and other documents required to be filed with the courts may be a more economical, efficient, and satisfactory procedure to handle the volumes of paperwork routinely filed with, handled by, and disseminated by the courts of this State, and therefore authorizes the use of electronic filing in the courts of this State.

(b) The Supreme Court may adopt rules governing this process and associated costs and may supervise its implementation and operation through the Administrative Office of the Courts. The rules adopted under this section shall address the waiver of electronic fees for indigents.

(c) The Administrative Office of the Courts may contract with a vendor to provide electronic filing in the courts, provided that the costs for the hardware and software are not paid using State funds.

(d) Any funds received by the Administrative Office of the Courts from the vendor selected pursuant to subsection (c) of this section, other than applicable statutory court costs, as a result of electronic filing, shall be deposited in the Court Information Technology Fund in accordance with G.S. 7A-343.2. (2006-187, s. 2(c).)

**Editor’s Note.** — Session Laws 2006-187, s. 13, provides in part: “Section 2 of this act is effective when it becomes law [August 3, 2006] and applies to all matters filed with the courts on or after the date that the Supreme Court adopts rules for electronic filing as authorized by that section.”

ARTICLE 9.

*District Attorneys and Judicial Districts.*

§ 7A-60. District attorneys and prosecutorial districts.

(a) The State shall be divided into prosecutorial districts, as shown in subsection (a1) of this section. There shall be a district attorney for each prosecutorial district, as provided in subsections (b) and (c) of this section who shall be a resident of the prosecutorial district for which elected. A vacancy in the office of district attorney shall be filled as provided in Article IV, Sec. 19 of the Constitution.

(a1) **(Effective until January 15, 2007)** — The counties of the State are organized into prosecutorial districts, and each district has the counties and the number of full-time assistant district attorneys set forth in the following table:

<i>Prosecutorial District</i>	<i>Counties</i>	<i>No. of Full-Time Asst. District Attorneys</i>
1	Camden, Chowan, Currituck, Dare, Gates, Pasquotank, Perquimans	11



**G.S. 7A-60(a1) is set out twice. See note.**


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<i>Prosecutorial District</i>	<i>Counties</i>	<i>No. of Full-Time Asst. District Attorneys</i>
2	Beaufort, Hyde, Martin, Tyrrell, Washington	7
3A	Pitt	11
3B	Carteret, Craven, Pamlico	11
4	Duplin, Jones, Onslow, Sampson	16
5	New Hanover, Pender	16
6A	Halifax	5
6B	Bertie, Hertford, Northampton	5
7	Edgecombe, Nash, Wilson	18
8	Greene, Lenoir, Wayne	13
9	Franklin, Granville, Vance, Warren	12
9A	Person, Caswell	5
10	Wake	38
11	Harnett, Johnston, Lee	16
12	Cumberland	21
13	Bladen, Brunswick, Columbus	12
14	Durham	15
15A	Alamance	10
15B	Orange, Chatham	9
16A	Scotland, Hoke	6
16B	Robeson	13
17A	Rockingham	6
17B	Stokes, Surry	7
18	Guilford	30
19A	Cabarrus	8
19B	Montgomery, Moore, Randolph	12
19C	Rowan	7
20A	Anson, Richmond, Stanly	10
20B	Union	8
21	Forsyth	20
22	Alexander, Davidson, Davie, Iredell	20
23	Alleghany, Ashe, Wilkes, Yadkin	7
24	Avery, Madison, Mitchell, Watauga, Yancey	6
25	Burke, Caldwell, Catawba	18
26	Mecklenburg	49
27A	Gaston	14
27B	Cleveland, Lincoln	10

**G.S. 7A-60(a1) is set out twice. See note.**


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<i>Prosecutorial District</i>	<i>Counties</i>	<i>No. of Full-Time Asst. District Attorneys</i>
28	Buncombe	13
29A	McDowell, Rutherford	6
29B	Henderson, Polk, Transylvania	7
30	Cherokee, Clay, Graham, Haywood, Jackson, Macon, Swain.	11

(a1) **(Effective January 15, 2007 — see Editor's note for contingency.)**

The counties of the State are organized into prosecutorial districts, and each district has the counties and the number of full-time assistant district attorneys set forth in the following table:

<i>Prosecutorial District</i>	<i>Counties</i>	<i>No. of Full-Time Asst. District Attorneys</i>
1	Camden, Chowan, Currituck, Dare, Gates, Pasquotank, Perquimans	11
2	Beaufort, Hyde, Martin, Tyrrell, Washington	7
3A	Pitt	11
3B	Carteret, Craven, Pamlico	11
4	Duplin, Jones, Onslow, Sampson	16
5	New Hanover, Pender	16
6A	Halifax	5
6B	Bertie, Hertford, Northampton	5
7	Edgecombe, Nash, Wilson	18
8	Greene, Lenoir, Wayne	13
9	Franklin, Granville, Vance, Warren	12
9A	Person, Caswell	5
10	Wake	38
11	Harnett, Johnston, Lee	16
12	Cumberland	21
13	Bladen, Brunswick, Columbus	12
14	Durham	15
15A	Alamance	10
15B	Orange, Chatham	9
16A	Scotland, Hoke	6
16B	Robeson	13
17A	Rockingham	6
17B	Stokes, Surry	7
18	Guilford	30
19A	Cabarrus	8
19B	Montgomery, Randolph	8

G.S. 7A-60(a1) is set out twice. See note.

<i>Prosecutorial District</i>	<i>Counties</i>	<i>No. of Full-Time Asst. District Attorneys</i>
19C	Rowan	7
19D	Moore	4
20A	Anson, Richmond, Stanly	10
20B	Union	8
21	Forsyth	20
22	Alexander, Davidson, Davie, Iredell	20
23	Alleghany, Ashe, Wilkes, Yadkin	7
24	Avery, Madison, Mitchell, Watauga, Yancey	6
25	Burke, Caldwell, Catawba	18
26	Mecklenburg	49
27A	Gaston	14
27B	Cleveland, Lincoln	10
28	Buncombe	13
29A	McDowell, Rutherford	6
29B	Henderson, Polk, Transylvania	7
30	Cherokee, Clay, Graham, Haywood, Jackson, Macon, Swain.	11

(b) Except as provided in subsection (c) of this section, each district attorney for a prosecutorial district as defined in subsection (a1) of this section, other than District 19B, who is in office on December 31, 1988, shall continue in office for that prosecutorial district, for a term expiring December 31, 1990. In the general election of 1990, and every four years thereafter, a district attorney shall be elected for a four-year term for each prosecutorial district other than Districts 16A and 19B, and shall take office on the January 1 following such election. The district attorney for Prosecutorial District 19B, who is elected in the general election of 1988 for a four-year term beginning January 1, 1989, shall serve that term for Prosecutorial District 19B. In the general election of 1992, and every four years thereafter, a district attorney shall be elected for a four-year term for Prosecutorial Districts 16A and 19B and shall take office on the January 1 following such election.

(c) The office and term of the district attorney for Prosecutorial District 12 formerly consisting of Cumberland and Hoke Counties are allocated to Prosecutorial District 12 as defined by subsection (a1) of this section. The office and the term of the district attorney for former Prosecutorial District 16 consisting of Robeson and Scotland Counties are allocated to Prosecutorial District 16B as defined by subsection (a1) of this section. The initial district attorney for Prosecutorial District 16A as defined in subsection (a1) of this section shall be elected in the general election of November 1988, from nominations made in accordance with G.S. 163-114 as if a vacancy had occurred in nomination, and shall serve an initial term expiring December 31, 1992. In all other respects, subsection (b) of this section shall apply to the district attorneys for Prosecutorial Districts 12, 16A, and 16B to the same



extent as all other district attorneys. (1967, c. 1049, s. 1; 1975, c. 956, s. 4; 1977, c. 1130, s. 3; 1977, 2nd Sess., c. 1238, s. 2; 1981, c. 964, ss. 2, 3; 1987, c. 509, ss. 4, 5; c. 738, s. 127(a); 1987 (Reg. Sess., 1988), c. 1056, s. 1; c. 1086, s. 111; 1989, c. 770, ss. 1, 56; c. 795, s. 24(a), (e); 1991, c. 742, s. 13; 1991 (Reg. Sess., 1992), c. 900, s. 120(a), (b); 1993, c. 321, ss. 200.4(l), 200.7(a), (b); 1995, c. 507, s. 21.7; 1995 (Reg. Sess., 1996), c. 589, s. 3(a); 1996, 2nd Ex. Sess., c. 18, s. 22(a); 1997-443, s. 18.11(a); 1998-212, s. 16.20(a); 1999-237, s. 17.8(a); 2004-124, s. 14.6(h); 2005-276, s. 14.2(l); 2006-66, ss. 14.3(a), 14.19(a).)

**Subsection (a1) is set out twice.** — The first version of subsection (a1) set out above is effective until January 15, 2007. The second version of subsection (a1) set out above is effective January 15, 2007.

**Preclearance under Section 5 of the Voting Rights Act.** — Session Laws 2005-276, s. 14.2(l), which amended subsection (a1), is effective January 1, 2007 or the date on which subsection (l) is approved under Section 5 of the Voting Rights Act of 1965, whichever is later. Preclearance was received from the U.S. Department of Justice by letter dated January 5, 2006.

**Editor's Note.** — Session Laws 2006-66, s. 1.2, provides: "This act shall be known as 'The Current Operations and Capital Improvements Appropriations Act of 2006'."

Session Laws 2006-66, s. 14.19(b), provides: "The district attorney position established for District 19B by subsection (a) of this section shall be filled by the district attorney currently serving District 19B who resides in Randolph County. The district attorney position established for District 19D by subsection (a) of this section shall be filled by appointment of the Governor for the remainder of the term expiring January 1, 2009. A district attorney for

District 19D shall be elected in 2008 for a four-year term commencing January 1, 2009."

Session Laws 2006-66, s. 14.19(c), provides: "The eight assistant district attorney positions for District 19B under subsection (a) of this section shall be filled by eight assistant district attorneys currently serving Montgomery and Randolph Counties in District 19B. The four assistant district attorney positions for District 19D under subsection (a) of this section shall be filled by four assistant district attorneys currently serving Moore County in District 19B."

Session Laws 2006-66, s. 28.3, provides: "Except for statutory changes or other provisions that clearly indicate an intention to have effects beyond the 2006-2007 fiscal year, the textual provisions of this act apply only to funds appropriated for, and activities occurring during, the 2006-2007 fiscal year."

Session Laws 2006-66, s. 28.6 is a severability clause.

**Effect of Amendments.** —

Session Laws 2006-66, s. 14.3(a), effective January 1, 2007, rewrote subsection (a1).

Session Laws 2006-66, s. 14.19(a), effective January 15, 2007, in the entry for District 19B, deleted "Moore" from the list of counties and changed the number of judges from "12" to "8"; and added the entry for District 19D.

## § 7A-69. Investigatorial assistants.

The district attorney in prosecutorial districts 1, 3B, 4, 5, 7, 8, 11, 12, 13, 14, 15A, 15B, 16A, 18, 19B, 20A, 20B, 21, 22, 24, 25, 26, 27A, 27B, 28, 29A, 29B, and 30 is entitled to one investigatorial assistant, and the district attorney in prosecutorial district 10 is entitled to two investigatorial assistants, to be appointed by the district attorney and to serve at his pleasure.

It shall be the duty of the investigatorial assistant to investigate cases preparatory to trial and to perform such other Duties as may be assigned by the district attorney. The investigatorial assistant is entitled to reimbursement for his subsistence and travel expenses to the same extent as State employees generally. (1975, c. 956, s. 6; 1977, c. 969, s. 1; 1981, c. 964, s. 2; 1993, c. 321, s. 200.7(e); 1997-443, s. 18.16; 1998-212, s. 16.21; 1999-237, s. 17.9; 2004-124, s. 14.7(a); 2005-276, s. 14.2(p).)

**Editor's Note.** —

Session Laws 2005-276, s. 14.2(q), provides, in part: "With respect to the division of Prosecutorial District 20, subsections (l) through (p) of this section become effective January 1, 2007, or the date upon which sub-

section (l) of this section [which amended G.S. 7A-60] is approved under section 5 of the Voting Rights Act of 1965, whichever is later, but the district attorneys for Prosecutorial Districts 20A and 20B shall be elected in the 2006 general election. With respect to the division of

Prosecutorial District 29, subsections (l) through (p) of this section become effective January 1, 2007, but the district attorneys for Prosecutorial Districts 29A and 29B shall be

elected in the 2006 general election." Preclearance was received from the U.S. Department of Justice by letter dated January 5, 2006.

CASE NOTES

**Discharge.** — Since an investigatorial assistant's public statements criticizing the district attorney's discretionary decisions and the disruption of his office's working relationship with law enforcement agencies were sufficient reasons, standing alone, to terminate the investigatorial assistant's at will employment, the district attorney's decision to terminate him rested within his lawful and discretionary

scope of authority; because the investigatorial assistant's termination was not injurious to the public or against the public good, there was no evidence to establish a genuine issue of material fact to support a claim for wrongful discharge against the district attorney. *Hines v. Yates*, 171 N.C. App. 150, 614 S.E.2d 385, 2005 N.C. App. LEXIS 1267 (2005).

ARTICLE 12.

*Clerk of Superior Court.*

§ 7A-101. Compensation.

(a) The clerk of superior court is a full-time employee of the State and shall receive an annual salary, payable in equal monthly installments, based on the population of the county as determined in subsection (a1) of this section, according to the following schedule:

<i>Population</i>	<i>Annual Salary</i>
Less than 100,000	\$77,112
100,000 to 149,999	86,532
150,000 to 249,999	95,954
250,000 and above	105,378.

The salary schedule in this subsection is intended to represent the following approximate percentage of the salary of a chief district court judge:

<i>Population</i>	<i>Annual Salary</i>
Less than 100,000	73%
100,000 to 149,999	82%
150,000 to 249,999	91%
250,000 and above	100%.

When a county changes from one population group to another, the salary of the clerk shall be changed, on July 1 of the fiscal year for which the change is reported, to the salary appropriate for the new population group, except that the salary of an incumbent clerk shall not be decreased by any change in population group during his continuance in office.

(a1) For purposes of subsection (a) of this section, the population of a county for any fiscal year shall be the population for the beginning of that fiscal year as reported by the Office of State Budget and Management to the Administrative Office of the Courts prior to the beginning of that fiscal year.

(b) The clerk shall receive no fees or commission by virtue of his office. The salary set forth in this section is the clerk's sole official compensation, but if, on June 30, 1975, the salary of a particular clerk, by reason of previous but no longer authorized merit increments, is higher than that set forth in the table, that higher salary shall not be reduced during his continuance in office.



(c) In lieu of merit and other increment raises paid to regular State employees, a clerk of superior court shall receive as longevity pay an amount equal to four and eight-tenths percent (4.8%) of the clerk's annual salary payable monthly after five years of service, nine and six-tenths percent (9.6%) after 10 years of service, fourteen and four-tenths percent (14.4%) after 15 years of service, and nineteen and two-tenths percent (19.2%) after 20 years of service. Service shall mean service in the elective position of clerk of superior court, as an assistant clerk of court and as a supervisor of clerks of superior court with the Administrative Office of the Courts and shall not include service as a deputy or acting clerk. Service shall also mean service as a justice, judge, or magistrate of the General Court of Justice or as a district attorney. (1965, c. 310, s. 1; 1967, c. 691, s. 5; 1969, c. 1186, s. 3; 1971, c. 877, ss. 1, 2; 1973, c. 571, ss. 1, 2; 1975, c. 956, s. 7; 1975, 2nd Sess., c. 983, s. 11; 1977, c. 802, s. 42; 1977, 2nd Sess., c. 1136, s. 13; 1979, c. 838, s. 85; 1979, 2nd Sess., c. 1137, s. 12; 1981, c. 964, s. 14; c. 1127, s. 12; 1983, c. 761, ss. 200, 247, 249; 1983 (Reg. Sess., 1984), c. 1034, ss. 86, 87; c. 1109, s. 13.1; 1985, c. 479, s. 211; c. 689, s. 3; c. 698, s. 10(c); 1985 (Reg. Sess., 1986), c. 1014, s. 34; 1987, c. 738, s. 20; 1987 (Reg. Sess., 1988), c. 1086, s. 14; c. 1100, ss. 16(a), 17; 1989, c. 752, s. 31; c. 799, s. 27(a); 1991 (Reg. Sess., 1992), c. 900, s. 40; c. 1039, s. 21; 1993, c. 321, s. 57(a); 1993 (Reg. Sess., 1994), c. 769, s. 7.10(a); 1996, 2nd Ex. Sess., c. 18, s. 28.4; 1997-443, s. 33.9; 1998-153, s. 7; 1999-237, s. 28.4; 2000-67, s. 26.4; 2000-140, s. 93.1(b); 2001-424, ss. 12.2(b), 32.5; 2004-124, s. 31.5(b); 2005-276, ss. 29.5, 29.23B; 2006-66, s. 22.5.)

**Editor's Note. —**

Session Laws 2006-66, s. 1.2, provides: "This act shall be known as 'The Current Operations and Capital Improvements Appropriations Act of 2006'."

Session Laws 2006-66, s. 28.6 is a severability clause.

**Effect of Amendments. —**

Session Laws 2006-66, s. 22.5, effective July 1, 2006, updated the Annual Salaries in the first paragraph of subsection (a).

## **§ 7A-102. Assistant and deputy clerks; appointment; number; salaries; duties.**

(a) The numbers and salaries of assistant clerks, deputy clerks, and other employees in the office of each clerk of superior court shall be determined by the Administrative Officer of the Courts after consultation with the clerk concerned. All personnel in the clerk's office are employees of the State. The clerk appoints the assistants, deputies, and other employees in the clerk's office to serve at his or her pleasure. Assistant and deputy clerks shall take the oath of office prescribed for clerks of superior court, conformed to the office of assistant or deputy clerk, as the case may be. Except as provided by subsection (c2) of this section, the job classifications and related salaries of each employee within the office of each superior court clerk shall be subject to the approval of the Administrative Officer of the Courts after consultation with each clerk concerned and shall be subject to the availability of funds appropriated for that purpose by the General Assembly.

(b) An assistant clerk is authorized to perform all the duties and functions of the office of clerk of superior court, and any act of an assistant clerk is entitled to the same faith and credit as that of the clerk. A deputy clerk is authorized to certify the existence and correctness of any record in the clerk's office, to take the proofs and examinations of the witnesses touching the execution of a will as required by G.S. 31-17, and to perform any other ministerial act which the clerk may be authorized and empowered to do, in his own name and without reciting the name of his principal. The clerk is responsible for the acts of his assistants and deputies. With the consent of the



clerk of superior court of each county and the consent of the presiding judge in any proceeding, an assistant or deputy clerk is authorized to perform all the duties and functions of the office of the clerk of superior court in another county in any proceeding in the district or superior court that has been transferred to that county from the county in which the assistant or deputy clerk is employed.

(c) Notwithstanding the provisions of subsection (a), the Administrative Officer of the Courts shall establish an incremental salary plan for assistant clerks and for deputy clerks based on a series of salary steps corresponding to the steps contained in the Salary Plan for State Employees adopted by the Office of State Personnel, subject to a minimum and a maximum annual salary as set forth below. On and after July 1, 1985, each assistant clerk and each deputy clerk shall be eligible for an annual step increase in his salary plan based on satisfactory job performance as determined by each clerk. Notwithstanding the foregoing, if an assistant or deputy clerk's years of service in the office of superior court clerk would warrant an annual salary greater than the salary first established under this section, that assistant or deputy clerk shall be eligible on and after July 1, 1984, for an annual step increase in his salary plan. Furthermore, on and after July 1, 1985, that assistant or deputy clerk shall be eligible for an increase of two steps in his salary plan, and shall remain eligible for a two-step increase each year as recommended by each clerk until that assistant or deputy clerk's annual salary corresponds to his number of years of service. Any person covered by this subsection who would not receive a step increase in fiscal year 1995-96 because that person is at the top of the salary range as it existed for fiscal year 1994-95 shall receive a salary increase to the maximum annual salary provided by subsection (c1) of this section.

(c1) A full-time assistant clerk or a full-time deputy clerk, and up to one full-time deputy clerk serving as head bookkeeper per county, shall be paid an annual salary subject to the following minimum and maximum rates:

<i>Assistant Clerks and Head Bookkeeper</i>	<i>Annual Salary</i>
Minimum	\$29,925
Maximum	51,251
<i>Deputy Clerks</i>	<i>Annual Salary</i>
Minimum	\$25,758
Maximum	39,862.

(c2) The clerk of superior court may appoint assistant clerks, deputy clerks, and a head bookkeeper and set their salaries above the minimum rate established for the positions by subsection (c1) of this section if, in the clerk's discretion, (i) the needs of the clerk's office would be best served by an appointment above the minimum rate, (ii) the appointee's skills and experience support the higher rate, and (iii) the Administrative Office of the Courts certifies that there are sufficient funds available.

(d) Full-time assistant clerks, licensed to practice law in North Carolina, who are employed in the office of superior court clerk on and after July 1, 1984, and full-time assistant clerks possessing a masters degree in business administration, public administration, accounting, or other similar discipline from an accredited college or university who are employed in the office of superior court clerk on and after July 1, 1997, are authorized an annual salary of not less than three-fourths of the maximum annual salary established for assistant clerks; the clerk of superior court, with the approval of the Administrative Office of the Courts, may establish a higher annual salary but that salary shall not be higher than the maximum annual salary established for assistant clerks. Full-time assistant clerks, holding a law degree from an accredited law school, who are employed in the office of superior court clerk on and after July 1, 1984, are authorized an annual salary of not less than two-thirds of the

maximum annual salary established for assistant clerks; the clerk of superior court, with the approval of the Administrative Office of the Courts, may establish a higher annual salary, but the entry-level salary may not be more than three-fourths of the maximum annual salary established for assistant clerks, and in no event may be higher than the maximum annual salary established for assistant clerks. Except as provided by subsection (c2) of this section, the entry-level annual salary for all other assistant and deputy clerks employed on and after July 1, 1984, shall be at the minimum rates as herein established.

(e) A clerk of superior court may apply to the Director of the Administrative Office of the Courts to enter into contracts with local governments for the provision by the State of services of assistant clerks, deputy clerks, and other employees in the office of each clerk of superior court pursuant to G.S. 153A-212.1 or G.S. 160A-289.1.

(f) The Director of the Administrative Office of the Courts may provide assistance requested pursuant to subsection (e) of this section only upon a showing by the senior resident superior court judge, supported by facts, that the overwhelming public interest warrants the use of additional resources for the speedy disposition of cases involving drug offenses, domestic violence, or other offenses involving a threat to public safety.

(g) The terms of any contract entered into with local governments pursuant to subsection (e) of this section shall be fixed by the Director of the Administrative Office of the Courts in each case. Nothing in this section shall be construed to obligate the General Assembly to make any appropriation to implement the provisions of this section or to obligate the Administrative Office of the Courts to provide the administrative costs of establishing or maintaining the positions or services provided for under this section. Further, nothing in this section shall be construed to obligate the Administrative Office of the Courts to maintain positions or services initially provided for under this section. (1777, c. 115, s. 86; P.R.; R.C., c. 19, s. 15; Code, s. 75; 1899, c. 235, ss. 2, 3; Rev., ss. 898-900; 1921, c. 32, ss. 1-3; C.S., ss. 934(a)-934(c), 935-937; 1951, c. 159, ss. 1, 2; 1959, c. 1297; 1963, c. 1187; 1965, c. 264; c. 310, s. 1; 1971, c. 363, s. 2; 1973, c. 678; 1983 (Reg. Sess., 1984), c. 1034, ss. 88, 89; 1985, c. 479, s. 212; c. 757, s. 190; 1985 (Reg. Sess., 1986), c. 1014, s. 35; 1987, c. 738, s. 21(a); 1987 (Reg. Sess., 1988), c. 1086, s. 15; 1989, c. 445; c. 752, s. 32; 1991 (Reg. Sess., 1992), c. 900, ss. 42, 119; 1993, c. 321, ss. 58, 59; 1993 (Reg. Sess., 1994), c. 769, ss. 7.11, 7.12; 1995, c. 507, s. 7.6(a), (b); 1996, 2nd Ex. Sess., c. 18, s. 28.5; 1997-443, ss. 33.12, 33.10(b); 1998-153, s. 8(b); 1999-237, s. 28.5; 2000-67, ss. 15.4(b), 26.5; 2001-424, s. 32.6; 2003-284, s. 30.14B; 2004-124, s. 31.6(b); 2005-276, s. 29.6; 2006-66, s. 22.6.)

#### **Editor's Note. —**

Session Laws 2006-66, s. 1.2, provides: "This act shall be known as 'The Current Operations and Capital Improvements Appropriations Act of 2006'."

Session Laws 2006-66, s. 28.6 is a severability clause.

#### **Effect of Amendments. —**

Session Laws 2006-66, s. 22.6, effective July 1, 2006, updated the annual salaries of Assistant Clerks, Head Bookkeeper, and Deputy Clerks in subsection (c1).

## **§ 7A-104. Disqualification; waiver; removal; when judge acts.**

### **CASE NOTES**

**Trial Court's Removal of Trustee Proper.** — Where beneficiaries' filings only requested an order removing the trustee of trusts, the trial court did not err by exercising jurisdiction



or entering orders regarding the trustee's removal after the clerk recused himself from the case; the trial court provided the parties with due process, and its conclusions removing the

trustee were supported by its findings of fact. In re Estate of Newton, 173 N.C. App. 530, 619 S.E.2d 571, 2005 N.C. App. LEXIS 2120 (2005).

## **§ 7A-109.2. (Contingent effective date — see notes) Records of dispositions in criminal cases; impaired driving integrated data system.**

(a) Each clerk of superior court shall ensure that all records of dispositions in criminal cases, including those records filed electronically, contain all the essential information about the case, including the the name of the presiding judge and the attorneys representing the State and the defendant.

(b) In addition to the information required by subsection (a) of this section for all offenses involving impaired driving as defined by G.S. 20-4.01, all charges of driving while license revoked for an impaired driving license revocation as defined by G.S. 20-28.2, and any other violation of the motor vehicle code involving the operation of a vehicle and the possession, consumption, use, or transportation of alcoholic beverages, the clerk shall include in the electronic records the following information:

- (1) The reasons for any pretrial dismissal by the court.
- (2) The alcohol concentration reported by the charging officer or chemical analyst, if any.
- (3) The reasons for any suppression of evidence. (1998-208, s. 2; 2006-253, s. 20.1.)

**Section Set Out Twice.** — The section above is effective upon the meeting of a contingency described in the Editor's note, below. For this section as effective until the meeting of that contingency, see the main volume. See Editor's note.

**Editor's Note.** — Session Laws 2006-253, s. 1, provides: "This act shall be known as 'The Motor Vehicle Driver Protection Act of 2006'."

Session Laws 2006-253, s. 20.1, substituted "the name" for "identity" and failed to delete the preceding "the" in subsection (a). Subsection (a) has been set out at the direction of the Revisor of Statutes.

Session Laws 2006-253, s. 33, provides in

part: "Sections 20.1, 20.2, and the requirement that the Administrative Office of the Courts electronically record certain data contained in subsection (c) of G.S. 20-138.4, as amended by Section 19 of this act, become effective after the next rewrite of the superior court clerks system by the Administrative Office of the Courts."

**Effect of Amendments.** — Session Laws 2006-253, s. 20.1, effective December 1, 2006, added "impaired driving integrated data system" in the section heading; inserted the subsection (a) designation and substituted "the name" for "identity" in subsection (a); and added subsection (b).

## **§ 7A-109.4. Records of offenses involving impaired driving.**

The clerk of superior court shall maintain all records relating to an offense involving impaired driving as defined in G.S. 20-4.01(24a) for a minimum of 10 years from the date of conviction. Prior to destroying the record, the clerk shall record the name of the defendant, the judge, the prosecutor, and the attorney or whether there was a waiver of attorney, the alcohol concentration or the fact of refusal, the sentence imposed, and whether the case was appealed to superior court and its disposition. (2006-253, s. 24.)

**Editor's Note.** — Session Laws 2006-253, s. 1, provides: "This act shall be known as 'The Motor Vehicle Driver Protection Act of 2006'."

Session Laws 2006-253, s. 33, made this

section effective December 1, 2006, and applicable to offenses committed on or after that date.



SUBCHAPTER IV. DISTRICT COURT DIVISION OF THE  
GENERAL COURT OF JUSTICE.

ARTICLE 13.

*Creation and Organization of the District Court Division.*

§ 7A-132. Judges, district attorneys, full-time assistant  
district attorneys and magistrates for district  
court districts.

Each district court district shall have one or more judges and one district attorney. Each county within each district shall have at least one magistrate. For each district the General Assembly shall prescribe the numbers of district judges, and the numbers of full-time assistant district attorneys. For each county within each district the General Assembly shall prescribe a minimum number of magistrates. (1965, c. 310, s. 1; 1967, c. 1049, s. 5; 1973, c. 47, s. 2; 2006-187, s. 7(b).)

**Effect of Amendments.** — Session Laws 2006-187, s. 7(b), effective July 1, 2006, deleted “and a maximum” preceding “number of magistrates” at the end of the second paragraph.

§ 7A-133. Numbers of judges by districts; numbers of magistrates and additional seats of court, by counties.

(a) **(Contingent expiration date — See Editor’s note.)** Each district court district shall have the numbers of judges as set forth in the following table:

District	Judges	County
1	5	Camden
		Chowan
		Currituck
		Dare
		Gates
		Pasquotank
		Perquimans
2	4	Martin
		Beaufort
		Tyrrell
		Hyde
		Washington
3A	5	Pitt
3B	5	Craven
		Pamlico
		Carteret
4	8	Sampson
		Duplin
		Jones
		Onslow

**G.S. 7A-133(a) is set out twice. See notes.**

District	Judges	County
5	8	New Hanover
		Pender
6A	2	Halifax
6B	3	Northampton
		Bertie
		Hertford
7	7	Nash
		Edgecombe
		Wilson
8	6	Wayne
		Greene
		Lenoir
9	4	Granville
		(part of Vance
		see subsection (b))
		Franklin
9A	2	Person
		Caswell
9B	2	Warren
		(part of Vance
		see subsection (b))
10	15	Wake
11	8	Harnett
		Johnston
		Lee
12	9	Cumberland
13	6	Bladen
		Brunswick
		Columbus
14	6	Durham
15A	4	Alamance
15B	4	Orange
		Chatham
16A	3	Scotland
		Hoke
16B	5	Robeson
17A	2	Rockingham
17B	4	Stokes
		Surry
18	12	Guilford
19A	4	Cabarrus
19B	6	Montgomery
		Moore
		Randolph
19C	4	Rowan

**G.S. 7A-133(a) is set out twice. See notes.**

District	Judges	County
20A	4	Stanly Anson Richmond
20B	1	(part of Union see subsection (b))
20C	2	(part of Union see subsection (b))
21	9	Forsyth
22	9	Alexander Davidson Davie Iredell
23	4	Alleghany Ashe Wilkes Yadkin
24	4	Avery Madison Mitchell Watauga Yancey
25	8	Burke Caldwell Catawba
26	17	Mecklenburg
27A	6	Gaston
27B	4	Cleveland Lincoln
28	6	Buncombe
29A	3	McDowell Rutherford
29B	4	Henderson Polk Transylvania
30	5	Cherokee Clay Graham Haywood Jackson Macon Swain.

(a) **(Contingent effective date — see Editor’s note)** Each district court district shall have the numbers of judges as set forth in the following table:



**G.S. 7A-133(a) is set out twice. See notes.**

District	Judges	County
1	5	Camden Chowan Currituck Dare Gates Pasquotank Perquimans
2	4	Martin Beaufort Tyrrell Hyde Washington
3A	5	Pitt
3B	6	Craven Pamlico Carteret
4	8	Sampson Duplin Jones Onslow
5	8	New Hanover Pender
6A	3	Halifax
6B	3	Northampton Bertie Hertford
7	7	Nash Edgecombe Wilson
8	6	Wayne Greene Lenoir
9	4	Granville (part of Vance see subsection (b)) Franklin
9A	2	Person Caswell
9B	2	Warren (part of Vance see subsection (b))
10	16	Wake
11	9	Harnett Johnston Lee
12	9	Cumberland

**G.S. 7A-133(a) is set out twice. See notes.**

District	Judges	County
13	6	Bladen Brunswick Columbus
14	7	Durham
15A	4	Alamance
15B	5	Orange Chatham
16A	3	Scotland Hoke
16B	5	Robeson
17A	3	Rockingham
17B	4	Stokes Surry
18	13	Guilford
19A	4	Cabarrus
19B	7	Montgomery Moore Randolph
19C	5	Rowan
20A	4	Stanly Anson Richmond
(See Editor's Note) 20B	1	(part of Union see subsection (b))
(See Editor's Note) 20C	2	(part of Union see subsection (b))
21	9	Forsyth
22	9	Alexander Davidson Davie Iredell
23	4	Alleghany Ashe Wilkes Yadkin
24	4	Avery Madison Mitchell Watauga Yancey
25	9	Burke Caldwell Catawba
26	18	Mecklenburg
27A	7	Gaston

G.S. 7A-133(a) is set out twice. See notes.

District	Judges	County
27B	5	Cleveland Lincoln
28	7	Buncombe
29A	3	McDowell Rutherford
29B	4	Henderson Polk Transylvania
30	6	Cherokee Clay Graham Haywood Jackson Macon Swain.

- (b) For district court districts of less than a whole county, or with part or all of one county with part of another, the composition of the district is as follows:
- (1) District Court District 9 consists of Franklin and Granville Counties and the remainder of Vance County not in District Court District 9B.
  - (2) District Court District 9B consists of Warren County and East Henderson I, North Henderson I, North Henderson II, Middleburg, Townsville, and Williamsboro Precincts of Vance County.
  - (3) District Court District 20C consists of the remainder of Union County not in District Court District 20B.
  - (4) District Court District 20B consists of Precinct 01: Tract 204.01: Block Group 2: Block 2040, Block 2057, Block 2058, Block 2060, Block 2061, Block 2062, Block 2064, Block 2065; Tract 204.02: Block Group 2: Block 2001, Block 2002, Block 2003, Block 2004, Block 2005, Block 2006, Block 2007, Block 2008, Block 2009, Block 2010, Block 2011, Block 2012, Block 2013, Block 2014, Block 2015, Block 2016, Block 2017, Block 2018, Block 2023, Block 2024, Block 2025, Block 2026, Block 2027, Block 2028, Block 2029, Block 2030, Block 2031, Block 2032, Block 2033, Block 2034; Block Group 3: Block 3000, Block 3003, Block 3004, Block 3005, Block 3006, Block 3007, Block 3008, Block 3009, Block 3010, Block 3011, Block 3012, Block 3013, Block 3014, Block 3015, Block 3016, Block 3017, Block 3018, Block 3019, Block 3020, Block 3021, Block 3022, Block 3023, Block 3024, Block 3025, Block 3026, Block 3027, Block 3028, Block 3029, Block 3030, Block 3031, Block 3032, Block 3033, Block 3034, Block 3035, Block 3036, Block 3037, Block 3038, Block 3039, Block 3040, Block 3041, Block 3042, Block 3043, Block 3044, Block 3045, Block 3046, Block 3047; Block Group 4: Block 4035, Block 4054, Block 4055; Precinct 02: Tract 205: Block Group 1: Block 1000, Block 1001, Block 1002, Block 1003, Block 1004, Block 1005, Block 1006, Block 1007, Block 1009, Block 1010, Block 1011, Block 1012, Block 1013, Block 1014, Block 1015, Block 1016, Block 1017, Block 1018, Block 1019, Block 1020, Block 1021, Block 1022, Block 1023, Block 1037, Block 1038; Block Group 2: Block 2081, Block 2082, Block 2092, Block 2099, Block 2100, Block 2101, Block 2102; Tract 206: Block Group 3: Block 3036, Block 3038,



Block 3039, Block 3040, Block 3048; Block Group 4: Block 4053; Precinct 03, Precinct 04, Precinct 06: Tract 202.02: Block Group 1: Block 1012, Block 1013, Block 1014, Block 1015, Block 1017, Block 1018, Block 1021, Block 1022, Block 1023; Tract 204.01: Block Group 2: Block 2000, Block 2001, Block 2002, Block 2003, Block 2004, Block 2005, Block 2033, Block 2034, Block 2035, Block 2036, Block 2041, Block 2042, Block 2043, Block 2044, Block 2045, Block 2056, Block 2063, Block 2999; Precinct 08, Precinct 09, Precinct 10, Precinct 13, Precinct 23: Tract 206: Block Group 4: Block 4051; Precinct 25: Tract 206: Block Group 4: Block 4036; Precinct 34, Precinct 36, Precinct 43 of Union County.

Precinct boundaries as used in this section for Vance County are those shown on maps on file with the Legislative Services Office on May 1, 1991, for Union County, are those shown on the Legislative Services Office's redistricting computer database on January 1, 2005; and for other counties are those reported by the United States Bureau of the Census under Public Law 94-171 for the 1990 Census in the IVTD Version of the TIGER files."

(b1) The qualified voters of District Court District 11 shall elect all eight judges established for the District in subsection (a) of this section, but only persons who reside in Johnston County may be candidates for five of the judgeships, only persons who reside in Harnett County may be candidates for two of the judgeships, and only persons who reside in Lee County may be candidates for the remaining judgeship.

(b2) **(Contingently effective October 1, 2006 — see Editor's note.)** The qualified voters of District Court District 13 shall elect all six judges established for the District in subsection (a) of this section, but only persons who reside in Bladen County may be candidates for one of those judgeships, only persons who reside in Columbus County may be candidates for one of those judgeships, and only persons who reside in Brunswick County may be candidates for two of those judgeships. The district court judgeship established for residents of Bladen County by this subsection shall be the judgeship currently held by Judge Phillips, who resides in Bladen County. The district court judgeship established for residents of Columbus County by this subsection shall be the judgeship currently held by Judge Jolly, who resides in Columbus County. The district court judgeships established for residents of Brunswick County by this subsection shall be the judgeships currently held by Judge Barefoot and Judge Warren, who reside in Brunswick County. Those judges' successors shall be elected for four-year terms in the 2008 general election. Candidates for the remaining judgeships in District 13 may be residents of any county within the district.

(c) Each county shall have the numbers of magistrates and additional seats of district court, as set forth in the following table:

County	Magistrates Min.	Additional Seats of Court
Camden	3	
Chowan	3	
Currituck	4	
Dare	6	
Gates	2	
Pasquotank	5	
Perquimans	3	
Martin	4	
Beaufort	5.05	

County	Magistrates Min.	Additional Seats of Court
Tyrrell	3	
Hyde	3.5	
Washington	4	
Pitt	10.5	Farmville Ayden Havelock
Craven	10	
Pamlico	3	
Carteret	9	
Sampson	7	
Duplin	8	
Jones	2	
Onslow	11	
New Hanover	11	
Pender	4.8	
Halifax	12	Roanoke Rapids, Scotland Neck
Northampton	5.25	
Bertie	5	
Hertford	6	
Nash	9	Rocky Mount
Edgecombe	7	Rocky Mount
Wilson	7	
Wayne	9	Mount Olive
Greene	4	
Lenoir	7	La Grange
Granville	7	
Vance	6	
Warren	3.5	
Franklin	7	
Person	4	
Caswell	4	
Wake	18.5	Apex, Wendell, Fuquay- Varina, Wake Forest
Harnett	10	Dunn
Johnston	11	Benson, Clayton, Selma
Lee	5.5	
Cumberland	19	
Bladen	5	
Brunswick	9	
Columbus	9.5	Tabor City
Durham	13	

County	Magistrates Min.	Additional Seats of Court
Alamance	12	Burlington
Orange	9	Chapel Hill
Chatham	6	Siler City
Scotland	5	
Hoke	5	
Robeson	15	Fairmont, Maxton, Pembroke, Red Springs, Rowland, St. Pauls
Rockingham	9	Reidsville, Eden, Madison
Stokes	5	
Surry	9	Mt. Airy
Guilford	24.4	High Point
Cabarrus	9	Kannapolis
Montgomery	5	
Randolph	10	Liberty
Rowan	9	
Stanly	6	
Union	7	
Anson	5	
Richmond	6	Hamlet
Moore	6.5	Southern Pines
Forsyth	15	Kernersville
Alexander	4	
Davidson	10	Thomasville
Davie	4	
Iredell	9	Mooresville
Alleghany	2	
Ashe	4	
Wilkes	6	
Yadkin	4	
Avery	4	
Madison	4	
Mitchell	4	
Watauga	5	
Yancey	3	
Burke	6.75	
Caldwell	7	
Catawba	10	Hickory
Mecklenburg	26.50	
Gaston	17	
Cleveland	8	



County	Magistrates Min.	Additional Seats of Court
Lincoln	6	
Buncombe	15	
Henderson	6.5	
McDowell	4.5	
Polk	4	
Rutherford	7	
Transylvania	4	
Cherokee	4	
Clay	2	
Graham	2	
Haywood	6.75	Canton
Jackson	5	
Macon	3.5	
Swain	3.75	

(1965, c. 310, s. 1; 1967, c. 691, s. 8; 1969, c. 1190, s. 10; c. 1254; 1971, c. 377, s. 7; cc. 727, 840, 841, 842, 843, 865, 866, 898; 1973, cc. 132, 373, 483; c. 838, s. 1; c. 1376; 1975, c. 956, ss. 8, 10; 1977, cc. 121, 122; c. 678, s. 2; c. 947, s. 1; c. 1130, ss. 4, 5; 1977, 2nd Sess., c. 1238, s. 3; c. 1243, ss. 3, 6; 1979, c. 465; c. 838, ss. 117, 118; c. 1072, ss. 2, 3; 1979, 2nd Sess., c. 1221, s. 2; 1981, c. 964, s. 4; 1983, c. 881, s. 5; 1983 (Reg. Sess., 1984), c. 1109, s. 5; 1985, c. 698, ss. 7(a), 12; 1985 (Reg. Sess., 1986), c. 1014, s. 222; 1987, c. 738, ss. 126(a), 130(a); 1987 (Reg. Sess., 1988), c. 1056, s. 4; c. 1075; c. 1100, s. 17.2(a); 1989, c. 795, s. 23(a), (d), (h); 1991, c. 742, ss. 11, 12(a); 1993, c. 321, ss. 200.4(e), 200.6(a), (d); 1993 (Reg. Sess., 1994), c. 769, s. 24.9; 1995, c. 507, s. 21.1(c); 1995 (Reg. Sess., 1996), c. 589, s. 2(a); 1996, 2nd Ex. Sess., c. 18, ss. 22.4, 22.7(a); 1997-443, ss. 18.12(a), 18.13; 1998-212, ss. 16.11, 16.16(a); 1998-217, s. 67.3(a); 1999-237, ss. 17.4, 17.6(a); 2000-67, ss. 15.2, 15.3(a); 2001-400, s. 1; 2001-424, ss. 22.16, 22.17(a); 2003-284, s. 13.8; 2004-124, ss. 14.1(a), 14.6(e); 2005-276, s. 14.2(f), (f1); 2005-345, s. 27(a), (b); 2006-66, ss. 14.4(a), 14.5; 2006-96, s. 1; 2006-187, s. 7(a); 2006-221, s. 14(a); 2006-264, s. 93(a).)

**Subsection (a) is set out twice.** — The first version of subsection (a) set out above is effective until January 15, 2007, or the date upon which approval is received under Section 5 of the Voting Rights Act of 1965, whichever is later. The second version of subsection (a) set out above is effective January 15, 2007, or the date upon which approval is received under Section 5 of the Voting Rights Act of 1965, whichever is later.

**Additional judgeship — Union County.** — Section 14.4(a) of Session Laws 2006-66 substituted “4” for “3” as the number of district court judges in District Court District 20B (Union County) in subsection (a) of this section. Section 14.4(a), however, fails to take into account the earlier amendment by Session Laws 2006-276, s. 14.2(f1), as added by Session Laws 2005-345, s. 27(a), which divided District Court District 20B (Union County) into District Court

Districts 20B, with one district court judge, and 20C, with two district court judges. At the time Session Laws 2006-66 was enacted, District Court District 20B had only one district court judge, not three, and Union County had two district court districts, not one. The amendment by s. 14.4(a) as it applies to Union County cannot be effectively codified. The Revisor of Statutes has directed that subsection (a) be set out in the form above and that the amendment by s. 14.4 as it applies to Union County be described in this editor’s note.

**Preclearance Under § 5 of the Voting Rights Act.** — For information on receipt of preclearance, please refer to the *North Carolina Register* (website at <http://www.oah.state.nc.us/rules/register>) or the Administrative Office of the Courts (website at <http://www.nccourts.org>) as described in Chapter 120, Article 6A, G.S. 120-30.9A et seq.

Session Laws 2005-276, s. 14.2(q), provides, in part: "With respect to the division of District Court District 20, subsections (f) through (k) of this section become effective December 1, 2005, or the date upon which subsection (f) of this section is approved under section 5 of the Voting Rights Act of 1965, whichever is later. With respect to the division of District Court District 29, subsections (f) through (k) of this section become effective December 1, 2005." Preclearance was received from the U.S. Department of Justice by letter dated January 5, 2006.

Session Laws 2006-66, s. 14.4(c), provides: "This section becomes effective January 15, 2007, as to any district court district not subject to section 5 of the Voting Rights Act of 1965. As to any district court district subject to section 5 of the Voting Rights Act of 1965, it becomes effective January 15, 2007, or the date upon which the additional judge added for that district by subsection (a) of this section is approved under section 5 of the Voting Rights Act of 1965, whichever is later."

Session Laws 2006-96, s. 5, provides in part: "Section 1 of this act, which added subsection (b2), becomes effective October 1, 2006, or the date upon which Section 1 of this act is approved under section 5 of the Voting Rights Act of 1965, whichever is later."

**Editor's Note.** — Session Laws 2006-66, s. 1.2, provides: "This act shall be known as 'The Current Operations and Capital Improvements Appropriations Act of 2006'."

Session Laws 2006-66, s. 14.4(b), provides: "The Governor shall appoint the additional district court judges for Districts 3B, 6A, 10, 11, 14, 15B, 17A, 18, 19B, 19C, 20B, 25, 26, 27A, 27B, 28, and 30 authorized by this act, and those judges' successors shall be elected in the 2008 election for four-year terms commencing on January 1, 2009."

Session Laws 2006-66, s. 28.3, provides: "Except for statutory changes or other provisions

that clearly indicate an intention to have effects beyond the 2006 2007 fiscal year, the textual provisions of this act apply only to funds appropriated for, and activities occurring during, the 2006 2007 fiscal year."

Session Laws 2006-66, s. 28.6 is a severability clause.

Session Laws 2006-264, s. 93(b) and (c), provide: "(b) This section becomes effective December 1, 2005, or the date upon which Section 14.2(f) of S.L. 2005-276 is approved under section 5 of the Voting Rights Act of 1965, whichever is later.

"(c) If House Bill 198, 2005 Regular Session, becomes law, this section is repealed." House Bill 198 did not become law.

#### **Effect of Amendments.** —

Session Laws 2006-66, s. 14.4(a), effective January 15, 2007, rewrote subsection (a). For contingency, see Editor's note. For Districts 20B and 20C, see Editor's note.

Session Laws 2006-66, s. 14.4(a), as amended by Session Laws 2006-221, s. 14(a), effective January 15, 2007, substituted "7" for "6" under "Judges" in Districts 27A and 28.

Session Laws 2006-66, s. 14.5, as amended by Session Laws 2006-187, s. 7(a), effective July 1, 2006, adjusted the number of magistrates in subsection (c).

Session Laws 2006-96, s. 1, effective October 1, 2006, or the date upon which Section 1 of the act is approved under Section 5 of the Voting Rights Act of 1965, whichever is later, added subsection (b2).

Session Laws 2006-264, s. 93(a), effective December 1, 2005, or the date upon which Section 14.2(f) of S.L. 2005-276 is approved under section 5 of the Voting Rights Act of 1965, whichever is later, in subdivision (b)(3), substituted "District 20C" for "District 20B", and "District 20B" for "District 20C"; and in subdivision (b)(4), substituted "District 20B" for "District 20C". S.L. 2005-276, s. 14.2(f) became effective January 5, 2006.

## ARTICLE 16.

### *Magistrates.*

#### **§ 7A-171. Numbers; appointment and terms; vacancies.**

(a) The General Assembly shall establish a minimum quota of magistrates for each county. In no county shall the minimum quota be less than one. The number of magistrates in a county, above the minimum quota set by the General Assembly, is determined by the Administrative Office of the Courts after consultation with the chief district court judge for the district in which the county is located.

(a1) The initial term of appointment for a magistrate is two years and subsequent terms shall be for a period of four years. The term of office begins on the first day of January of the odd-numbered year after appointment. The



service of an individual as a magistrate filling a vacancy as provided in subsection (d) of this section does not constitute an initial term. For purposes of this section, any term of office for a magistrate who has served a two-year term is for four years even if the two-year term of appointment was before the effective date of this section, the term is after a break in service, or the term is for appointment in a different county from the county where the two-year term of office was served.

(b) Not earlier than the Tuesday after the first Monday nor later than the third Monday in December of each even-numbered year, the clerk of the superior court shall submit to the senior regular resident superior court judge of the district or set of districts as defined in G.S. 7A-41.1(a) in which the clerk's county is located the names of two (or more, if requested by the judge) nominees for each magisterial office for the county for which the term of office of the magistrate holding that position shall expire on December 31 of that year. Not later than the fourth Monday in December, the senior regular resident superior court judge shall, from the nominations submitted by the clerk of the superior court, appoint magistrates to fill the positions for each county of the judge's district or set of districts.

(c) If an additional magisterial office for a county is approved to commence on January 1 of an odd-numbered year, the new position shall be filled as provided in subsection (b) of this section. If the additional position takes effect at any other time, it is to be filled as provided in subsection (d) of this section.

(d) Within 30 days after a vacancy in the office of magistrate occurs the clerk of superior court shall submit to the senior regular resident superior court judge the names of two (or more, if so requested by the judge) nominees for the office vacated. Within 15 days after receipt of the nominations the senior regular resident superior court judge shall appoint from the nominations received a magistrate who shall take office immediately and shall serve until December 31 of the even-numbered year, and thereafter the position shall be filled as provided in subsection (b) of this section. (1965, c. 310, s. 1; 1967, c. 691, s. 15; 1971, s. 84, s. 1; 1973, c. 503, s. 2; 1977, c. 945, ss. 3, 4; 1987 (Reg. Sess., 1988), c. 1037, s. 17; 2004-128, s. 19; 2006-187, s. 7(c).)

**Effect of Amendments. —**

Session Laws 2006-187, s. 7(c), effective July 1, 2006, in subsection (a), deleted "and a maximum" preceding "quota of magistrates" in the

first sentence, and substituted "above the minimum quota" for "within the quota" in the second sentence.

## **§ 7A-171.1. Duty hours, salary, and travel expenses within county.**

(a) The Administrative Officer of the Courts, after consultation with the chief district judge and pursuant to the following provisions, shall set an annual salary for each magistrate.

- (1) A full-time magistrate shall be paid the annual salary indicated in the table set out in this subdivision. A full-time magistrate is a magistrate who is assigned to work an average of not less than 40 hours a week during the term of office. The Administrative Officer of the Courts shall designate whether a magistrate is full-time. Initial appointment shall be at the entry rate. A magistrate's salary shall increase to the next step every two years on the anniversary of the date the magistrate was originally appointed for increases to Steps 1 through 3, and every four years on the anniversary of the date the magistrate was originally appointed for increases to Steps 4 through 6.



*Table of Salaries of Full-Time Magistrates*

<i>Step Level</i>	<i>Annual Salary</i>
<i>Entry Rate</i>	\$30,320
<i>Step 1</i>	33,101
<i>Step 2</i>	36,126
<i>Step 3</i>	39,429
<i>Step 4</i>	43,046
<i>Step 5</i>	47,122
<i>Step 6</i>	51,692.

- (2) A part-time magistrate is a magistrate who is assigned to work an average of less than 40 hours of work a week during the term, except that no magistrate shall be assigned an average of less than 10 hours of work a week during the term. A part-time magistrate is included, in accordance with G.S. 7A-170, under the provisions of G.S. 135-1(10) and G.S. 135-40.2(a). The Administrative Officer of the Courts designates whether a magistrate is a part-time magistrate. A part-time magistrate shall receive an annual salary based on the following formula: The average number of hours a week that a part-time magistrate is assigned work during the term shall be multiplied by the annual salary payable to a full-time magistrate who has the same number of years of service prior to the beginning of that term as does the part-time magistrate and the product of that multiplication shall be divided by the number 40. The quotient shall be the annual salary payable to that part-time magistrate.

- (3) Notwithstanding any other provision of this subsection, a magistrate who is licensed to practice law in North Carolina or any other state shall receive the annual salary provided in the Table in subdivision (1) of this subsection for Step 4.

(a1) Notwithstanding subsection (a) of this section, the following salary provisions apply to individuals who were serving as magistrates on June 30, 1994:

- (1) The salaries of magistrates who on June 30, 1994, were paid at a salary level of less than five years of service under the table in effect that date shall be as follows:

<i>Less than 1 year of service</i>	\$24,450
<i>1 or more but less than 3 years of service</i>	25,572
<i>3 or more but less than 5 years of service</i>	27,831.

Upon completion of five years of service, those magistrates shall receive the salary set as the Entry Rate in the table in subsection (a).

- (2) The salaries of magistrates who on June 30, 1994, were paid at a salary level of five or more years of service shall be based on the rates set out in subsection (a) as follows:

<i>Salary Level</i> <i>on June 30, 1994</i>	<i>Salary Level</i> <i>on July 1, 1994</i>
<i>5 or more but less than 7 years of service</i>	<i>Entry Rate</i>
<i>7 or more but less than 9 years of service</i>	<i>Step 1</i>
<i>9 or more but less than 11 years of service</i>	<i>Step 2</i>
<i>11 or more years of service</i>	<i>Step 3</i>

Thereafter, their salaries shall be set in accordance with the provisions in subsection (a).

- (3) The salaries of magistrates who are licensed to practice law in North Carolina shall be adjusted to the annual salary provided in the table in subsection (a) as Step 4, and, thereafter, their salaries shall be set in accordance with the provisions in subsection (a).

- (4) The salaries of “part-time magistrates” shall be set under the formula set out in subdivision (2) of subsection (a) but according to the rates set out in this subsection.

(a2) The Administrative Officer of the Courts shall provide magistrates with longevity pay at the same rates as are provided by the State to its employees subject to the State Personnel Act.

(b) Notwithstanding G.S. 138-6, a magistrate may not be reimbursed by the State for travel expenses incurred on official business within the county in which the magistrate resides. (1977, c. 945, s. 5; 1979, c. 838, s. 84; c. 991; 1979, 2nd Sess., c. 1137, s. 11; 1981, c. 914, s. 1; c. 1127, s. 11; 1983, c. 761, s. 199; c. 923, s. 217; 1983 (Reg. Sess., 1984), c. 1034, ss. 84, 211; 1985, c. 479, s. 210; c. 698, ss. 13(a), (b) (14); 791, s. 39.1; 1985 (Reg. Sess., 1986), c. 1014, ss. 36, 223(a); 1987, c. 564, s. 12; c. 738, ss. 22, 34; 1987 (Reg. Sess., 1988), c. 1086, s. 16; 1989, c. 752, s. 33; 1991, c. 742, s. 14(a); 1991 (Reg. Sess., 1992), c. 900, ss. 41, 43; c. 1044, s. 9.1; 1993, c. 321, s. 60; 1993 (Reg. Sess., 1994), c. 769, s. 7.13(b), (c); 1995, c. 507, s. 7.7(a), (b); 1996, 2nd Ex. Sess., c. 18, s. 28.6(a), (b); 1999-237, s. 28.6(a), (b); 2000-67, s. 26.6; 2001-424, s. 32.7; 2004-124, s. 31.7(b); 2005-276, s. 29.7(a), (b); 2006-66, s. 22.7(a), (b).)

#### Editor’s Note. —

Session Laws 2006-66, s. 1.2, provides: “This act shall be known as ‘The Current Operations and Capital Improvements Appropriations Act of 2006’.”

Session Laws 2006-66, s. 28.6 is a severability clause.

#### Effect of Amendments. —

Session Laws 2006-66, s. 22.7(a) and (b), effective July 1, 2006, updated the “Table of Salaries of Full-Time Magistrates” in subdivision (a)(1); and updated the salaries in subdivision (a1)(1).

## § 7A-177. Training course in duties of magistrate.

(a) Within six months of taking the oath of office as a magistrate for the first time, a magistrate is required to attend and satisfactorily complete a course of basic training of at least 40 hours in the civil and criminal duties of a magistrate. The Administrative Office of the Courts is authorized to contract with the School of Government at the University of North Carolina at Chapel Hill or with any other qualified educational organization to conduct this training, and to reimburse magistrates for travel and subsistence expenses incurred in taking such training.

(b) Training courses shall be provided at such times and locations as necessary to assure that they are conveniently available to all magistrates without extensive travel to other parts of the State. Courses shall be provided in Asheville for the magistrates from the western region of the State. (1975, c. 956, s. 11; 1983 (Reg. Sess., 1984), c. 1116, s. 87; 2006-264, s. 29(a).)

**Effect of Amendments.** — Session Laws 2006-264, s. 29(a), effective August 27, 2006, substituted “School of Government at the Uni-

versity of North Carolina at Chapel Hill” for “Institute of Government” in subsection (a).

## ARTICLE 18.

### *District Court Practice and Procedure Generally.*

## § 7A-193. Civil procedure generally.

#### CASE NOTES

**Applied in** *In re J.B.*, 172 N.C. App. 1, 616 S.E.2d 264, 2005 N.C. App. LEXIS 1589 (2005).

## ARTICLE 19.

*Small Claim Actions in District Court.***§ 7A-218. Answer of defendant.**

## CASE NOTES

**Failure to Plead Affirmative Defense on Appeal.** — When a landlord successfully sued a tenant for summary ejectment in small claims court, and the tenant obtained a trial de novo in district court, the tenant was not required to file an answer to preserve its affirmative defense of estoppel for a trial de novo in the district court because there were no required

pleadings in assigned small claim actions other than the complaint, and defendant's failure to file an answer in small claims court after being subjected to the jurisdiction of the court over his person was a general denial. *Don Setliff & Assocs. v. Subway Real Estate Corp.*, — N.C. App. —, 631 S.E.2d 526, 2006 N.C. App. LEXIS 1414 (2006).

**§ 7A-219. Certain counterclaims; cross claims; third-party claims not permissible.**

## CASE NOTES

**Applied** in *Don Setliff & Assocs. v. Subway Real Estate Corp.*, — N.C. App. —, 631 S.E.2d 526, 2006 N.C. App. LEXIS 1414 (2006).

**§ 7A-220. No required pleadings other than complaint.**

## CASE NOTES

**Assertion of Affirmative Defense on Appeal.** — When a landlord successfully sued a tenant for summary ejectment in small claims court, and the tenant obtained a trial de novo in district court, the tenant did not waive its affirmative defense of estoppel by not pleading it in district court because, in small claims

court, the only pleading was the complaint, and on appeal to district court, the district court judge could elect to try the case on the pleadings filed, so the tenant did not waive its affirmative defense. *Don Setliff & Assocs. v. Subway Real Estate Corp.*, — N.C. App. —, 631 S.E.2d 526, 2006 N.C. App. LEXIS 1414 (2006).

**§ 7A-229. Trial de novo on appeal.**

## CASE NOTES

**District Court Could Decide Trial De Novo on Appeal on the Basis of Just the Pleadings.** —

When a landlord successfully sued a tenant for summary ejectment in small claims court, and the tenant obtained a trial de novo in district court, the tenant did not waive its affirmative defense of estoppel by not pleading

it in district court because, in small claims court, the only pleading was the complaint, and on appeal to district court, the district court judge could elect to try the case on the pleadings filed, so the tenant did not waive its affirmative defense. *Don Setliff & Assocs. v. Subway Real Estate Corp.*, — N.C. App. —, 631 S.E.2d 526, 2006 N.C. App. LEXIS 1414 (2006).



SUBCHAPTER V. JURISDICTION AND POWERS OF THE TRIAL DIVISIONS OF THE GENERAL COURT OF JUSTICE.

ARTICLE 20.

*Original Civil Jurisdiction of the Trial Divisions.*

§ 7A-240. Original civil jurisdiction generally.

CASE NOTES

**Dispute Over Settlement Agreement.** — When petitioner on appeal from an order of the clerk of superior court attacked a prior court decision, there was no merit to her claim that the prior decision was void for lack of subject matter jurisdiction; the trial court had not been addressing an estate matter under G.S. 28A-2-1 but determining whether there were issues

of fact about the terms of a settlement agreement following a mediation; it had jurisdiction under G.S. 7A-240 to do this, as it later had jurisdiction to enforce a settlement agreement reached by the parties. *In re Estate of Whitaker*, — N.C. App. —, 633 S.E.2d 849, 2006 N.C. App. LEXIS 1902 (2006).

§ 7A-241. Original jurisdiction in probate and administration of decedents' estates.

CASE NOTES

**Cited in** *In re Estate of Whitaker*, — N.C. App. —, 633 S.E.2d 849, 2006 N.C. App. LEXIS 1902 (2006).

ARTICLE 22.

*Jurisdiction of the Trial Divisions in Criminal Actions.*

§ 7A-271. Jurisdiction of superior court.

CASE NOTES

I. General Consideration.

**I. GENERAL CONSIDERATION.**

**Cited in** *State v. Speight*, 359 N.C. 602, 614 S.E.2d 262, 2005 N.C. LEXIS 645 (2005); *State*

*v. Bowden*, — N.C. App. —, 630 S.E.2d 208, 2006 N.C. App. LEXIS 1218 (2006).

§ 7A-272. Jurisdiction of district court; concurrent jurisdiction in guilty or no contest pleas for certain felony offenses; appellate and appropriate relief procedures applicable.

CASE NOTES

I. General Consideration.

**I. GENERAL CONSIDERATION.**

**Cited** in *State v. Speight*, 359 N.C. 602, 614 S.E.2d 262, 2005 N.C. LEXIS 645 (2005); *State*

*v. McBride*, 173 N.C. App. 101, 618 S.E.2d 754, 2005 N.C. App. LEXIS 1897 (2005).

**ARTICLE 25.**

*Jurisdiction and Procedure in Criminal Appeals from District Courts.*

**§ 7A-290. Appeals from district court in criminal cases; notice; appeal bond.**

**CASE NOTES****II. Appeal to Superior Court.****II. APPEAL TO SUPERIOR COURT.**

**Trial Court Erred Where Defendant Entitled to Arraignment in Superior Court.**

— By immediately proceeding to trial without defendant's consent on an appeal de novo from a district court, a superior court violated G.S. 15A-943(b), which defendant adequately invoked; as the superior court was not the court of original jurisdiction, the prosecutor never submitted a bill of indictment for defendant nor

was defendant indicted, so there was no 21-day period from which defendant needed to file a written request for an arraignment. A trial de novo in the superior court was a new trial from the beginning to the end, disregarding completely the plea below, and, therefore, since defendant's plea from the district court was completely disregarded, defendant was entitled to an arraignment in superior court. *State v. Vereen*, — N.C. App. —, 628 S.E.2d 408, 2006 N.C. App. LEXIS 847 (2006).

**SUBCHAPTER VI. REVENUES AND EXPENSES OF THE JUDICIAL DEPARTMENT.**

**ARTICLE 28.**

*Uniform Costs and Fees in the Trial Divisions.*

**§ 7A-305. Costs in civil actions.**

**Editor's Note. —**

Session Laws 2006-248, ss. 12.1 through 12.5, provide: "12.1. A House of Representatives Task Force on the Recovery of Costs in Civil Cases is established to review and recommend a resolution to the conflict in North Carolina law regarding the recovery of costs in a civil case. Specifically, the Task Force on the Recovery of Costs in Civil Cases shall study the conflict that exists between G.S. 6-20 and G.S. 7A-305, and the appellate cases interpreting those statutes, and recommend revisions to one or both statutes to resolve that conflict.

"12.2. The Speaker of the House of Representatives shall appoint to serve on the Task Force six members of the House of Representatives and three public members: one member of the North Carolina Academy of Trial Lawyers, one

member of the North Carolina Association of Defense Attorneys, and one member of the North Carolina Bar Association. The Speaker shall appoint a chair from the Task Force membership. The Task Force shall meet upon the call of its chair. A quorum of the Committee shall be a majority of its members.

"12.3. Members of the Task Force shall receive per diem, subsistence, and travel allowances in accordance with G.S. 120-3.1, 138-5, or 138-6, as appropriate. Upon the prior approval of the Legislative Services Commission, the Legislative Services Officer shall assign professional and clerical staff to the Task Force to aid in its work. The Task Force may contract for professional, clerical, or consultant services as provided by G.S. 120-32.02. The Task Force may meet at various locations around the State

to promote greater public participation in its deliberations. Subject to the approval of the Legislative Services Commission, the Task Force may meet in the Legislative Building or the Legislative Office Building. The Task Force, while in the discharge of its official duties, may exercise all the powers provided under the provisions of G.S. 120-19 and G.S. 120-19.1 through G.S. 120-19.4, including the power to request all officers, agents, agencies, and departments of the State to provide any information, data, or documents within their posses-

sion, ascertainable from their records, or otherwise available to them and the power to subpoena witnesses.

"12.4. The Task Force shall report the results of its review and its recommended resolution to the conflict to the Speaker of the House of Representatives by December 31, 2006.

"12.5. From funds appropriated to the General Assembly, the Legislative Services Commission shall allocate funds for the purpose of conducting the study provided for in this Part."

## CASE NOTES

### Authority to Tax Costs Under G.S. 6-20.

— Since the trial court's costs ruling was governed by G.S. 6-20, and thus could be allowed at the discretion of the court, and the doctors had not alleged, and there appeared to the appellate court to be no abuse of discretion in the denial of their request to be reimbursed for the expert witness fees where the verdict was in their favor, the judgment was affirmed. *Smith v. Cregan*, — N.C. App. —, 632 S.E.2d 206, 2006 N.C. App. LEXIS 1568 (2006).

### Expenses Not Enumerated or Otherwise Provided by Law. —

In a negligence case, a trial court improperly awarded the cost of trial exhibits because they were not either set forth in G.S. 7A-305 or recoverable under common law; moreover, the cost of obtaining medical records was not recoverable for the same reason. *Morgan v. Steiner*, 173 N.C. App. 577, 619 S.E.2d 516, 2005 N.C. App. LEXIS 2105 (2005).

### Deposition Expenses. —

In a medical malpractice case, although deposition costs were recoverable under G.S. 7A-305, defendants did not argue in their brief that the trial court abused its discretion in refusing to award this item as costs, nor was there evidence of an abuse of discretion. *Miller v. Forsyth Mem'l Hosp., Inc.*, 173 N.C. App. 385, 618 S.E.2d 838, 2005 N.C. App. LEXIS 2040 (2005).

### Expert Witness Fees. —

In a negligence case, the expert witness fees of two witnesses were taxable under G.S. 7A-314, but fees associated with a third witness testifying on the same issue were not recoverable; in addition, the cost of reviewing records and consulting was not recoverable. *Morgan v. Steiner*, 173 N.C. App. 577, 619 S.E.2d 516, 2005 N.C. App. LEXIS 2105 (2005).

In a medical malpractice case, a trial court did not err by refusing to award expert witness fees because none of the witnesses were under

subpoena. *Miller v. Forsyth Mem'l Hosp., Inc.*, 173 N.C. App. 385, 618 S.E.2d 838, 2005 N.C. App. LEXIS 2040 (2005).

### Fees of Court-Appointed Mediator Are Assessable Costs. —

In a negligence case, a trial court improperly awarded the cost of lunch provided during a mediated settlement conference because, although the mediator's fees was covered under G.S. 7A-305, the lunch associated therewith was not. *Morgan v. Steiner*, 173 N.C. App. 577, 619 S.E.2d 516, 2005 N.C. App. LEXIS 2105 (2005).

**Mediation Costs.** — In a medical malpractice case, trial court erred in denying motion seeking to recover mediation costs because mediation was ordered in all civil actions, and the cost was recoverable under G. S. 7A-305(d)(7). *Miller v. Forsyth Mem'l Hosp., Inc.*, 173 N.C. App. 385, 618 S.E.2d 838, 2005 N.C. App. LEXIS 2040 (2005).

**Costs in Personal Injury Action.** — Trial court erred in awarding numerous costs not authorized for medical reports, deposition costs, filing fees, travel costs, trial exhibits, color copies, and photocopies; there was statutory authority, however, for the following awards: mediation fees pursuant to G.S. 7A-305(d)(7); expert witness fees pursuant to G.S. 7A-305(d)(1); and service of process fees pursuant to G.S. 7A-305(d)(6). *Oakes v. Wooten*, 173 N.C. App. 506, 620 S.E.2d 39, 2005 N.C. App. LEXIS 2100 (2005).

**Costs of Exhibits Not Recoverable.** — Costs associated with trial exhibits were not recoverable under G.S. 7A-305(d), and the refusal to award such costs in a medical malpractice action did not constitute error. *Miller v. Forsyth Mem'l Hosp., Inc.*, 173 N.C. App. 385, 618 S.E.2d 838, 2005 N.C. App. LEXIS 2040 (2005).

**Applied in** *Tillman v. Commer. Credit Loans, Inc.*, — N.C. App. —, 629 S.E.2d 865, 2006 N.C. App. LEXIS 1186 (2006).



## § 7A-308. Miscellaneous fees and commissions.

### **Editor's Note. —**

Session Laws 2006-66, s. 1.2, provides: "This act shall be known as 'The Current Operations and Capital Improvements Appropriations Act of 2006'."

Session Laws 2006-66, s. 14.1, provides: "Notwithstanding the provisions of G.S. 7A-308(c), the Judicial Department may use any balance remaining in the Collection of Worthless Checks Fund on June 30, 2006, for the purchase or repair of office or information technology equipment during the 2006-2007 fiscal year. Prior to using any funds under this section, the Judicial Department shall report to the Joint Legislative Commission on Govern-

mental Operations and the Chairs of the Senate and House of Representatives Appropriations Subcommittees on Justice and Public Safety on the equipment to be purchased or repaired and the reasons for the purchases."

Session Laws 2006-66, s. 28.3, provides: "Except for statutory changes or other provisions that clearly indicate an intention to have effects beyond the 2006-2007 fiscal year, the textual provisions of this act apply only to funds appropriated for, and activities occurring during, the 2006-2007 fiscal year."

Session Laws 2006-66, s. 28.6 is a severability clause.

## § 7A-312. Uniform fees for jurors; meals.

A juror in the General Court of Justice including a petit juror, or a coroner's juror, but excluding a grand juror, shall receive twelve dollars (\$12.00) for the first day of service and twenty dollars (\$20.00) per day afterwards, except that if any person serves as a juror for more than five days in any 24-month period, the juror shall receive forty dollars (\$40.00) per day for each day of service in excess of five days. A grand juror shall receive twenty dollars (\$20.00) per day. A juror required to remain overnight at the site of the trial shall be furnished adequate accommodations and subsistence. If required by the presiding judge to remain in a body during the trial of a case, meals shall be furnished the jurors during the period of sequestration. Jurors from out of the county summoned to sit on a special venire shall receive mileage at the same rate as State employees. (1965, c. 310, s. 1; 1967, c. 1169; 1969, c. 1190, s. 32; 1971, c. 377, s. 26; 1973, c. 503, s. 19; 1979, c. 985; 1983, c. 881, ss. 2, 3; 1989, c. 646, s. 2; 1995, c. 324, ss. 21.1(a), (c); 2006-66, s. 14.17; 2006-187, s. 9.)

**Editor's Note. —** Session Laws 2006-66, s. 1.2, provides: "This act shall be known as 'The Current Operations and Capital Improvements Appropriations Act of 2006'."

Session Laws 2006-66, s. 14.17(b), as added by Session Laws 2006-187, s. 9, provides: "This section applies to persons summoned to serve as jurors on or after August 7, 2006."

Session Laws 2006-66, s. 28.3, provides: "Except for statutory changes or other provisions that clearly indicate an intention to have effects beyond the 2006-2007 fiscal year, the textual provisions of this act apply only to funds appropriated for, and activities occurring during, the 2006-2007 fiscal year."

Session Laws 2006-66, s. 28.6 is a severability clause.

**Effect of Amendments. —** Session Laws 2006-66, s. 14.17, as amended by Session Laws 2006-187, s. 9, effective July 1, 2006, and applicable to persons summoned to serve as jurors on or after August 27, 2006, in the first sentence, substituted "for the first day of service and twenty dollars (\$20.00) per day afterwards" for "per day" and "forty dollars (\$40.00)" for "thirty dollars (\$30.00)"; and in the second sentence, substituted "twenty dollars (\$20.00)" for "twelve dollars (\$12.00)." For applicability provisions, see Editor's note.

## § 7A-314. Uniform fees for witnesses; experts; limit on number.

(a) A witness under subpoena, bound over, or recognized, other than a salaried State, county, or municipal law-enforcement officer, or an out-of-state witness in a criminal case, whether to testify before the court, Judicial Standards Commission, jury of view, magistrate, clerk, referee, commissioner, appraiser, or arbitrator shall be entitled to receive five dollars (\$5.00) per day, or fraction thereof, during his attendance, which, except as to witnesses before

the Judicial Standards Commission, must be certified to the clerk of superior court.

(b) A witness entitled to the fee set forth in subsection (a) of this section, and a law-enforcement officer who qualifies as a witness, shall be entitled to receive reimbursement for travel expenses as follows:

- (1) A witness whose residence is outside the county of appearance but within 75 miles of the place of appearance shall be entitled to receive mileage reimbursement at the rate currently authorized for State employees, for each mile necessarily traveled from his place of residence to the place of appearance and return, each day.
- (2) A witness whose residence is outside the county of appearance and more than 75 miles from the place of appearance shall be entitled to receive mileage reimbursement at the rate currently authorized State employees for one round-trip from his place of residence to the place of appearance. A witness required to appear more than one day shall be entitled to receive reimbursement for actual expenses incurred for lodging and meals not to exceed the maximum currently authorized for State employees, in lieu of daily mileage.

(c) A witness who resides in a state other than North Carolina and who appears for the purpose of testifying in a criminal action and proves his attendance may be compensated at the rate allowed to State officers and employees by subdivisions (1) and (2) of G.S. 138-6(a) for one round-trip from his place of residence to the place of appearance, and five dollars (\$5.00) for each day that he is required to travel and attend as a witness, upon order of the court based upon a finding that the person was a necessary witness. If such a witness is required to appear more than one day, he is also entitled to reimbursement for actual expenses incurred for lodging and meals, not to exceed the maximum currently authorized for State employees.

(d) An expert witness, other than a salaried State, county, or municipal law-enforcement officer, shall receive such compensation and allowances as the court, or the Judicial Standards Commission, in its discretion, may authorize. A law-enforcement officer who appears as an expert witness shall receive reimbursement for travel expenses only, as provided in subsection (b) of this section. Compensation of experts provided under G.S. 7A-454 shall be in accordance with rules established by the Office of Indigent Defense Services.

(e) If more than two witnesses are subpoenaed, bound over, or recognized, to prove a single material fact, the expense of the additional witnesses shall be borne by the party issuing or requesting the subpoena.

(f) In any case in which the Judicial Department is bearing the costs of representation for a party and that party or a witness for that party does not speak or understand the English language, and the court appoints a foreign language interpreter to assist that party or witness, the reasonable fee for the interpreter's services is payable from funds appropriated to the Administrative Office of the Courts. The appointment and payment shall be made in accordance with G.S. 7A-343(9c). (1965, c. 310, s. 1; 1969, c. 1190, s. 34; 1971, c. 377, s. 27; 1973, c. 503, ss. 21, 22; 1983, c. 713, s. 20; 1998-212, s. 16.25(a); 2000-144, s. 3; 2006-187, s. 5(a).)

**Effect of Amendments.** — Session Laws 2006-187, s. 5(a), effective August 3, 2006, rewrote subsection (f).

#### CASE NOTES

**Award of Expert Witness Fees Was Proper.** — Trial court did not err in awarding expert witness fees to two doctors where both expert witnesses were subpoenaed to testify



and provided testimony on the injured person's condition, and where the trial court found that the testimony of both expert witnesses was clear, strong, and convincing and reasonably necessary in the case. *Oakes v. Wooten*, 173 N.C. App. 506, 620 S.E.2d 39, 2005 N.C. App. LEXIS 2100 (2005).

**Experts Must Be Subpoenaed. —**

In a medical malpractice case, a trial court did not err by refusing to award expert witness fees because none of the witnesses were under subpoena. *Miller v. Forsyth Mem'l Hosp., Inc.*, 173 N.C. App. 385, 618 S.E.2d 838, 2005 N.C. App. LEXIS 2040 (2005).

**Trial Court's Discretion Supersedes Even the Issuance of Subpoenas. —**

Since the trial court's costs ruling was governed by G.S. 6-20, and thus could be allowed at

the discretion of the court, and the doctors had not alleged, and there appeared to the appellate court to be no abuse of discretion in the denial of their request to be reimbursed for the expert witness fees where the verdict was in their favor, the judgment was affirmed. *Smith v. Cregan*, — N.C. App. —, 632 S.E.2d 206, 2006 N.C. App. LEXIS 1568 (2006).

**Third witness fees denied. —** In a negligence case, the expert witness fees of two witnesses were taxable under G.S. 7A-314, but fees associated with a third witness testifying on the same issue were not recoverable; in addition, the cost of reviewing records and consulting was not recoverable. *Morgan v. Steiner*, 173 N.C. App. 577, 619 S.E.2d 516, 2005 N.C. App. LEXIS 2105 (2005).

## § 7A-320. Costs are exclusive.

### CASE NOTES

**Deposition fees. —** In a negligence case, deposition costs were recoverable as trial expenses under G.S. 6-20 because they were established by case law prior to the enactment of

G.S. 7A-320 in 1983. *Morgan v. Steiner*, 173 N.C. App. 577, 619 S.E.2d 516, 2005 N.C. App. LEXIS 2105 (2005).

## § 7A-321. Collection of offender fines and fees assessed by the court.

The Judicial Department may, in lieu of payment by cash or check, accept payment by credit card, charge card, or debit card for the fines, fees, and costs owed to the courts by offenders. (2006-187, s. 1(a).)

**Editor's Note. —** Session Laws 2006-187, s. 13, made this section effective August 3, 2006.

## SUBCHAPTER VII. ADMINISTRATIVE MATTERS.

### ARTICLE 29.

#### *Administrative Office of the Courts.*

## § 7A-343. Duties of Director.

The Director is the Administrative Officer of the Courts, and his duties include the following:

- (1) Collect and compile statistical data and other information on the judicial and financial operation of the courts and on the operation of other offices directly related to and serving the courts;
- (2) Determine the state of the dockets and evaluate the practices and procedures of the courts, and make recommendations concerning the number of judges, district attorneys, and magistrates required for the efficient administration of justice;
- (3) Prescribe uniform administrative and business methods, systems, forms and records to be used in the offices of the clerks of superior court;



- (4) Prepare and submit budget estimates of State appropriations necessary for the maintenance and operation of the Judicial Department, and authorize expenditures from funds appropriated for these purposes;
- (5) Investigate, make recommendations concerning, and assist in the securing of adequate physical accommodations for the General Court of Justice;
- (6) Procure, distribute, exchange, transfer, and assign such equipment, books, forms and supplies as are to be acquired with State funds for the General Court of Justice;
- (7) Make recommendations for the improvement of the operations of the Judicial Department;
- (8) Prepare and submit an annual report on the work of the Judicial Department to the Chief Justice, and transmit a copy to each member of the General Assembly;
- (9) Assist the Chief Justice in performing his duties relating to the transfer of district court judges for temporary or specialized duty;
- (9a) Establish and operate systems and services that provide for electronic filing in the court system and further provide electronic transaction processing and access to court information systems pursuant to G.S. 7A-343.2; and
- (9b) Enter into contracts with one or more private vendors to provide for the payment of fines, fees, and costs due to the court by credit, charge, or debit cards; such contracts may provide for the assessment of a convenience or transaction fee by the vendor to cover the costs of providing this service;
- (9c) Prescribe policies and procedures for the appointment and payment of foreign language interpreters in those cases specified in G.S. 7A-314(f). These policies and procedures shall be applied uniformly throughout the General Court of Justice. After consultation with the Joint Legislative Commission on Governmental Operations, the Director may also convert contractual foreign language interpreter positions to permanent State positions when the Director determines that it is more cost-effective to do so; [and]
- (10) Perform such additional duties and exercise such additional powers as may be prescribed by statute or assigned by the Chief Justice. (1965, c. 310, s. 1; 1967, c. 1049, s. 5; 1973, c. 47, s. 2; 1999-237, s. 17.15(a); 2006-187, ss. 1(b), 2(b), 5(b).)

**Editor's Note.** — Session Laws 2006-187, s. 13, provides in part: "Section 2 of this act is effective when it becomes law and applies to all matters filed with the courts on or after the date that the Supreme Court adopts rules for electronic filing as authorized by that section."

Subdivision (9b), as enacted by Session Laws 2006-187, s. 5(b), was redesignated as subdivi-

sion (9c) at the direction of the Revisor of Statutes.

**Effect of Amendments.** — Session Laws 2006-187, ss. 1(b), 2(b), and 5(b), effective August 3, 2006, in subdivision (9a), added "provide for electronic filing in the court system and further"; and added subdivisions (9b) and (9c). For applicability provisions, see Editor's note.

## § 7A-343.2. Court Information Technology Fund.

The Court Information Technology Fund is established within the Judicial Department as a nonreverting, interest-bearing special revenue account. Accordingly, revenue in the Fund at the end of a fiscal year does not revert and interest and other investment income earned by the Fund shall be credited to it. All moneys collected by the Director pursuant to G.S. 7A-109(d) and G.S. 7A-49.5 shall be remitted to the State Treasurer and held in this Fund. Moneys in the Fund shall be used to supplement funds otherwise available to the

Judicial Department for court information technology and office automation needs. The Director shall report by August 1 and February 1 of each year to the Joint Legislative Commission on Governmental Operations, the Chairs of the Senate and House Appropriations Committees, and the Chairs of the Senate and House Appropriations Subcommittees on Justice and Public Safety on all moneys collected and deposited in the Fund and on the proposed expenditure of those funds collected during the preceding six months. (1999-237, s. 17.15(b); 2000-67, s. 15.1; 2006-187, s. 2(d).)

**Editor's Note.** — Session Laws 2006-187, s. 13, provides in part: "Section 2 of this act is effective when it becomes law and applies to all matters filed with the courts on or after the date that the Supreme Court adopts rules for electronic filing as authorized by that section."

**Effect of Amendments.** — Session Laws 2006-187, s. 2(d), effective August 3, 2006, inserted "and G.S. 7A-49.5" in the third sentence. For applicability provisions, see Editor's note.

## § 7A-346.2. Various reports to General Assembly.

**Editor's Note.** —

Session Laws 2006-187, s. 10, provides: "The Administrative Office of Courts, in conjunction with the North Carolina Equal Access to Justice Commission, North Carolina Bar Association, North Carolina Legal Services Planning Council, Legal Aid of North Carolina, Inc., North Carolina Justice Center, and Pisgah Le-

gal Services, Inc., shall study the most effective way to address the increasing numbers of persons who either cannot afford representation or choose to represent themselves in family law matters and in some civil litigation, and report the results of the study to the Joint Appropriations Subcommittee on Justice and Public Safety no later than December 31, 2007."

## § 7A-346.3. (Contingent effective date — see editor's note) Impaired driving integrated data system report.

The information compiled by G.S. 7A-109.2 shall be maintained in an Administrative Office of the Courts database. By March 1, the Administrative Office of the Courts shall provide an annual report of the previous calendar year to the Joint Legislative Commission on Governmental Operations and the Joint Legislative Corrections, Crime Control, and Juvenile Justice Oversight Committee. The annual report shall show the types of dispositions for the entire State by county, by judge, by prosecutor, and by defense attorney. This report shall also include the amount of fines, costs, and fees ordered at the disposition of the charge, the amount of any subsequent reduction, amount collected, and the amount still owed, and compliance with sanctions of community service, jail, substance abuse assessment, treatment, and education. The Administrative Office of the Courts shall facilitate public access to the information collected under this section by posting this information on the court's Internet page in a manner accessible to the public and shall make reports of any information collected under this section available to the public upon request and without charge. (2006-253, s. 20.2.)

**Editor's Note.** — Session Laws 2006-253, s. 1, provides: "This act shall be known as 'The Motor Vehicle Driver Protection Act of 2006.'"

Session Laws 2006-253, s. 33, provides in part: "Sections 20.1, 20.2, and the requirement that the Administrative Office of the Courts electronically record certain data contained in

subsection (c) of G.S. 20-138.4, as amended by Section 19 of this act, become effective after the next rewrite of the superior court clerks system by the Administrative Office of the Courts." The rewrite of the superior court clerks system has not happened.



## § 7A-349. Criminal history record check; denial of employment, contract, or volunteer opportunity.

The Judicial Department may deny employment, a contract, or a volunteer opportunity to any person who refuses to consent to a criminal history check authorized under G.S. 114-19.19 and may dismiss a current employee, terminate a contractor, or terminate a volunteer relationship if that employee, contractor, or volunteer refuses to consent to a criminal history record check authorized under G.S. 114-19.19. (2006-187, s. 3(b).)

**Editor's Note.** — Session Laws 2006-187, s. 13, made this section effective October 1, 2006.

## ARTICLE 30.

### *Judicial Standards Commission.*

## § 7A-374.1. Purpose.

The purpose of this Article is to provide for the investigation and resolution of inquiries concerning the qualification or conduct of any judge or justice of the General Court of Justice. The procedure for discipline of any judge or justice of the General Court of Justice shall be in accordance with this Article. Nothing in this Article shall affect the impeachment of judges under the North Carolina Constitution, Article IV, Sections 4 and 17. (2006-187, s. 11.)

**Editor's Note.** — Session Laws 2006-187, s. 13, made this section effective January 1, 2007.

## § 7A-374.2. Definitions.

Unless the context clearly requires otherwise, the definitions in this section shall apply throughout this Article:

- (1) "Censure" means a finding by the Supreme Court, based upon a written recommendation by the Commission, that a judge has willfully engaged in misconduct prejudicial to the administration of justice that brings the judicial office into disrepute, but which does not warrant the suspension of the judge from the judge's judicial duties or the removal of the judge from judicial office. A censure may require that the judge follow a corrective course of action. Unless otherwise ordered by the Supreme Court, the judge shall personally appear in the Supreme Court to receive a censure.
- (2) "Commission" means the North Carolina Judicial Standards Commission.
- (3) "Incapacity" means any physical, mental, or emotional condition that seriously interferes with the ability of a judge to perform the duties of judicial office.
- (4) "Investigation" means the gathering of information with respect to alleged misconduct or disability.
- (5) "Judge" means any justice or judge of the General Court of Justice of North Carolina, including any retired justice or judge who is recalled for service as an emergency judge of any division of the General Court of Justice.
- (6) "Letter of caution" means a written action of the Commission that cautions a judge not to engage in certain conduct that violates the Code of Judicial Conduct as adopted by the Supreme Court.



- (7) "Public reprimand" means a written action of the Commission issued upon a finding by the Commission that a judge has violated the Code of Judicial Conduct and has engaged in conduct prejudicial to the administration of justice, but that misconduct is minor and does not warrant a recommendation by the Commission that the judge be disciplined by the Supreme Court. A public reprimand may require that the judge follow a corrective course of action.
- (8) "Remove" or "removal" means a finding by the Supreme Court, based upon a written recommendation by the Commission, that a judge should be relieved of all duties of the judge's office and disqualified from holding further judicial office.
- (9) "Suspend" or "suspension" means a finding by the Supreme Court, based upon a written recommendation by the Commission, that a judge should be relieved of the duties of the judge's office for a period of time, and upon conditions, including those regarding treatment and compensation, as may be specified by the Supreme Court. (2006-187, §. 11.)

**Editor's Note.** — Session Laws 2006-187, s. 13, made this section effective January 1, 2007.

## § 7A-375. Judicial Standards Commission.

(a) The Judicial Standards Commission shall consist of the following residents of North Carolina: one Court of Appeals judge, two superior court judges, and two district court judges, each appointed by the Chief Justice of the Supreme Court; four members of the State Bar who have actively practiced in the courts of the State for at least 10 years, elected by the State Bar Council; and four citizens who are not judges, active or retired, nor members of the State Bar, two appointed by the Governor, and two appointed by the General Assembly in accordance with G.S. 120-121, one upon recommendation of the President Pro Tempore of the Senate and one upon recommendation of the Speaker of the House of Representatives. The Court of Appeals judge shall act as chair of the Commission.

(b) The Court of Appeals judge shall serve at the pleasure of the Chief Justice. Terms of other Commission members shall be for six years. No member who has served a full six-year term is eligible for reappointment. If a member ceases to have the qualifications required for the member's appointment, that person ceases to be a member. Vacancies of members, other than those appointed by the General Assembly, are filled in the same manner as the original appointment, for the remainder of the term. Vacancies of members appointed by the General Assembly are filled as provided under G.S. 120-122. Members who are not judges are entitled to per diem and all members are entitled to reimbursement for travel and subsistence expenses at the rate applicable to members of State boards and commissions generally, for each day engaged in official business.

(c) If a member of the Commission who is a judge becomes disabled, or becomes a respondent before the Commission, the Chief Justice shall appoint an alternate member to serve during the period of disability or disqualification. The alternate member shall be from the same division of the General Court of Justice as the judge whose place the alternate member takes. If a member of the Commission who is not a judge becomes disabled, the Governor, if he appointed the disabled member, shall appoint, or the State Bar Council, if it elected the disabled member, shall elect, an alternate member to serve during the period of disability. If a member of the Commission who is not a judge and who was appointed by the General Assembly becomes disabled, an alternate

member shall be appointed to serve during the period of disability in the same manner as if there were a vacancy to be filled under G.S. 120-122. In a particular case, if a member becomes disqualified, or is successfully challenged for cause, the member's seat for that case shall be filled by an alternate member selected as provided in this subsection.

(d) A member may serve after expiration of the member's term only to participate until the conclusion of a disciplinary proceeding begun before expiration of the member's term. Such participation shall not prevent the successor from taking office, but the successor may not participate in the proceeding for which the predecessor's term was extended. This subsection shall apply also to any judicial member whose membership on the Commission is automatically terminated by retirement or resignation from judicial office, or expiration of the term of judicial office.

(e) Members of the Commission and its employees are immune from civil suit for all conduct undertaken in the course of their official duties.

(f) The chair of the Commission may employ, if funds are appropriated for that purpose, an executive director, Commission counsel, investigator, and any support staff as may be necessary to assist the Commission in carrying out its duties. With the approval of the Chief Justice, for specific cases, the chair also may employ special counsel or call upon the Attorney General to furnish counsel. In addition, with the approval of the Chief Justice, for specific cases, the chair or executive director also may call upon the Director of the State Bureau of Investigation to furnish an investigator who shall serve under the supervision of the executive director. While performing duties for the Commission, the executive director, counsel, and investigator have authority throughout the State to serve subpoenas or other process issued by the Commission in the same manner and with the same effect as an officer authorized to serve process of the General Court of Justice.

(g) The Commission may adopt, and may amend from time to time, its own rules of procedure for the performance of the duties and responsibilities prescribed by this Article, subject to the approval of the Supreme Court. (1971, c. 590, s. 1; 1973, c. 50; 1975, c. 956, s. 13; 1997-72, s. 1; 2006-187, s. 11.)

**Editor's Note. —**

Session Laws 2006-187, s. 12, as amended by Session Laws 2006-259, s. 44(b), provides: "In order to provide for an orderly transition in membership to the Judicial Standards Commission to the six-year terms specified in G.S. 7A-375(b), as amended by Section 11 of this act, and notwithstanding G.S. 7A-375(b), as amended by Section 11 of this act, the following provisions apply:

"(1) The initial terms of the new district court judge, of one new member of the North Caro-

lina Bar, and of one citizen upon recommendation of the Speaker of the House of Representatives, appointed to the Commission effective January 1, 2007, shall be two-year terms.

"(2) The initial terms of all other new members appointed to the Commission effective January 1, 2007, shall be five-year terms."

**Effect of Amendments. —** Session Laws 2006-187, s. 11, effective January 1, 2007, rewrote the section.

## **§ 7A-376. Grounds for discipline by Commission; censure, suspension, or removal by the Supreme Court.**

(a) The Commission, upon a determination that any judge has engaged in conduct that violates the North Carolina Code of Judicial Conduct as adopted by the Supreme Court but that is not of such a nature as would warrant a recommendation of censure, suspension, or removal, may issue to the judge a private letter of caution or may issue to the judge a public reprimand.

(b) Upon recommendation of the Commission, the Supreme Court may censure, suspend, or remove any judge for willful misconduct in office, willful and persistent failure to perform the judge's duties, habitual intemperance,



conviction of a crime involving moral turpitude, or conduct prejudicial to the administration of justice that brings the judicial office into disrepute. A judge who is suspended for any of the foregoing reasons shall receive no compensation during the period of that suspension. A judge who is removed for any of the foregoing reasons shall receive no retirement compensation and is disqualified from holding further judicial office.

(c) Upon recommendation of the Commission, the Supreme Court may suspend, for a period of time the Supreme Court deems necessary, any judge for temporary physical or mental incapacity interfering with the performance of the judge's duties, and may remove any judge for physical or mental incapacity interfering with the performance of the judge's duties which is, or is likely to become, permanent. A judge who is suspended for temporary incapacity shall continue to receive compensation during the period of the suspension. A judge removed for mental or physical incapacity is entitled to retirement compensation if the judge has accumulated the years of creditable service required for incapacity or disability retirement under any provision of State law, but he shall not sit as an emergency justice or judge. (1971, c. 590, s. 1; 1979, c. 486, s. 2; 2006-187, s. 11.)

**Effect of Amendments.** — Session Laws 2006-187, s. 11, effective January 1, 2007, substituted "Grounds for discipline by Commission; censure, suspension, or removal by the

Supreme Court" for "Grounds for censure or removal" in the section heading; and rewrote the section.

## CASE NOTES

### IV. Illustrative Cases.

#### IV. ILLUSTRATIVE CASES.

##### **Sexual Harassment of Court Personnel.**

— Because a judge sexually harassed a judicial assistant and a paralegal, pursuant to G.S. 7A-376, G.S. 7A-377, and Rule 3 of the Rules for Supreme Court Review of Recommendations of

the Judicial Standards Commission, the judge was censured for conduct prejudicial to the administration of justice and violation of the judge's oath of office under G.S. 7A-376, N.C. Code Jud. Conduct 1, N.C. Code Jud. Conduct 2(A), and N.C. Code Jud. Conduct 3(A)(3). In re Inquiry Concerning Daisy, 359 N.C. 622, 614 S.E.2d 529, 2005 N.C. LEXIS 636 (2005).

## § 7A-377. Procedures.

(a) Any citizen of the State may file a written complaint with the Commission concerning the qualifications or conduct of any justice or judge of the General Court of Justice, and thereupon the Commission shall make such investigation as it deems necessary. The Commission may also make an investigation on its own motion. The Commission may issue process to compel the attendance of witnesses and the production of evidence, to administer oaths, and to punish for contempt. No justice or judge shall be recommended for censure, suspension, or removal unless he has been given a hearing affording due process of law.

(a1) Unless otherwise waived by the justice or judge involved, all papers filed with and proceedings before the Commission, including any investigation that the Commission may make, are confidential, and no person shall disclose information obtained from Commission proceedings or papers filed with or by the Commission, except as provided herein. Those papers are not subject to disclosure under Chapter 132 of the General Statutes.

(a2) Information submitted to the Commission or its staff, and testimony given in any proceeding before the Commission, shall be absolutely privileged,



and no civil action predicated upon that information or testimony may be instituted against any complainant, witness, or his or her counsel.

(a3) If, after an investigation is completed, the Commission concludes that a letter of caution is appropriate, it shall issue to the judge a letter of caution in lieu of any further proceeding in the matter. The issuance of a letter of caution is confidential in accordance with subsection (a1) of this section.

(a4) If, after an investigation is completed, the Commission concludes that a public reprimand is appropriate, the judge shall be served with a copy of the proposed reprimand and shall be allowed 20 days within which to accept the reprimand or to reject it and demand, in writing, that disciplinary proceedings be instituted in accordance with subsection (a5) of this section. A public reprimand, when issued by the Commission and accepted by the respondent judge, is not confidential.

(a5) If, after an investigation is completed, the Commission concludes that disciplinary proceedings should be instituted, the notice and statement of charges filed by the Commission, along with the answer and all other pleadings, are not confidential. Disciplinary hearings ordered by the Commission are not confidential, and recommendations of the Commission to the Supreme Court, along with the record filed in support of such recommendations are not confidential. Testimony and other evidence presented to the Commission is privileged in any action for defamation. At least five members of the Commission must concur in any recommendation to censure, suspend, or remove any judge. A respondent who is recommended for censure, suspension, or removal is entitled to a copy of the proposed record to be filed with the Supreme Court, and if the respondent has objections to it, to have the record settled by the Commission's chair. The respondent is also entitled to present a brief and to argue the respondent's case, in person and through counsel, to the Supreme Court. A majority of the members of the Supreme Court voting must concur in any order of censure, suspension, or removal. The Supreme Court may approve the recommendation, remand for further proceedings, or reject the recommendation. A justice of the Supreme Court or a member of the Commission who is a judge is disqualified from acting in any case in which he is a respondent.

(b) Repealed by Session Laws 2006-187, s. 11, effective January 1, 2007.

(c) The Commission may issue advisory opinions to judges, in accordance with rules and procedures adopted by the Commission.

(d) The Commission has the same power as a trial court of the General Court of Justice to punish for contempt, or for refusal to obey lawful orders or process issued by the Commission. (1971, c. 590, s. 1; 1973, c. 808; 1989 (Reg. Sess., 1990), c. 995, s. 2; 1997-72, s. 2; 2006-187, s. 11.)

**Effect of Amendments.** — Session Laws 2006-187, s. 11, effective January 1, 2007, substituted "Procedures" for "Procedures; employ-

ment of executive secretary, special counsel or investigator" in the section heading; and rewrote the section.

### CASE NOTES

#### **Judge was censured for conduct prejudicial to the administration of justice, etc.**

Because a judge sexually harassed a judicial assistant and a paralegal, pursuant to G.S. 7A-376, G.S. 7A-377, and Rule 3 of the Rules for Supreme Court Review of Recommendations of the Judicial Standards Commission, the judge

was censured for conduct prejudicial to the administration of justice and violation of the judge's oath of office under G.S. 7A-376, N.C. Code Jud. Conduct 1, N.C. Code Jud. Conduct 2(A), and N.C. Code Jud. Conduct 3(A)(3). In re Inquiry Concerning Daisy, 359 N.C. 622, 614 S.E.2d 529, 2005 N.C. LEXIS 636 (2005).

## § 7A-378. Censure, suspension, or removal of justice of Supreme Court.

(a) The recommendation of the Judicial Standards Commission for censure, suspension, or removal of any justice of the Supreme Court for any grounds provided by G.S. 7A-376 shall be made to, and the record filed with, the Court of Appeals, which shall have and shall proceed under the same authority for censure, suspension, or removal of any justice as is granted to the Supreme Court under G.S. 7A-376 and G.S. 7A-377(a) for censure, suspension, or removal of any judge.

(b) The proceeding shall be heard by a panel of the Court of Appeals consisting of the Chief Judge, who shall be the presiding judge of the panel, and six other judges, the senior in service, excluding the judge who is chairman of the Commission. For good cause, a judge may be excused by a majority of the panel. If the Chief Judge is excused, the presiding judge shall be designated by a majority of the panel. The vacancy created by an excused judge shall be filled by the judge of the court who is next senior in service. (1979, c. 486, s. 1; 2006-187, s. 11.)

**Effect of Amendments.** — Session Laws 2006-187, s. 11, effective January 1, 2007, added “suspension,” preceding “or removal” in the section heading and three times in subsec-

tion (a); in subsection (a), inserted “G.S.” preceding “7A-377(a)”; and made a minor stylistic change in subsection (b).

## ARTICLE 31A.

### *State Judicial Council.*

## § 7A-409.1. Duties of the State Judicial Council.

(a) The State Judicial Council shall:

- (1) Study the judicial system and report periodically to the Chief Justice on its findings;
- (2) Advise the Chief Justice on priorities for funding;
- (3) Review and advise the Chief Justice on the budget prepared by the Director of the Administrative Office of the Courts for submission to the General Assembly;
- (4) Study and recommend to the General Assembly the salaries of justices and judges;
- (5) Recommend to the General Assembly changes in the expense allowances, benefits, and other compensation for judicial officials;
- (6) Recommend the creation of judgeships; and
- (7) Advise or assist the Chief Justice, as requested, on any other matter concerning the operation of the courts.

(b) The State Judicial Council, with the assistance of the Director of the Administrative Office of the Courts, shall recommend to the Chief Justice performance standards for all courts and all judicial officials and shall recommend procedures for periodic evaluation of the court system and individual judicial officials and employees. If these standards are implemented by the Chief Justice, the Director of the Administrative Office of the Courts shall inform each judicial official of the standards being used to evaluate that official's performance. If implemented, the evaluation of each judge shall include assessments from other judges, litigants, jurors, and attorneys, as well as a self-evaluation by the judge. Summaries of the evaluations of justices and judges shall be made available to the public, in a manner to be determined by the Council, but the data collected in producing the evaluations shall not be a public record.



(c) The State Judicial Council shall study and recommend guidelines for the assignment and management of cases, including the identification of different kinds of cases for different kinds of resolution. If the Chief Justice decides to implement these guidelines, the guidelines may provide that, except for good cause, each civil case subject to assignment to a trial judge should be directed first to an appropriate form of alternative dispute resolution. The guidelines may also provide for posttrial alternative dispute resolution before or as part of an appeal. The guidelines should not require absolute uniformity from district to district and should allow case management personnel within each district the flexibility to direct cases to the most appropriate means of resolution in that district.

(d) The State Judicial Council shall monitor the use of alternative dispute resolution throughout the court system and, with the assistance of the Director of the Administrative Office of the Courts and the Dispute Resolution Commission, evaluate the effectiveness of those programs.

(e) The State Judicial Council may recommend changes in the boundaries of the judicial districts or divisions.

(f) The State Judicial Council shall monitor the administration of justice and assess the effectiveness of the Judicial Branch in serving the public and to advise the Chief Justice and the General Assembly on changes needed to assist the General Court of Justice in better fulfilling its mission.

(g) The State Judicial Council shall report to the General Assembly and the Chief Justice no later than December 31, 2009, and no later than December 31 of every third year, regarding the implementation of S.L. 2006-184 and shall include in its report the statistics regarding inquiries and any recommendations for changes. The House of Representatives and the Senate shall refer the report of the State Judicial Council to the Joint Legislative Corrections, Crime Control, and Juvenile Justice Oversight Committee and such other committees as the Speaker of the House of Representatives or the President Pro Tempore of the Senate shall deem appropriate, for their review. (1999-390, s. 1; 2006-184, s. 10.)

**Editor's Note. —**

Session Laws 2006-184 enacted the North Carolina Inquiry Commission, Article 92 of Chapter 15A of the General Statutes of North Carolina.

Session Laws 2006-184, s. 10, effective August 3, 2006, and applicable to claims of factual innocence filed on or before December 31, 2010, was codified as subsection (g) of this section at the direction of the Revisor of Statutes.

## SUBCHAPTER VIII. CONFERENCE OF DISTRICT ATTORNEYS.

### ARTICLE 32.

#### *Conference of District Attorneys.*

### **§ 7A-413. Powers of Conference.**

(a) The Conference may:

- (1) Cooperate with citizens and other public and private agencies to promote the effective administration of criminal justice.
- (2) Assist prosecutors in the effective prosecution and trial of criminal offenses, and develop an advisory trial manual.
- (3) Develop advisory manuals to assist prosecutors in the organization and administration of their offices, case management, calendaring, case tracking, filing, and office procedures.



- (4) Cooperate with the Administrative Office of the Courts and the School of Government at the University of North Carolina at Chapel Hill concerning education and training programs for prosecutors and staff.
- (b) The Conference may not adopt rules pursuant to Chapter 150B of the General Statutes. (1983, c. 761, s. 152; 1987, c. 827, s. 1; 2006-264, s. 29(b).)

**Effect of Amendments.** — Session Laws 2006-264, s. 29(b), effective August 27, 2006, substituted “School of Government at the Uni-

versity of North Carolina at Chapel Hill” for “Institute of Government” in subdivision (a)(4).

## SUBCHAPTER IX. REPRESENTATION OF INDIGENT PERSONS.

### ARTICLE 36.

#### *Entitlement of Indigent Persons Generally.*

### § 7A-450. Indigency; definition; entitlement; determination; change of status.

#### CASE NOTES

#### III. Appointment of Experts.

##### III. APPOINTMENT OF EXPERTS.

**Same — Mental Health Care Provider.** — Where a mother in a proceeding to terminate her parental rights failed to demonstrate how the diagnosis and records of a new mental health care provider would materially assist her in her trial preparation and she was unable

to demonstrate how she was deprived of a fair trial without the requested expert assistance, the trial court did not abuse its discretion in denying the mother’s request for expenses related to expert witness fees. In re J.B., 172 N.C. App. 1, 616 S.E.2d 264, 2005 N.C. App. LEXIS 1589 (2005).

### § 7A-454. Supporting services.

#### CASE NOTES

**Denial of Motion for Expert Witness in Termination Proceeding Upheld.** — Trial court in a termination of parental rights hearing did not err by denying a father’s motion for funds to employ an expert witness to examine the child, review his medical records, and assist in preparation for the hearing as there was not a reasonable likelihood that an expert would have materially assisted the parents in the preparation of their defense, or that without such help it was probable that they would not have received a fair trial. In re D.R., 172 N.C. App. 300, 616 S.E.2d 300, 2005 N.C. App. LEXIS 1578 (2005).

**Denial of Funds for Telephone Deposition In Termination Case Was Proper.** — Trial court did not err by denying a father’s motion for funds for a telephone deposition in a termination proceeding since the father did not include in his motion his reasons for deposing the foster parents, the information he sought, or that there was a reasonable likelihood that it would have materially assisted in the preparation of the parents’ defense. In re D.R., 172 N.C. App. 300, 616 S.E.2d 300, 2005 N.C. App. LEXIS 1578 (2005).

## § 7A-455. Partial indigency; liens; acquittals.

### CASE NOTES

#### **Notice and Opportunity to Be Heard Required. —**

Imposition of attorney's fees was erroneous where the trial court did not give defendant an opportunity to be heard regarding the appointed attorney's total hours or the total amount of the fees imposed. *State v. Jacobs*, 172 N.C. App. 220, 616 S.E.2d 306, 2005 N.C. App. LEXIS 1586 (2005).

Though the record showed that a defendant was given notice of the trial court's intention to impose attorney fees upon him for the cost of

his court-appointed counsel in a criminal proceeding, because the defendant was never given an opportunity to be heard regarding the attorney's total hours or the total amount of the fees imposed, the trial court's order imposing attorney fees against the defendant was vacated and the matter was remanded to the trial court for the state to apply for a judgment in accordance with G.S. 7A-455. *State v. Jacobs*, 174 N.C. App. 1, 620 S.E.2d 204, 2005 N.C. App. LEXIS 2279 (2005).

### ARTICLE 39B.

#### *Indigent Defense Services Act.*

## § 7A-498.3. Responsibilities of Office of Indigent Defense Services.

#### **Editor's Note. —**

Session Laws 2006-66, s. 1.2, provides: "This act shall be known as 'The Current Operations and Capital Improvements Appropriations Act of 2006'."

Session Laws 2006-66, s. 14.16, provides: "The State Auditor shall conduct an analysis of the fee payment practices of the Office of Indigent Defense Services and make recommendations for process improvements in payment of fee applications, including recommendations regarding automation. The State Auditor shall report the results of this analysis and the

recommendations resulting from it to the Chairs of the House and Senate Appropriations Subcommittees on Justice and Public Safety by March 1, 2007."

Session Laws 2006-66, s. 28.3, provides: "Except for statutory changes or other provisions that clearly indicate an intention to have effects beyond the 2006 2007 fiscal year, the textual provisions of this act apply only to funds appropriated for, and activities occurring during, the 2006 2007 fiscal year."

Session Laws 2006-66, s. 28.6 is a severability clause.

## SUBCHAPTER XII. ADMINISTRATIVE HEARINGS.

### ARTICLE 60.

#### *Office of Administrative Hearings.*

## § 7A-760. Number and status of employees; staff assignments; role of State Personnel Commission.

(a) The number of administrative law judges and employees of the Office of Administrative Hearings shall be established by the General Assembly. The Chief Administrative Law Judge is exempt from provisions of the State Personnel Act as provided by G.S. 126-5(c1)(26). All other employees of the Office of Administrative Hearings are subject to the State Personnel Act.

(b) The Chief Administrative Law Judge shall designate, from among the employees of the Office of Administrative Hearings, the Director and staff of the Rules Review Commission. (2006-66, s. 18.2(d); 2006-221, s. 20.)

**Editor's Note.** — Session Laws 2006-66, s. 28.7, made this section effective July 1, 2006.

Session Laws 2006-66, s. 18.2(c), as added by Session Laws 2006-221, s. 20, provides: "The number of administrative law judges and employees in the Office of Administrative Hearings are established as follows:

<u>"Position</u>	<u>Number</u>
"Administrative Law Judge	10
"Rules Review Commission	4
"Other Employees	31."

## SUBCHAPTER XIII. SENTENCING SERVICES PROGRAM.

### ARTICLE 61.

#### *Sentencing Services Program.*

### § 7A-771. Definitions.

#### CASE NOTES

**Intermediate Sentence.** — Court rejected defendant's claim of ineffective assistance of counsel due to his counsel's alleged request that the court impose consecutive sentences on defendant, because the record indicated that defense counsel did not, in fact, request consecutive sentences, but rather asked that defendant's four convictions for Class F felonies

be consolidated into a single mitigated sentence, to be followed by one consolidated "intermediate sentence" pursuant to G.S. 7A-771 (3a) which would include anger management treatment, but no active jail time. *State v. McCoy*, 174 N.C. App. 105, 620 S.E.2d 863, 2005 N.C. App. LEXIS 2289 (2005).

### § 7A-775. Sentencing services board.

(a) Each sentencing services program shall establish a sentencing services board to provide direction and assistance to the sentencing services program in the implementation and evaluation of the plan. Sentencing services boards may be organized as nonprofit corporations under Chapter 55A of the General Statutes. The sentencing services board shall consist of not less than 12 members, and shall include, insofar as possible, judges, district attorneys, attorneys, social workers, law-enforcement officers, probation officers, and other interested persons. The sentencing services board shall meet on a regular basis, and its duties include, but are not limited to, the following:

- (1) Preparation and submission of the sentencing services program plan to the senior resident superior court judge and the Director annually, as provided in G.S. 7A-772(a);
- (1a) Development of an annual budget for the program;
- (2) Hiring, firing, and evaluation of program personnel;
- (3) Selection of board members;
- (4) **(Effective until July 1, 2007)** Arranging for an annual audit, in accordance with G.S. 143-6.1 [G.S. 143-6.2];
- (4) **(Effective July 1, 2007)** Arranging for an annual financial audit.
- (5) Development of procedures for contracting for services.

(b) If the board serves as an advisory board to a sentencing services program located in a local or State agency, the board's duties do not include budgeting and personnel decisions. (1983, c. 909, s. 1; 1991, c. 566, ss. 2, 6; 1999-306, s. 1; 2006-203, s. 11; 2006-264, s. 1(a).)

**Subdivision (a)(4) is set out twice.** — The first version of subdivision (a)(4) set out above is effective until July 1, 2007. The second version of subdivision (a)(4) set out above is effective July 1, 2007.

**Editor's Note.** —

Session Laws 2006-203, s. 126, provides, in part: "Prosecutions for offenses committed before the effective date of this act are not abated or affected by this act, and the statutes that



would be applicable but for this act remain applicable to those prosecutions.”

Session Laws 2006-264, s. 1(a), which amended subdivision (a)(4) by substituting “143-6.2” for “143-6.1” was repealed by Session Laws 2006-264, s. 1(c), which provided that the section was repealed if House Bill 914, 2005 Regular Session [2006-203] becomes law.

**Effect of Amendments.** — Session Laws 2006-203, s. 11, effective July 1, 2007, and applicable to the budget for the 2007-2009 biennium and each subsequent biennium thereafter, substituted “financial audit.” for “audit, in accordance with G.S. 143-6.1,” in subdivision (a)(4).

## SUBCHAPTER XIV. DRUG TREATMENT COURTS.

### ARTICLE 62.

#### *North Carolina Drug Treatment Court Act.*

#### § 7A-790. Short title.

**Editor’s Note.** —

Session Laws 2006-32, s. 4, as amended by 2006-187, s. 8, as amended by 2006-259, s. 44(a), provides: “The Legislative Research Commission shall study drug treatment courts in North Carolina. The study shall include the following issues in relation to drug treatment courts:

- “(1) Funding mechanisms;
- “(2) Target populations;

“(3) Interagency collaboration at the State and local levels; and

“(4) Any other matter that the Commissions deem appropriate or necessary to provide proper information to the General Assembly on the subject of the study.

“The Commission may report its findings and recommendations to the 2007 Regular Session of the 2007 General Assembly.”

## SUBCHAPTER XV. CONFERENCE OF CLERKS OF SUPERIOR COURT.

### ARTICLE 63.

#### *Conference of Clerks of Superior Court.*

#### § 7A-806. Annual meetings; organization; election of officers.

(a) Annual Meetings. — The Conference shall meet each summer and winter at a time and place selected by the President of the Conference.

(b) Election of Officers. — Officers of the Conference are a President, two Vice Presidents, a Secretary, a Treasurer, and other officers from among its membership that the Conference may designate in its bylaws. Officers are elected for one-year terms at the annual summer conference and take office immediately following their election.

(c) Executive Committee. — The Executive Committee of the Conference consists of the President, the two Vice Presidents, the Secretary, the Treasurer, and seven other members of the Conference. One of these seven members shall be the immediate past president if there is one and that past president continues to be a member.

(d) Organization and Functioning; Bylaws. — The bylaws may provide for the organization and functioning of the Conference, including the powers and duties of its officers and committees. The bylaws shall state the number of

members required to constitute a quorum at any meeting of the Conference or the Executive Committee. The bylaws shall set out the procedure for amending the bylaws.

(e) **Calling Meetings; Duty to Attend.** — The President or the Executive Committee may call a meeting of the Conference upon 10 days’ notice to the members, except upon written waiver of notice signed by at least three-fourths of the members. A member should attend each meeting of the Conference and the Executive Committee of which he is given notice. Members are entitled to reimbursement for travel and subsistence expenses at the rate applicable to State employees. (2005-100, s. 1; 2006-66, s. 14.20(a); 2006-221, s. 15.)

<p><b>Effect of Amendments.</b> — Session Laws 2006-66, s. 14.20(a), as added by Session Laws 2006-221, s. 15, effective July 1, 2006, deleted</p>	<p>“on July 1” following “take office” in the second sentence of subsection (b).</p>
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## § 7A-807. Powers of Conference.

### CASE NOTES

<p><b>Evidentiary Standard.</b> — Trial court’s conclusion sufficiently stated the evidentiary standard for terminating the mother’s parental rights where it stated “Clear, cogent and con-</p>	<p>vincing evidence exists.” In re J.T.W., — N.C. App. —, 632 S.E.2d 237, 2006 N.C. App. LEXIS 1677 (2006).</p>
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**Chapter 7B.**  
**Juvenile Code.**

**SUBCHAPTER I. ABUSE, NEGLECT,  
DEPENDENCY.**

**Article 2.**

**Jurisdiction.**

Sec.  
7B-202. Permanency mediation.  
7B-203 through 7B-299. [Reserved.]

**Article 3.**

**Screening of Abuse and Neglect  
Complaints.**

7B-302. Assessment by director; access to con-

fidential information; notification  
of person making the report.

**SUBCHAPTER III. JUVENILE RECORDS.**

**Article 31.**

**Disclosure of Juvenile Information.**

Sec.  
7B-3100. Disclosure of information about juve-  
niles.

**SUBCHAPTER I. ABUSE, NEGLECT, DEPENDENCY.**

**ARTICLE 1.**

*Purposes; Definitions.*

**§ 7B-100. Purpose.**

**CASE NOTES**

**Legislative Intent.** — When, in a depen-  
dency proceeding, a trial court's order transfer-  
ring a child's custody from a department of  
social services to foster parents was entered  
eight months late, this resulted in protracted  
custody proceedings that left the legal relation-  
ship between parent and child unresolved and  
left the child in legal limbo, thwarting the  
legislature's wish that children be placed in  
safe, permanent homes within a reasonable  
amount of time, as stated in G.S. 7B-100(5). In  
re L.L., 172 N.C. App. 689, 616 S.E.2d 392,  
2005 N.C. App. LEXIS 1798 (2005).

**Goal of G.S. 7B-100(5) is to place chil-  
dren in safe, permanent houses within a**

**reasonable time,** and allowing parents to de-  
lay termination proceedings by appealing cus-  
tody review orders would have thwarted G.S.  
7B-100(5); G.S. 7B-1003 did not deprive the  
trial court of jurisdiction to terminate the moth-  
er's parental rights during the pendency of the  
custody review order appeal as G.S. 7B-1003  
applied only to dependency proceedings, not to  
termination proceedings. In re R.T.W., 359 N.C.  
539, 614 S.E.2d 489, 2005 N.C. LEXIS 646  
(2005).

**Cited in** In re As.L.G., 173 N.C. App. 551,  
619 S.E.2d 561, 2005 N.C. App. LEXIS 2116  
(2005).

**§ 7B-101. Definitions.**

**CASE NOTES**

**“Dependent.”** — Trial court erred in adjudicating a mother's three-month-old son as dependent, pursuant to G.S. 7B-101(9), as the trial court's finding of fact that the mother was not willing to investigate the needs of her son in a safe environment, after the infant suffered a severe head trauma while in the father's sole care, was not supported by clear and convincing

evidence; as the mother did not neglect her son, nor was he deemed abused, he was not dependent because he had a parent capable of providing care and supervision. In re J.A.G., 172 N.C. App. 708, 617 S.E.2d 325, 2005 N.C. App. LEXIS 1785 (2005).

Children were dependent where the parents were neither able to care for them nor did they



suggest appropriate alternate replacements; the father's proposed replacement was insufficient because there was no evidence that his aunt was willing or able to care for the children. In re D.J.D., 171 N.C. App. 230, 615 S.E.2d 26, 2005 N.C. App. LEXIS 1268 (2005).

**"Dependent juvenile."** — Trial court's finding of fact that the child's mother had not appropriately cared for him was not supported by clear and convincing evidence; similarly, the finding of fact that the mother was not willing to investigate the needs of the child in a safe environment was not supported by clear and convincing evidence. Further, the child was not neglected as to his mother; therefore, pursuant to G.S. 7B-101(9), the child was not dependent as to his mother because she was capable of providing care for and supervision of the child. In re J.A.G., — N.C. App. —, — S.E.2d —, 2005 N.C. App. LEXIS 1091 (June 7, 2005).

**Applicability To Termination Proceedings.** — Although G.S. 7B-101(9), G.S. 7B-111(a)(6) concerned dependency, those provisions are applicable to termination of parental rights proceedings where neglect is pursued. In re L.W., — N.C. App. —, 623 S.E.2d 626, 2006 N.C. App. LEXIS 55 (2006).

**Findings of Fact Required.** — Trial court erred in concluding that a child was dependent because the trial court made no findings of fact concerning the mother's ability to provide care or supervision for the child or that the mother lacked an alternative child care arrangement to support the court's conclusion that the child was dependent. In re E.C., — N.C. App. —, 621 S.E.2d 647, 2005 N.C. App. LEXIS 2494 (2005).

**Evidence Held Sufficient to Show Neglect.** —

Where the evidence showed that a child resided in the same home where four other children had been neglected, this fact was sufficient to support a finding that the child was being neglected under G.S. 7B-101(15); although the father was in jail, the mother was accused of the previous neglect. In re P.M., 169 N.C. App. 423, 610 S.E.2d 403, 2005 N.C. App. LEXIS 678 (2005).

Trial court did not abuse its discretion in terminating a mother's parental rights based on neglect where: (1) the mother failed to maintain stable housing and was unemployed, (2) the mother failed to comply with a child support order, (3) the mother had left the child with others, including an incident initiating the child's removal from her custody, (4) the mother failed to provide proper medication for the child, (5) the mother had attempted suicide, had not cooperated with social workers, did not follow through with mental health counseling, and did not complete parenting classes, and (6) the mother only sporadically visited and contacted the child for over five years. In re E.T.S.,

— N.C. App. —, 623 S.E.2d 300, 2005 N.C. App. LEXIS 2724 (2005).

When it was alleged that a mother's parental rights to two children should be terminated because she (1) neglected them while they were in an agency's care within the meaning of G.S. 7B-101, under G.S. 7B-111(a)(1), (2) willfully left the children in foster care for more than 12 months without showing reasonable progress to correct the conditions that led to their removal, under G.S. 7B-111(a)(2), and (3) willfully failed to pay a reasonable portion of the cost of the children's care while in an agency's custody, under G.S. 7B-111(a)(3), and the petition was sustained on all three grounds, when the mother objected to findings as to only one ground on appeal, the other findings were binding, under N.C. R. App. P. 10, and, as only one ground had to be found to terminate parental rights, it was unnecessary to consider the mother's appellate argument as to the ground she challenged. In re J.A.A., — N.C. App. —, 623 S.E.2d 45, 2005 N.C. App. LEXIS 2706 (2005).

Social services department presented clear, cogent, and convincing evidence from which the trial court could find and conclude that child was at risk of some physical, mental, or emotional impairment where the mother kept the child at her cousin's home in a filthy room with clothes and dirty diapers strewn about, she would leave the home for several days at a time and, upon her return, she would sleep for long periods of time with the child in the bed and would not awaken when the child cried, the mother came home drunk or under the influence of drugs on one occasion and attempted to remove the child from the home in the middle of the night, and the mother was unable to complete a substance abuse treatment program because of frequent altercations with other residents. In re E.C., — N.C. App. —, 621 S.E.2d 647, 2005 N.C. App. LEXIS 2494 (2005).

In a termination of parental rights hearing, clear, cogent and convincing evidence showed a mother's children were neglected, as defined in G.S. 7B-101(15), for purposes of termination, as the mother did not (1) complete classes in parenting, budgeting, and homemaking, (2) obtain mental health counseling, (3) have a phone, or (4) keep a clean home, all as required by her case plan, and she offered no specific plan for the children's care while she worked, if they were returned to her, and her residential instability was shown. In re J.W., 173 N.C. App. 450, 619 S.E.2d 534, 2005 N.C. App. LEXIS 2109 (2005), *aff'd*, — N.C. —, 625 S.E.2d 780 (2006).

Admittedly, there was not testimonial evidence that a mother failed to provide consistent financial support to the minor child. However, when compared to the overwhelming, substantive evidence supporting findings of fact four

and five, that the mother physically harmed the minor child by hitting her with a belt and failed to consistently attend assigned mental health sessions as she only attended five of 10 sessions, and finding of fact six, that the mother failed to regularly visit the minor child, the substantive evidence supported the trial court's conclusion that the minor child was neglected pursuant to G.S. 7B-101(15). In re A.J.M., — N.C. App. —, 630 S.E.2d 33, 2006 N.C. App. LEXIS 1220 (2006).

Trial court's order concluding that a mother's children were neglected and ordering the continued legal custody of the children with a state agency was affirmed because the trial court's findings supported its conclusion of law that the children were neglected juveniles under G.S. 7B-101(15); the findings included instances of drug abuse and domestic violence by the mother and the father of one of her children. In re T.S., — N.C. App. —, 631 S.E.2d 19, 2006 N.C. App. LEXIS 1299 (2006).

#### **Evidence Insufficient to Show Neglect.**

While the findings of fact and conclusions of law showed, by clear and convincing evidence pursuant to G.S. 7B-805, that a father neglected his three-month-old infant under G.S. 7B-101(15), based on an incident where the infant suffered a severe head injury while in his father's sole care, which could not have been attributed to rolling off the couch as the father contended happened when he went to get a bottle for the infant, the proof was insufficient to show that the mother had neglected the infant; she was not at home when the incident occurred and there were no other incidents involving the infant. In re J.A.G., 172 N.C. App. 708, 617 S.E.2d 325, 2005 N.C. App. LEXIS 1785 (2005).

Trial court erred in finding that the mother neglected the child, because: (1) the trial court's finding of fact that the mother had failed to appropriately care for the child was not supported by clear and convincing evidence; (2) the trial court's findings of fact indicated that the mother was not at the home when the child suffered his injuries; (3) the child was developing appropriately and had never missed any doctor's appointments; (4) there were no allegations, evidence, or findings of fact related to any of the other bases for a finding of neglect as defined in G.S. 7B-101(15); and (5) there was no evidence presented indicating that the mother knew or reasonably should have known that the father would harm the child. In re J.A.G., — N.C. App. —, — S.E.2d —, 2005 N.C. App. LEXIS 1091 (June 7, 2005).

**"Reasonable Effort."** — "Reasonable effort" has been defined to mean the diligent and timely implementation of a plan of action; in the context of G.S. 15A-1344(f) that would mean those actions a reasonable person would

pursue in seeking to notify defendant of his probation violation and conduct a hearing on the matter. State v. Burns, 171 N.C. App. 759, 615 S.E.2d 347, 2005 N.C. App. LEXIS 1273 (2005).

**Allegations of G.S. 7B-602 Parental Condition Triggers Required Appointment of Guardian Ad Litem.** — Department of social services "alleged" that the mother's dependency and mental illness were the cause of her child's problems so, even without allegations of specific facts, it was error under G.S. 7B-602 for the lower court not to appoint a guardian ad litem for her before it adjudicated whether her child was dependent and neglected under G.S. 7B-101(9), (15). In re C.B., 171 N.C. App. 341, 614 S.E.2d 579, 2005 N.C. App. LEXIS 1205 (2005).

**Dependency Finding Reversed.** — Decision that a child was dependent under G.S. 7B-101(9) was reversed because a trial court failed to conduct the two-part analysis; the court did not consider the availability of alternative child care arrangements where the evidence showed that a relative was willing to take the child in question. In re P.M., 169 N.C. App. 423, 610 S.E.2d 403, 2005 N.C. App. LEXIS 678 (2005).

**Change of Custody Improper.** — Given that the department of social services was prohibited under G.S. 7B-903(a)(2)(c) from returning physical custody of a child, to the parent from whom the child had been taken, without a hearing in which a court found that the child would receive proper care in a safe home, as defined in G.S. 7B-101(19), a trial court erred in changing custody of a child from a father to the mother because the court was required to find, but did not find, that the child would receive from the mother the necessary proper care and supervision in a safe home, particularly in light of prior evidence that domestic violence had occurred in the home. In re H.S.F., — N.C. App. —, 628 S.E.2d 416, 2006 N.C. App. LEXIS 866 (2006).

**Return of Child to Parents Did Not Make the Issue of Neglect Moot.** — Although a father regained full custody of his child, since there were collateral legal consequences that could arise from a neglect adjudication, such as a determination of whether another child was neglected, the appeal from the adjudication of neglect should not have been dismissed as moot. In re A.K., 360 N.C. 449, 628 S.E.2d 753, 2006 N.C. LEXIS 44 (2006).

**Applied in** In re R.T.W., 359 N.C. 539, 614 S.E.2d 489, 2005 N.C. LEXIS 646 (2005); In re C.C., 173 N.C. App. 375, 618 S.E.2d 813, 2005 N.C. App. LEXIS 2017 (2005); In re K.D., — N.C. App. —, 631 S.E.2d 150, 2006 N.C. App. LEXIS 1393 (2006).

**Cited in** In re P.L.P., 173 N.C. App. 1, 618



S.E.2d 241, 2005 N.C. App. LEXIS 1921 (2005), *aff'd*, — N.C. —, 625 S.E.2d 779 (2006); *In re As.L.G.*, 173 N.C. App. 551, 619 S.E.2d 561, 2005 N.C. App. LEXIS 2116 (2005); *In re D.M.W.*, 173 N.C. App. 679, 619 S.E.2d 910,

2005 N.C. App. LEXIS 2308 (2005); *In re H.S.F.*, — N.C. App. —, 628 S.E.2d 416, 2006 N.C. App. LEXIS 866 (2006); *In re J.G.B.*, — N.C. App. —, 628 S.E.2d 450, 2006 N.C. App. LEXIS 978 (2006).

## ARTICLE 2.

### *Jurisdiction.*

## § 7B-200. Jurisdiction.

### CASE NOTES

#### **Jurisdiction over Neglect and Dependency Proceedings. —**

Trial court had authority pursuant to G.S. 7B-200(a)(6) to issue an *ex parte* order directing a mother to cease interference with a department's juvenile investigation concerning her children; however, where no request for nonsecure custody was presented and no petition alleging that the children were neglected was filed, the trial court lacked jurisdiction to award custody of the children to their father. *In re K.C.G.*, 171 N.C. App. 488, 615 S.E.2d 76, 2005 N.C. App. LEXIS 1314 (2005).

Trial court lacked subject matter jurisdiction to enter orders finding the mother's four minor children to be abused and neglected after the county social services department of the neighboring county, due to a conflict the county social services department had, conducted an investigation and found that allegations of abuse and neglect by the mother's church and the caretaker of the children were unfounded; once an official finding that no abuse and neglect had occurred, the trial court lost the authority to declare that it had occurred and to determine that the four minor children should be removed from the custody of the caretaker. *In re S.D.A.*, 170 N.C. App. 354, 612 S.E.2d 362, 2005 N.C. App. LEXIS 1012 (2005).

District court, in adjudicating a child ne-

glected, was not limited to considering only those circumstances occurring within its district. To hold otherwise would allow abusive and neglectful parents to avoid court intervention by simply moving from county to county. *In re E.C.*, — N.C. App. —, 621 S.E.2d 647, 2005 N.C. App. LEXIS 2494 (2005).

Failure of the director of a county department of social services to sign and verify before a notary, pursuant to G.S. 7B-403(a), a petition for a finding that a minor child was a neglected juvenile rendered the petition fatally deficient and inoperative to invoke the subject matter jurisdiction of the trial court; because there was no evidence in the record suggesting later filings sufficient to invoke subject matter jurisdiction as to the lower court's subsequent order from a review hearing, the trial court erred in proceeding on the matter due to lack of subject matter jurisdiction. *In re T.R.P.*, 173 N.C. App. 541, 619 S.E.2d 525, 2005 N.C. App. LEXIS 2098 (2005).

Trial court had jurisdiction over a child's mother and father where both parents were properly served with the summons and the petition alleged that the child was neglected. *In re M.B.*, — N.C. App. —, — S.E.2d —, 2006 N.C. App. LEXIS 1960 (Sept. 19, 2006).

**Applied in** *In re R.T.W.*, 359 N.C. 539, 614 S.E.2d 489, 2005 N.C. LEXIS 646 (2005).

## § 7B-201. Retention and termination of jurisdiction.

### CASE NOTES

#### **Jurisdiction over Neglect and Dependency Proceedings. —**

Failure of the director of a county department of social services to sign and verify before a notary, pursuant to G.S. 7B-403(a), a petition for a finding that a minor child was a neglected juvenile rendered the petition fatally deficient and inoperative to invoke the subject matter jurisdiction of the trial court; because there was no evidence in the record suggesting later fil-

ings sufficient to invoke subject matter jurisdiction as to the lower court's subsequent order from a review hearing, the trial court erred in proceeding on the matter due to lack of subject matter jurisdiction. *In re T.R.P.*, 173 N.C. App. 541, 619 S.E.2d 525, 2005 N.C. App. LEXIS 2098 (2005).

**Effect of Voluntary Dismissal of First Termination Petition. —** Fact that county department of social services had dismissed a



prior petition for termination of a mother's parental rights did not preclude a subsequent petition since the best interests of the children was always the primary focus, with no procedural rule barring the court's continuing jurisdiction over such a matter. In re L.O.K., — N.C. App. —, 621 S.E.2d 236, 2005 N.C. App. LEXIS 2476 (2005).

**Jurisdiction Until 18 or Emancipated.** — Although a trial court in a custody dispute ended the custody of a county department of social services, the court did not err in retaining jurisdiction to conduct period review hearings, despite a father's claim that the court, under G.S. 7B-906(d), the court was relieved of the duty to conduct such reviews after custody was awarded to the father; in deciding a custody case under G.S. 7A-657, the almost-identical

predecessor to G.S. § 7B-906, the state's supreme court had already ruled that the relevant statutory language meant only that a trial court had a right to terminate its jurisdiction, but a trial court was not required to do so. Further, in the context of the Juvenile Code, North Carolina, G.S. 7B-201 provided that once a court obtained jurisdiction over a juvenile, that jurisdiction continued until terminated by a court order or until the juvenile reached the age of 18 years or was otherwise emancipated, and the parties' child was not yet 18 or emancipated. In re H.S.F., — N.C. App. —, 628 S.E.2d 416, 2006 N.C. App. LEXIS 866 (2006).

**Cited in** In re P.L.P., 173 N.C. App. 1, 618 S.E.2d 241, 2005 N.C. App. LEXIS 1921 (2005), *aff'd*, — N.C. —, 625 S.E.2d 779 (2006).

## § 7B-202. Permanency mediation.

(a) The Administrative Office of the Courts shall establish a Permanency Mediation Program to provide statewide and uniform services to resolve issues in cases under this Subchapter in which a juvenile is alleged or has been adjudicated to be abused, neglected, or dependent, or in which a petition or motion to terminate a parent's rights has been filed. Participants in the mediation shall include the parties and their attorneys, including the guardian ad litem and attorney advocate for the child; provided, the court may allow mediation to proceed without the participation of a parent whose identity is unknown, a party who was served and has not made an appearance, or a parent, guardian, or custodian who has not been served despite a diligent attempt to serve the person. Upon a finding of good cause, the court may allow mediation to proceed without the participation of a parent who is unable to participate due to incarceration, illness, or some other cause. Others may participate by agreement of the parties, their attorneys, and the mediator, or by order of the court.

(b) The Administrative Office of the Courts shall establish in phases a statewide Permanency Mediation Program consisting of local district programs to be established in all judicial districts of the State. The Director of the Administrative Office of the Courts is authorized to approve contractual agreements for such services as executed by order of the Chief District Court Judge of a district court district, such contracts to be exempt from competitive bidding procedures under Chapter 143 of the General Statutes. The Administrative Office of the Courts shall promulgate policies and regulations necessary and appropriate for the administration of the program. Any funds appropriated by the General Assembly for the establishment and maintenance of permanency mediation programs under this Article shall be administered by the Administrative Office of the Courts.

(c) Mediation proceedings shall be held in private and shall be confidential. Except as provided otherwise in this section, all verbal or written communications from participants in the mediation to the mediator or between or among the participants in the presence of the mediator are absolutely privileged and inadmissible in court.

(d) Neither the mediator nor any party or other person involved in mediation sessions under this section shall be competent to testify to communications made during or in furtherance of such mediation sessions; provided, there is no confidentiality or privilege as to communications made in furtherance of a crime or fraud. Nothing in this subsection shall be construed as

permitting an individual to obtain immunity from prosecution for criminal conduct or as excusing an individual from the reporting requirements of Article 3 of Chapter 7B of the General Statutes or G.S. 108A-102.

(e) Any agreement reached by the parties as a result of the mediation, whether referred to as a “placement agreement,” “case plan,” or some similar name, shall be reduced to writing, signed by each party, and submitted to the court as soon as practicable. Unless the court finds good reason not to, the court shall incorporate the agreement in a court order, and the agreement shall become enforceable as a court order. If some or all of the issues referred to mediation are not resolved by mediation, the mediator shall report that fact to the court. (2006-187, s. 4(a).)

**Editor’s Note.** — Session Laws 2006-187, s. 13, made this section effective July 1, 2006.

Session Laws 2006-187, s. 4(b), provides: “The Administrative Office of the Courts may

use funds available during the 2006-2007 fiscal year to implement the provisions of this section.”

**§§ 7B-203 through 7B-299:** Reserved for future codification purposes.

### ARTICLE 3.

#### *Screening of Abuse and Neglect Complaints.*

**§ 7B-301. Duty to report abuse, neglect, dependency, or death due to maltreatment.**

#### CASE NOTES

**Cited in** *In re A.K.*, 360 N.C. 449, 628 S.E.2d 753, 2006 N.C. LEXIS 44 (2006); *State v.*

*Browning*, — N.C. App. —, 629 S.E.2d 299, 2006 N.C. App. LEXIS 1079 (2006).

**§ 7B-302. Assessment by director; access to confidential information; notification of person making the report.**

(a) When a report of abuse, neglect, or dependency is received, the director of the department of social services shall make a prompt and thorough assessment, using either a family assessment response or an investigative assessment response, in order to ascertain the facts of the case, the extent of the abuse or neglect, and the risk of harm to the juvenile, in order to determine whether protective services should be provided or the complaint filed as a petition. When the report alleges abuse, the director shall immediately, but no later than 24 hours after receipt of the report, initiate the assessment. When the report alleges neglect or dependency, the director shall initiate the assessment within 72 hours following receipt of the report. When the report alleges abandonment, the director shall immediately initiate an assessment, take appropriate steps to assume temporary custody of the juvenile, and take appropriate steps to secure an order for nonsecure custody of the juvenile. The assessment and evaluation shall include a visit to the place where the juvenile resides, except when the report alleges abuse or neglect in a child care facility as defined in Article 7 of Chapter 110 of the General Statutes. When a report alleges abuse or neglect in a child care facility as defined in Article 7 of Chapter 110 of the General Statutes, a visit to the place where the juvenile resides is not required. When the report alleges abandonment, the assessment shall include a request from the director to law enforcement officials to investigate



through the North Carolina Center for Missing Persons and other national and State resources whether the juvenile is a missing child. All information received by the department of social services, including the identity of the reporter, shall be held in strictest confidence by the department. However, the department of social services shall disclose confidential information to any federal, State, or local governmental entity or its agent needing confidential information to protect a juvenile from abuse and neglect. Any confidential information disclosed to any federal, State, or local governmental entity, or its agent, under this subsection shall remain confidential with the other governmental entity, or its agent, and shall only be redisclosed by the governmental entity or its agent for purposes directly connected with carrying out the governmental entity's or agent's mandated responsibilities.

(b) When a report of a juvenile's death as a result of suspected maltreatment or a report of suspected abuse, neglect, or dependency of a juvenile in a noninstitutional setting is received, the director of the department of social services shall immediately ascertain if other juveniles live in the home, and, if so, initiate an assessment in order to determine whether they require protective services or whether immediate removal of the juveniles from the home is necessary for their protection. When a report of a juvenile's death as a result of maltreatment or a report of suspected abuse, neglect, or dependency of a juvenile in an institutional setting such as a residential child care facility or residential educational facility is received, the director of the department of social services shall immediately ascertain if other juveniles remain in the facility subject to the alleged perpetrator's care or supervision, and, if so, assess the circumstances of those juveniles in order to determine whether they require protective services or whether immediate removal of those juveniles from the facility is necessary for their protection.

(c) If the assessment indicates that abuse, neglect, or dependency has occurred, the director shall decide whether immediate removal of the juvenile or any other juveniles in the home is necessary for their protection. If immediate removal does not seem necessary, the director shall immediately provide or arrange for protective services. If the parent, guardian, custodian, or caretaker refuses to accept the protective services provided or arranged by the director, the director shall sign a complaint seeking to invoke the jurisdiction of the court for the protection of the juvenile or juveniles.

(d) If immediate removal seems necessary for the protection of the juvenile or other juveniles in the home, the director shall sign a complaint that alleges the applicable facts to invoke the jurisdiction of the court. Where the assessment shows that it is warranted, a protective services worker may assume temporary custody of the juvenile for the juvenile's protection pursuant to Article 5 of this Chapter.

(d1) Whenever a juvenile is removed from the home of a parent, guardian, custodian, stepparent, or adult relative entrusted with the juvenile's care due to physical abuse, the director shall conduct a thorough review of the background of the alleged abuser or abusers. This review shall include a criminal history check and a review of any available mental health records. If the review reveals that the alleged abuser or abusers have a history of violent behavior against people, the director shall petition the court to order the alleged abuser or abusers to submit to a complete mental health evaluation by a licensed psychologist or psychiatrist.

(e) In performing any duties related to the assessment of the report or the provision or arrangement for protective services, the director may consult with any public or private agencies or individuals, including the available State or local law enforcement officers who shall assist in the assessment and evaluation of the seriousness of any report of abuse, neglect, or dependency when requested by the director. The director or the director's representative may



make a written demand for any information or reports, whether or not confidential, that may in the director's opinion be relevant to the assessment or provision of protective services. Upon the director's or the director's representative's request and unless protected by the attorney-client privilege, any public or private agency or individual shall provide access to and copies of this confidential information and these records to the extent permitted by federal law and regulations. If a custodian of criminal investigative information or records believes that release of the information will jeopardize the right of the State to prosecute a defendant or the right of a defendant to receive a fair trial or will undermine an ongoing or future investigation, it may seek an order from a court of competent jurisdiction to prevent disclosure of the information. In such an action, the custodian of the records shall have the burden of showing by a preponderance of the evidence that disclosure of the information in question will jeopardize the right of the State to prosecute a defendant or the right of a defendant to receive a fair trial or will undermine an ongoing or future investigation. Actions brought pursuant to this paragraph shall be set down for immediate hearing, and subsequent proceedings in the actions shall be accorded priority by the trial and appellate courts.

(f) Within five working days after receipt of the report of abuse, neglect, or dependency, the director shall give written notice to the person making the report, unless requested by that person not to give notice, as to whether the report was accepted for assessment and whether the report was referred to the appropriate State or local law enforcement agency.

(g) Within five working days after completion of the protective services assessment, the director shall give subsequent written notice to the person making the report, unless requested by that person not to give notice, as to whether there is a finding of abuse, neglect, or dependency, whether the county department of social services is taking action to protect the juvenile, and what action it is taking, including whether or not a petition was filed. The person making the report shall be informed of procedures necessary to request a review by the prosecutor of the director's decision not to file a petition. A request for review by the prosecutor shall be made within five working days of receipt of the second notification. The second notification shall include notice that, if the person making the report is not satisfied with the director's decision, the person may request review of the decision by the prosecutor within five working days of receipt. The person making the report may waive the person's right to this notification, and no notification is required if the person making the report does not identify himself to the director.

(h) The director or the director's representative may not enter a private residence for assessment purposes without at least one of the following:

- (1) The reasonable belief that a juvenile is in imminent danger of death or serious physical injury.
- (2) The permission of the parent or person responsible for the juvenile's care.
- (3) The accompaniment of a law enforcement officer who has legal authority to enter the residence.
- (4) An order from a court of competent jurisdiction. (1979, c. 815, s. 1; 1985, c. 205; 1991, c. 593, s. 1; 1991 (Reg. Sess., 1992), c. 923, s. 3; 1993, c. 516, s. 5; 1995, c. 411, s. 1; 1997-390, s. 3.1; 1998-202, s. 6; 1998-229, ss. 2, 19; 1999-190, s. 2; 1999-318, s. 2; 1999-456, s. 60; 2001-291, s. 1; 2003-304, s. 4.1; 2005-55, s. 4; 2006-205, s. 1.)

**Effect of Amendments.** —  
Session Laws 2006-205, s. 1, effective August

8, 2006, added the last two sentences in subsection (a).

## CASE NOTES

**Jurisdiction.** — Trial court had authority pursuant to G.S. 7B-200(a)(6) to issue an ex parte order directing a mother to cease interference with a department's juvenile investigation concerning her children; however, where no request for nonsecure custody was presented and no petition alleging that the children were neglected was filed, the trial court lacked jurisdiction to award custody of the children to their father. In re K.C.G., 171 N.C. App. 488, 615 S.E.2d 76, 2005 N.C. App. LEXIS 1314 (2005).

**Investigation Not Revealing Abuse or Neglect.** — Trial court lacked subject matter jurisdiction to enter orders finding the mother's four minor children to be abused and neglected after the county social services department of

the neighboring county, due to a conflict the county social services department had, conducted an investigation and found that allegations of abuse and neglect by the mother's church and the caretaker of the children were unfounded; once an official finding that no abuse and neglect had occurred, the trial court lost the authority to declare that it had occurred and to determine that the four minor children should be removed from the custody of the caretaker. In re S.D.A., 170 N.C. App. 354, 612 S.E.2d 362, 2005 N.C. App. LEXIS 1012 (2005).

**Cited in** In re A.K., 360 N.C. 449, 628 S.E.2d 753, 2006 N.C. LEXIS 44 (2006).

## § 7B-303. Interference with assessment.

## CASE NOTES

**Jurisdiction.** — Trial court had authority pursuant to G.S. 7B-200(a)(6) to issue an ex parte order directing a mother to cease interference with a department's juvenile investigation concerning her children; however, where no request for nonsecure custody was presented

and no petition alleging that the children were neglected was filed, the trial court lacked jurisdiction to award custody of the children to their father. In re K.C.G., 171 N.C. App. 488, 615 S.E.2d 76, 2005 N.C. App. LEXIS 1314 (2005).

## § 7B-310. Privileges not grounds for failing to report or for excluding evidence.

## CASE NOTES

**Privilege Not Available in Child Abuse Cases.** —

Under G.S. 7B-310, a trial court in a child neglect case did not err in admitting certain evidence in violation of a mother's psychologist-

patient privilege; that privilege did not operate to bar relevant evidence in an action that concerned the abuse or neglect of a child. In re K.D., — N.C. App. —, 631 S.E.2d 150, 2006 N.C. App. LEXIS 1393 (2006).

## ARTICLE 4.

*Venue; Petitions.*

## § 7B-400. Venue; pleading.

## CASE NOTES

**Court Not Limited To Only Circumstances Occurring Within Its District.** — District court, in adjudicating a child neglected, was not limited to considering only those circumstances occurring within its district. To hold otherwise would have allowed abusive and neglectful parents to avoid court intervention by simply moving from county to county. In re

E.C., — N.C. App. —, 621 S.E.2d 647, 2005 N.C. App. LEXIS 2494 (2005).

**Cited in** In re R.T.W., 359 N.C. 539, 614 S.E.2d 489, 2005 N.C. LEXIS 646 (2005); In re A.K., 360 N.C. 449, 628 S.E.2d 753, 2006 N.C. LEXIS 44 (2006); In re M.B., — N.C. App. —, — S.E.2d —, 2006 N.C. App. LEXIS 1960 (Sept. 19, 2006).

## § 7B-402. Petition.

### CASE NOTES

**Applied** in *In re R.T.W.*, 359 N.C. 539, 614 S.E.2d 489, 2005 N.C. LEXIS 646 (2005).

**Cited** in *In re H.S.F.*, — N.C. App. —, 628 S.E.2d 416, 2006 N.C. App. LEXIS 866 (2006).

## § 7B-403. Receipt of reports; filing of petition.

### CASE NOTES

**Verification of petition.** — Failure of the director of a county department of social services to sign and verify before a notary, pursuant to G.S. 7B-403(a), a petition for a finding that a minor child was a neglected juvenile rendered the petition fatally deficient and inop-

erative to invoke the subject matter jurisdiction of the trial court. *In re T.R.P.*, 173 N.C. App. 541, 619 S.E.2d 525, 2005 N.C. App. LEXIS 2098 (2005).

**Cited** in *In re A.K.*, 360 N.C. 449, 628 S.E.2d 753, 2006 N.C. LEXIS 44 (2006).

## § 7B-405. Commencement of action.

### CASE NOTES

**Verification of petition.** — Failure of the director of a county department of social services to sign and verify before a notary, pursuant to G.S. 7B-403(a), a petition for a finding that a minor child was a neglected juvenile rendered the petition fatally deficient and inoperative to invoke the subject matter jurisdiction of the trial court; because there was no evidence in the record suggesting later filings sufficient

to invoke subject matter jurisdiction as to the lower court's subsequent order from a review hearing, the trial court erred in proceeding on the matter due to lack of subject matter jurisdiction. *In re T.R.P.*, 173 N.C. App. 541, 619 S.E.2d 525, 2005 N.C. App. LEXIS 2098 (2005).

**Cited** in *In re P.L.P.*, 173 N.C. App. 1, 618 S.E.2d 241, 2005 N.C. App. LEXIS 1921 (2005), *aff'd*, — N.C. —, 625 S.E.2d 779 (2006).

## § 7B-406. Issuance of summons.

### CASE NOTES

#### **Jurisdiction.** —

Juvenile petition was filed June 11, 2004, and the summons was issued four days later, but the summons was returned by the sheriff on June 30, 2004, unserved; on July 8, 2004, the mother attended a hearing regarding the allegations her minor child was neglected and dependent. The mother was not only present in court, but also agreed to continue the matter until July 22, 2004, and there was no evidence that the mother raised any objection at that

hearing regarding insufficient service of process or personal jurisdiction; thus, her actions amounted to waiver of her right to challenge the trial court's exercise of personal jurisdiction over her regardless of whether she was served with a juvenile summons in compliance with G.S. 1A-1-4. *In re A.J.M.*, — N.C. App. —, 630 S.E.2d 33, 2006 N.C. App. LEXIS 1220 (2006).

**Cited** in *In re E.C.*, — N.C. App. —, 621 S.E.2d 647, 2005 N.C. App. LEXIS 2494 (2005).

### ARTICLE 5.

#### *Temporary Custody; Nonsecure Custody; Custody Hearings.*

## § 7B-500. Taking a juvenile into temporary custody; civil and criminal immunity.

### CASE NOTES

**Jurisdiction.** — Trial court had authority pursuant to G.S. 7B-200(a)(6) to issue an ex

parte order directing a mother to cease interference with a department's juvenile investiga-



tion concerning her children; however, where no request for nonsecure custody was presented and no petition alleging that the children were neglected was filed, the trial court lacked jurisdiction to award custody of the children to their

father. In re K.C.G., 171 N.C. App. 488, 615 S.E.2d 76, 2005 N.C. App. LEXIS 1314 (2005).

**Cited in** In re E.C., — N.C. App. —, 621 S.E.2d 647, 2005 N.C. App. LEXIS 2494 (2005).

## § 7B-502. Authority to issue custody orders; delegation.

### CASE NOTES

**Jurisdiction.** — Trial court had authority pursuant to G.S. 7B-200(a)(6) to issue an ex parte order directing a mother to cease interference with a department's juvenile investigation concerning her children; however, where no request for nonsecure custody was presented

and no petition alleging that the children were neglected was filed, the trial court lacked jurisdiction to award custody of the children to their father. In re K.C.G., 171 N.C. App. 488, 615 S.E.2d 76, 2005 N.C. App. LEXIS 1314 (2005).

## § 7B-503. Criteria for nonsecure custody.

### CASE NOTES

#### **Jurisdiction Required.** —

Trial court had authority pursuant to G.S. 7B-200(a)(6) to issue an ex parte order directing a mother to cease interference with a department's juvenile investigation concerning her children; however, where no request for nonsecure custody was presented and no petition alleging that the children were neglected was filed, the trial court lacked jurisdiction to award custody of the children to their father. In re K.C.G., 171 N.C. App. 488, 615 S.E.2d 76, 2005 N.C. App. LEXIS 1314 (2005).

**Findings of Fact Required.** — Trial court erred in concluding that child was dependent there were no findings of fact concerning the mother's ability to provide care or supervision for the child or that the mother lacked an alternative child care arrangement to support the court's conclusion that the child was dependent. In re E.C., — N.C. App. —, 621 S.E.2d 647, 2005 N.C. App. LEXIS 2494 (2005).

**Applied in** In re R.T.W., 359 N.C. 539, 614 S.E.2d 489, 2005 N.C. LEXIS 646 (2005).

## § 7B-504. Order for nonsecure custody.

### CASE NOTES

**Cited in** In re H.S.F., — N.C. App. —, 628 S.E.2d 416, 2006 N.C. App. LEXIS 866 (2006).

## § 7B-505. Place of nonsecure custody.

### CASE NOTES

**Placement With Relatives.** — When, in a dependency proceeding, a trial court placed a child's custody with the child's foster parents without finding it was contrary to the child's best interests to place her with willing relatives, pursuant to G.S. 7B-903(a)(2)c, this was error because, inter alia, G.S. 7B-505 required the trial court, in entering a nonsecure custody

order, to first consider the child's placement with a relative; G.S. 7B-506(h) continued this requirement at each hearing to determine the need for the child's continued custody outside of her home, so the general assembly intended to apply this requirement to reviews of custody placements. In re L.L., 172 N.C. App. 689, 616 S.E.2d 392, 2005 N.C. App. LEXIS 1798 (2005).

## § 7B-506. Hearing to determine need for continued nonsecure custody.

### CASE NOTES

**Placement With Relatives.** — When, in a dependency proceeding, a trial court placed a child's custody with the child's foster parents without finding it was contrary to the child's best interests to place her with willing relatives, pursuant to G.S. 7B-903(a)(2)c, this was error because, *inter alia*, G.S. 7B-505 required the trial court, in entering a nonsecure custody order, to first consider the child's placement with a relative; G.S. 7B-506(h) continued this

requirement at each hearing to determine the need for the child's continued custody outside of her home, so the general assembly intended to apply this requirement to reviews of custody placements. In re L.L., 172 N.C. App. 689, 616 S.E.2d 392, 2005 N.C. App. LEXIS 1798 (2005).

**Cited in** In re B.N.H., 170 N.C. App. 157, 611 S.E.2d 888, 2005 N.C. App. LEXIS 885 (2005); In re H.S.F., — N.C. App. —, 628 S.E.2d 416, 2006 N.C. App. LEXIS 866 (2006).

## § 7B-507. Reasonable efforts.

### CASE NOTES

#### **Applicability.** —

Award of guardianship did not cease social services department's duty to continue reunification efforts with the mother because the dispositional order did not make a guardianship the permanent plan. Therefore, the trial court was not required to make findings pursuant to G.S. 7B-507(b). In re E.C., — N.C. App. —, 621 S.E.2d 647, 2005 N.C. App. LEXIS 2494 (2005).

#### **Evidence Sufficient to Terminate Reunification Efforts.** —

In a case involving G.S. 7B-507(a) and G.S. 7B-907(c), the trial court did not err in granting guardianship of the mother's three older children to the maternal aunt because the best interests of the children were paramount, and the trial court had no assurances the mother

had made sufficient progress for the children to be returned to the mother's care. In re T.K., — N.C. App. —, 613 S.E.2d 739, 2005 N.C. App. LEXIS 1191 (2005), *aff'd*, 360 N.C. 163, 622 S.E.2d 494 (2005).

**Concurrent Permanent Placement Plan of Reunification and Adoption Held Proper.** — Concurrent permanent placement plan of reunification and adoption as allowed by G.S. 7B-507(d) did not conflict with the requirement of G.S. 7B-907(a) to obtain permanent placement within a reasonable period of time; concurrent plans leading to adoption of children by their foster parents and reunification with their mother were proper. In re J.J.L., 170 N.C. App. 368, 612 S.E.2d 404, 2005 N.C. App. LEXIS 1010 (2005).

## ARTICLE 6.

### *Basic Rights.*

## § 7B-600. Appointment of guardian.

### CASE NOTES

#### **Appointment of Guardian Was Proper.**

— Guardian was properly appointed for child where the dispositional order demonstrated that the trial court found guardianship to be in the child's best interest following the presentation at the adjudicatory hearing of all the evidence concerning the mother's failure to properly care for the child, and after the review of the social service department's and guardian ad litem's reports. Additionally, the mother did not appear at the dispositional hearing, provid-

ing the court with additional grounds to appoint a guardian. In re E.C., — N.C. App. —, 621 S.E.2d 647, 2005 N.C. App. LEXIS 2494 (2005).

Amended G.S. 7B-906(b) and G.S. 7B-600(b) applied to a review conducted in October 2002 because the amended statutes applied to reviews that were commenced after October 1, 2000. In re J.D.C., 174 N.C. App. 157, 620 S.E.2d 49, 2005 N.C. App. LEXIS 2250 (2005).

**Applicability.** — Trial court's denial of a

mother's request to regain legal and physical custody of her minor child, who was in the legal custody of the county department of social services and under the guardianship of the child's grandparents, was reversed and remanded because while the court held multiple proceedings pursuant to G.S. 7B-906, there was never a finding made that guardianship was

the permanent plan under G.S. 7B-907; therefore, G.S. 7B-600(b) was inapplicable, and the trial court erred by imposing the burden of proof upon the mother. *In re J.D.C.*, 174 N.C. App. 157, 620 S.E.2d 49, 2005 N.C. App. LEXIS 2250 (2005).

**Cited in** *In re L.M.C.*, 170 N.C. App. 676, 613 S.E.2d 256, 2005 N.C. App. LEXIS 1089 (2005).

## § 7B-601. Appointment and duties of guardian ad litem.

### CASE NOTES

**Trial court erred in failing to appoint a guardian ad litem (GAL) for the child from the beginning of a termination proceeding;** a GAL and an attorney advocate performed distinct and separate roles, so the appointment of the attorney advocate as the GAL after three and a half days of testimony was insufficient, even though the advocate had been involved in

the case from an earlier time. *In re R.A.H.*, 171 N.C. App. 427, 614 S.E.2d 382, 2005 N.C. App. LEXIS 1256 (2005).

**Cited in** *In re A.D.L.*, 169 N.C. App. 701, 612 S.E.2d 639, 2005 N.C. App. LEXIS 797 (2005); *In re J.S.L.*, — N.C. App. —, 628 S.E.2d 387, 2006 N.C. App. LEXIS 883 (2006).

## § 7B-602. Parent's right to counsel; guardian ad litem.

### CASE NOTES

**Section G.S. 7B-602(b) Analysis Compared to G.S. 7B-1101 Analysis for Appointment of Guardian Ad Litem.** — Court saw no reason why the analysis of the issues arising under G.S. 7B-1101 were not applicable to the same issues arising under G.S. 7B-602(b) with respect to whether to appoint a guardian ad litem; the G.S. 7B-1101 analysis centered on the intertwining of the parent's condition and the child's neglect. *In re C.B.*, 171 N.C. App. 341, 614 S.E.2d 579, 2005 N.C. App. LEXIS 1205 (2005).

**Failure to Appoint Guardian Ad Litem.** — Trial court erroneously failed to appoint a guardian ad litem for the mother as required by G.S. 7B-602 where the mother had mental health issues, a depressive disorder and borderline personality disorder, which resulted in the daughter's dependency. *In re L.M.C.*, 170 N.C. App. 676, 613 S.E.2d 256, 2005 N.C. App. LEXIS 1089 (2005).

G.S. 7B-602 required that a guardian ad litem (GAL) be appointed if the juvenile was alleged to be "dependent" and the parent was incapable as a result of mental illness of providing the proper care and supervision of the juvenile; G.S. 7B-602 was not limited to termination cases, and the trial court's failure to sua sponte appoint a GAL for the mother in a dependency case was error where the trial court was on notice of the mother's alleged mental conditions, and made references to and questioned the mother's mental condition in several orders. *In re D.D.Y.*, 171 N.C. App. 347,

621 S.E.2d 15, 2005 N.C. App. LEXIS 1257 (2005).

Since it was unclear the extent to which a father's mental health issues were inextricably linked to the issues of domestic violence, substance abuse, and anger management that supported the finding of continued neglect of the children, the trial court erred in failing to hold a hearing as to the father's need for a guardian ad litem. *In re K.H.*, — N.C. App. —, 627 S.E.2d 478, 2006 N.C. App. LEXIS 710 (2006).

**Mother Was Not Entitled to Appointment of Guardian Ad Litem During Termination of Parental Rights Action.** — Mother was not entitled to the appointment of a guardian ad litem in an action to terminate her parental rights; the mother's sparse references to her need to counseling and drug treatment did not rise to the level of being so intertwined with the neglect of her children and to be virtually inseparable and while the Department of Social Services recommended counseling, there was no significant evidence in the record to suggest that the mother's parental rights were terminated due to any mental illness or substance abuse. *In re As.L.G.*, 173 N.C. App. 551, 619 S.E.2d 561, 2005 N.C. App. LEXIS 2116 (2005).

**Allegations of Parental Condition Triggers Appointment of Guardian Ad Litem.** — Department of social services "alleged" that the mother's dependency and mental illness were the cause of her child's problems so, even without allegations of specific facts, it was error



under G.S. 7B-602 for the lower court not to appoint a guardian ad litem for her before it adjudicated whether her child was dependent and neglected under G.S. 7B-101(9), (15). In re C.B., 171 N.C. App. 341, 614 S.E.2d 579, 2005 N.C. App. LEXIS 1205 (2005).

**Cited in** In re O.C., 171 N.C. App. 457, 615 S.E.2d 391, 2005 N.C. App. LEXIS 1272 (2005),

cert. denied, — N.C. —, 623 S.E.2d 587 (2005); In re E.C., — N.C. App. —, 621 S.E.2d 647, 2005 N.C. App. LEXIS 2494 (2005); In re L.W., — N.C. App. —, 623 S.E.2d 626, 2006 N.C. App. LEXIS 55 (2006); In re J.S.L., — N.C. App. —, 628 S.E.2d 387, 2006 N.C. App. LEXIS 883 (2006); In re D.H., — N.C. App. —, 629 S.E.2d 920, 2006 N.C. App. LEXIS 1195 (2006).

## ARTICLE 7.

### *Discovery.*

## § 7B-700. Regulation of discovery; protective orders.

### CASE NOTES

**Denial to Interview Child Was Not Abuse of Discretion.** — Trial court did not err by denying a mother's motion to interview her son for whom a proceeding was initiated against the mother for termination of her parental rights because, as evidenced by the multiple findings of fact contained within multiple court orders, any contact the mother had with the child was disruptive to his own therapeutic

progress and it was clear from the record that the trial court was concerned with the mother's behavior in attempting to learn of the child's whereabouts, particularly since the mother abducted the child from his school bus stop while he was in foster care. In re J.B., 172 N.C. App. 1, 616 S.E.2d 264, 2005 N.C. App. LEXIS 1589 (2005).

## ARTICLE 8.

### *Hearing Procedures.*

## § 7B-801. Hearing.

### CASE NOTES

**Cited in** In re B.N.H., 170 N.C. App. 157, 611 S.E.2d 888, 2005 N.C. App. LEXIS 885 (2005).

## § 7B-803. Continuances.

### CASE NOTES

#### **Denial of Continuance Proper.** —

Trial court did not abuse its discretion by denying a mother's third motion to continue in the proceeding commenced to terminate her parental rights to her son because, though she was incarcerated prior to the hearing, such incarceration was the result of her own actions

in abducting the child and the preceding continuance was allowed expressly for the purpose of allowing the mother to gather the documents that she asserted she needed to obtain. In re J.B., 172 N.C. App. 1, 616 S.E.2d 264, 2005 N.C. App. LEXIS 1589 (2005).

## § 7B-805. Quantum of proof in adjudicatory hearing.

### CASE NOTES

#### **Clear and Convincing Evidence Required.** —

While the findings of fact and conclusions of

law showed, by clear and convincing evidence pursuant to G.S. 7B-805, that a father neglected his three-month-old infant under G.S.

7B-101(15), based on an incident where the infant suffered a severe head injury while in his father's sole care, which could not have been attributed to rolling off the couch as the father contended happened when he went to get a bottle for the infant, the proof was insufficient to show that the mother had neglected the infant; she was not at home when the incident occurred and there were no other incidents involving the infant. In re J.A.G., 172 N.C. App. 708, 617 S.E.2d 325, 2005 N.C. App. LEXIS 1785 (2005).

Disagreement among expert physicians as to whether a six-month-old child's broken clavicle, compression fracture of the spine, and hemorrhaged eyes were caused by accidents or by non-accidental trauma, as well as a trial court's findings that the child's regular pediatrician saw no reason for concern about child abuse and that there was no evidence that her parents had problems affecting their parenting ability, supported the trial court's conclusion of law that clear and convincing evidence was not presented to show that the child was abused or neglected under G.S. 7B-805. In re A.R.H., — N.C. App. —, 629 S.E.2d 925, 2006 N.C. App. LEXIS 1183 (2006).

**The evidence before the trial court was sufficient, etc.**

Social services department presented clear, cogent, and convincing evidence from which the trial court could find and conclude that child was at risk of some physical, mental, or emotional impairment where the mother kept the child at her cousin's home in a filthy room with clothes and dirty diapers strewn about, she would leave the home for several days at a time and, upon her return, she would sleep for long periods of time with the child in the bed and would not awaken when the child cried, the mother came home drunk or under the influence of drugs on one occasion and attempted to remove the child from the home in the middle of the night, and the mother was unable to complete a substance abuse treatment program because of frequent altercations with other residents. In re E.C., — N.C. App. —, 621 S.E.2d 647, 2005 N.C. App. LEXIS 2494 (2005).

**Finding that areas of the brain effected by infarctions would not regenerate was supported by clear and convincing evidence.** — In a case alleging abuse, neglect, and dependency, a medical expert explained that with an infarction, part of the brain tissue begins to swell, will become damaged, and will either scar down or just go away; the damaged portion of the brain typically will not regenerate. Thus, based on the expert's testimony, the trial court's finding of fact that the areas effected by the infarctions will not regenerate was supported by clear and convincing evidence. In re J.A.G., — N.C. App. —, — S.E.2d —, 2005 N.C. App. LEXIS 1091 (June 7, 2005).

**Evidence of neglect was not supported by clear and convincing evidence.** — In a case alleging abuse, neglect, and dependency, the finding that the mother had neglected in the past to appropriately care for the child was not supported by clear and convincing evidence, because: (1) although the mother testified that she neither placed any devices on the sofa to prevent the child from falling off nor placed any pillows in front of the sofa in the event that the child did roll off, the child was unable to roll over, and was not otherwise mobile, during the prior instances when the parents placed him on the sofa; (2) it was not unusual for parents to place an immobile infant on a sofa, couch, or bed; and (3) the child had never missed any doctor's appointments, was developing appropriately, and had no prior injuries. In re J.A.G., — N.C. App. —, — S.E.2d —, 2005 N.C. App. LEXIS 1091 (June 7, 2005).

**Finding that mother was not willing to investigate the needs of the child in a safe environment** was not supported by clear and convincing evidence in a case alleging abuse, neglect, and dependency; in one week, the mother provided the county department of social services with at least four names of individuals who could potentially care for the child, if necessary. In re J.A.G., — N.C. App. —, — S.E.2d —, 2005 N.C. App. LEXIS 1091 (June 7, 2005).

**Applied in** In re R.T.W., 359 N.C. 539, 614 S.E.2d 489, 2005 N.C. LEXIS 646 (2005).

## § 7B-807. Adjudication.

### CASE NOTES

**Adjudication Supported by Evidence.** —

In a case where there was an adjudication of dependency, neglect, and abuse, any error in the admission of the child's hearsay statements was harmless because the other evidence alone supported a finding of dependency and neglect. The evidence at trial clearly showed (1) the mother violated a safety plan by leaving the

child alone with men who were alleged to be sexually abusing her; (2) an examining doctor found extensive eroding dental caries going into the gums and a one-inch linear scar on the child's lower leg that was opined to be inflicted by the mother with either a shoe, a stick with thorns, or the metal part of a belt; (3) the mother called the child a "whore" and a "bitch"

and further stated that the child was no longer her daughter and that she was on her own and no longer had a mother; and (4) expert testimony that the child displayed symptoms of anxiety, anger, disassociation, and post-traumatic stress disorder. In re M.G.T.-B., — N.C. App. —, 629 S.E.2d 916, 2006 N.C. App. LEXIS 1182 (2006).

**Applied** in In re A.D.L., 169 N.C. App. 701, 612 S.E.2d 639, 2005 N.C. App. LEXIS 797

(2005); In re R.T.W., 359 N.C. 539, 614 S.E.2d 489, 2005 N.C. LEXIS 646 (2005); In re A.K., 360 N.C. 449, 628 S.E.2d 753, 2006 N.C. LEXIS 44 (2006).

**Cited** in In re L.E.B., 169 N.C. App. 375, 610 S.E.2d 424, 2005 N.C. App. LEXIS 598 (2005); In re B.N.H., 170 N.C. App. 157, 611 S.E.2d 888, 2005 N.C. App. LEXIS 885 (2005); In re L.L., 172 N.C. App. 689, 616 S.E.2d 392, 2005 N.C. App. LEXIS 1798 (2005).

## ARTICLE 9.

### *Dispositions.*

#### § 7B-900. Purpose.

##### CASE NOTES

**Cited** in In re A.K., 360 N.C. 449, 628 S.E.2d 753, 2006 N.C. LEXIS 44 (2006).

#### § 7B-901. Dispositional hearing.

##### CASE NOTES

**Evidence of Neglect Obtained From Agency and Guardian Ad Litem Reports Properly Admitted.** — In re C.B., 171 N.C. App. 341, 614 S.E.2d 579, 2005 N.C. App. LEXIS 1205 (2005).

**Applied** in In re R.T.W., 359 N.C. 539, 614 S.E.2d 489, 2005 N.C. LEXIS 646 (2005).

**Cited** in In re A.K., 360 N.C. 449, 628 S.E.2d 753, 2006 N.C. LEXIS 44 (2006).

#### § 7B-903. Dispositional alternatives for abused, neglected, or dependent juvenile.

##### CASE NOTES

**Placement With Relatives.** — When, in a dependency proceeding, a trial court placed a child's custody with the child's foster parents without finding it was contrary to the child's best interests to place her with willing relatives, pursuant to G.S. 7B-903(a)(2)c, this was error as: (1) this statutory requirement applied to the review hearing at which the trial court entered its custody order because G.S. 7B-906, which governed the hearing, incorporated dispositional alternatives in G.S. 7B-903, which gave priority to placing a child with a suitable relative; (2) 42 U.S.C.S. § 671(a)(19) required that, as a condition for receiving federal foster care funds, a state had to have a foster care plan that gave preference to placement with a relative; (3) G.S. 7B-505 required the trial court, in entering a nonsecure custody order, to first consider the child's placement with a relative, and G.S. 7B-506(h) continued this re-

quirement at each hearing to determine the need for the child's continued custody outside of her home, so the general assembly intended to apply this requirement to reviews of custody placements; and (4) exempting review hearings from the requirement to first consider placement with relatives risked undermining the Interstate Compact on the Placement of Children (ICPC), G.S. 7B-3800, as home studies of out-of-state relatives required by the ICPC were often not completed until a review hearing was held. In re L.L., 172 N.C. App. 689, 616 S.E.2d 392, 2005 N.C. App. LEXIS 1798 (2005).

**Dispositional Alternatives.** — While a trial court had the authority under G.S. 7B-906 to issue a dispositional order in a child custody case, and while that court had had the authority under G.S. 7B-906(g) to place custody of the child with someone other than a parent, the court erred in giving physical custody to the



mother but ordering the child's "physical placement" to be with her maternal grandfather. G.S. 7B-903(a) specified the dispositional alternatives that were available in a custody matter, a "physical placement" with someone who did not have custody was not a permissible alternative under G.S. 7B-903(a), and G.S. 7B-906(g) contemplated that the person with whom the child was to live was a person who had custody of the child. In *re* H.S.F., — N.C. App. —, 628 S.E.2d 416, 2006 N.C. App. LEXIS 866 (2006).

**Finding of Proper Care and Supervision.** — Before returning a child to the custody of a parent from whose custody the child is originally taken, a trial court must find that the child will receive from that parent the proper care and supervision in a safe home. In *re* H.S.F., — N.C. App. —, 628 S.E.2d 416, 2006 N.C. App. LEXIS 866 (2006).

**Change of Custody Improper.** — Given that the department of social services was prohibited under G.S. 7B-903(a)(2)(c) from returning physical custody of a child, to the parent from whom the child had been taken, without a hearing in which a court found that the child would receive proper care in a safe home, as defined in G.S. 7B-101(19), a trial court erred in changing custody of a child from a father to the mother because the court was required to find,

but did not find, that the child would receive from the mother the necessary proper care and supervision in a safe home, particularly in light of prior evidence that domestic violence had occurred in the home. In *re* H.S.F., — N.C. App. —, 628 S.E.2d 416, 2006 N.C. App. LEXIS 866 (2006).

**Insufficient Findings.** — While a court had the power under G.S. 7B-903 to enter an order transferring the custody of a minor child from her father to her mother, there was no evidence in the record in a proceeding on the parties' cross-motions for contempt that supported the finding that transferring custody to the mother was in the child's best interests. It had been found in an earlier proceeding that the mother was abusing prescription drugs, that her husband had been physically abusing her, and that loaded weapons were kept in their home, yet in the contempt proceeding, the trial court made no findings addressing a prior adjudication in which it had been determined that the child was neglected, and no findings were made as to whether efforts to mend the mother's relationship with her husband had been resolved. In *re* H.S.F., — N.C. App. —, 628 S.E.2d 416, 2006 N.C. App. LEXIS 866 (2006).

**Applied** in *re* R.T.W., 359 N.C. 539, 614 S.E.2d 489, 2005 N.C. LEXIS 646 (2005).

**Cited** in *re* A.K., 360 N.C. 449, 628 S.E.2d 753, 2006 N.C. LEXIS 44 (2006).

## § 7B-904. Authority over parents of juvenile adjudicated as abused, neglected, or dependent.

### CASE NOTES

#### Authority of the Court. —

Pursuant to G.S. 7B-904(d1)(3), a trial court did not exceed its authority in ordering the mother to comply with its directive that the father not have any contact with the son, as the infant had suffered a severe head trauma while

in the father's sole care, which could not have been attributed to the infant's having rolled off the couch, as the father claimed. In *re* J.A.G., 172 N.C. App. 708, 617 S.E.2d 325, 2005 N.C. App. LEXIS 1785 (2005).

## § 7B-905. Dispositional order.

### CASE NOTES

#### Late Filing of Adjudication and Disposition Orders Not Grounds for Reversal Where No Prejudice. —

Mother did not establish that a trial court's late entry of an order under G.S. 7B-905(a) in a neglect and dependency proceeding prejudiced the mother, as the delay did not preclude the reunification of the children and the mother. In *re* T.S., — N.C. App. —, 631 S.E.2d 19, 2006 N.C. App. LEXIS 1299 (2006).

#### Improper Discretion As to Visitation At Discretion of Guardian Held Error. — Trial

court erred in ordering visitation between mother and her child at the discretion of the guardian with whom the court vested the physical custody of the child because the court, at a review hearing, was to consider and make relevant findings of fact regarding an appropriate visitation plan under G.S. 7B-906(c)(6). In *re* E.C., — N.C. App. —, 621 S.E.2d 647, 2005 N.C. App. LEXIS 2494 (2005).

**Cited** in *re* B.N.H., 170 N.C. App. 157, 611 S.E.2d 888, 2005 N.C. App. LEXIS 885 (2005); In *re* L.E.B., 169 N.C. App. 375, 610 S.E.2d 424,

2005 N.C. App. LEXIS 598 (2005); In re A.D.L., 169 N.C. App. 701, 612 S.E.2d 639, 2005 N.C. App. LEXIS 797 (2005); In re As.L.G., 173 N.C. App. 551, 619 S.E.2d 561, 2005 N.C. App. LEXIS 2116 (2005); In re L.L., 172 N.C. App.

689, 616 S.E.2d 392, 2005 N.C. App. LEXIS 1798 (2005); In re A.K., 360 N.C. 449, 628 S.E.2d 753, 2006 N.C. LEXIS 44 (2006); In re A.R.G., — N.C. App. —, 631 S.E.2d 146, 2006 N.C. App. LEXIS 1335 (2006).

## § 7B-906. Review of custody order.

### CASE NOTES

**Applicability.** — Amended G.S. 7B-906(b) and G.S. 7B-600(b) applied to a review conducted in October 2002 because the amended statutes applied to reviews that were commenced after October 1, 2000. In re J.D.C., 174 N.C. App. 157, 620 S.E.2d 49, 2005 N.C. App. LEXIS 2250 (2005).

**Lack of Timeliness.** — Where the review hearing of the neglect disposition was not held within the time period provided in G.S. 7B-906(a) and where the permanency planning orders were late under G.S. 7B-907(c), the mother was not entitled to relief, as the mother made no attempt to demonstrate the prejudice required for reversal. In re C.L.C., 171 N.C. App. 438, 615 S.E.2d 704, 2005 N.C. App. LEXIS 1316 (2005).

Mother was not prejudiced by a trial court's delay in entering its order in a child neglect and pendency proceeding because neither the pendency of the trial court's order, nor an appeal, deprived the mother of reunification with her children; if the mother had complied with the trial court's order, she could have requested a review hearing and sought custody of her children. In re T.S., — N.C. App. —, 631 S.E.2d 19, 2006 N.C. App. LEXIS 1299 (2006).

**Disposition on Review of Custody Order.** —

When, in a dependency proceeding, a trial court placed a child's custody with the child's foster parents without finding it was contrary to the child's best interests to place her with willing relatives, pursuant to G.S. 7B-903(a)(2)c, this was error because, *inter alia*, this statutory requirement applied to the review hearing at which the trial court entered its custody order because G.S. 7B-906, which governed the hearing, incorporated dispositional alternatives in G.S. 7B-903, which gave priority to placing a child with a suitable relative. In re L.L., 172 N.C. App. 689, 616 S.E.2d 392, 2005 N.C. App. LEXIS 1798 (2005).

**Written Custody Review Order.** —

When, in a dependency proceeding, a trial court's order transferring custody of a child from a department of social services to foster parents but requiring the department to continue to work towards reunification of the child with her parents was not entered until nine months after the hearing, contrary to the re-

quirement of G.S. 7B-906(d) that an order be entered within 30 days of a hearing, (1) the department of social services and the child's parents, who sought to appeal the order, were prejudiced, because they could not perfect their appeal; (2) the child was prejudiced, because, while her permanency plan was reunification with her parents, nothing required her foster parents to cooperate with that plan, and, in fact, they sought termination of her parents' parental rights, causing confusion as to what the child's plan actually was; and (3) the permanency planning process was prejudiced, for the aforementioned reasons. In re L.L., 172 N.C. App. 689, 616 S.E.2d 392, 2005 N.C. App. LEXIS 1798 (2005).

**Burden on Parents and Department.** —

Trial court's denial of a mother's request to regain legal and physical custody of her minor child, who was in the legal custody of the county department of social services and under the guardianship of the child's grandparents, was reversed and remanded because while the court held multiple proceedings pursuant to G.S. 7B-906, there was never a finding made that guardianship was the permanent plan under G.S. 7B-907; therefore, G.S. 7B-600(b) was inapplicable, and the trial court erred by imposing the burden of proof upon the mother. In re J.D.C., 174 N.C. App. 157, 620 S.E.2d 49, 2005 N.C. App. LEXIS 2250 (2005).

**Periodic Review by Judge.** —

Trial court's custody review order did not comply with G.S. 7B-906(c)(3) and (4) because it did not address the goals of a child's foster care placement or the role her foster parents were to play in her future planning, because the foster parents were foster parents, as they were providing foster care, as defined by G.S. 131D-10.2(9). In re L.L., 172 N.C. App. 689, 616 S.E.2d 392, 2005 N.C. App. LEXIS 1798 (2005).

**Failure to Make Relevant Findings of Fact Regarding Appropriate Visitation Plan Held Error.** — Trial court erred in ordering visitation between mother and her child at the discretion of the guardian with whom the court vested the physical custody of the child because the court, at a review hearing, was to consider and make relevant findings of fact regarding an appropriate visitation plan under G.S. 7B-906(c)(6). In re E.C., — N.C. App. —,



621 S.E.2d 647, 2005 N.C. App. LEXIS 2494 (2005).

**Contemplation of Custody With Whom Child Resides.** — While a trial court had the authority under G.S. 7B-906 to issue a dispositional order in a child custody case, and while that court had had the authority under G.S. 7B-906(g) to place custody of the child with someone other than a parent, the court erred in giving physical custody to the mother but ordering the child's "physical placement" to be with her maternal grandfather. G.S. 703(a) specified the dispositional alternatives that were available in a custody matter, a "physical placement" with someone who did not have custody was not a permissible alternative under G.S. 703(a), and G.S. 7B-906(g) contemplated that the person with whom the child was to live was a person who had custody of the child. *In re H.S.F.*, — N.C. App. —, 628 S.E.2d 416, 2006 N.C. App. LEXIS 866 (2006).

Although a trial court in a custody dispute ended the custody of a county department of social services, the court did not err in retaining jurisdiction to conduct period review hearings, despite a father's claim that the court, under G.S. 7B-906(d), the court was relieved of the

duty to conduct such reviews after custody was awarded to the father; in deciding a custody case under G.S. 7A-657, the almost-identical predecessor to G.S. 7B-906, the state's supreme court had already ruled that the relevant statutory language meant only that a trial court had a right to terminate its jurisdiction, but a trial court was not required to do so. Further, in the context of the Juvenile Code, North Carolina, G.S. 7B-201 provided that once a court obtained jurisdiction over a juvenile, that jurisdiction continued until terminated by a court order or until the juvenile reached the age of 18 years or was otherwise emancipated, and the parties' child was not yet 18 or emancipated. *In re H.S.F.*, — N.C. App. —, 628 S.E.2d 416, 2006 N.C. App. LEXIS 866 (2006).

**Cited in** *In re B.N.H.*, 170 N.C. App. 157, 611 S.E.2d 888, 2005 N.C. App. LEXIS 885 (2005); *In re L.M.C.*, 170 N.C. App. 676, 613 S.E.2d 256, 2005 N.C. App. LEXIS 1089 (2005); *In re R.T.W.*, 359 N.C. 539, 614 S.E.2d 489, 2005 N.C. LEXIS 646 (2005); *In re K.T.L.*, — N.C. App. —, 629 S.E.2d 152, 2006 N.C. App. LEXIS 965 (2006); *In re A.K.*, 360 N.C. 449, 628 S.E.2d 753, 2006 N.C. LEXIS 44 (2006).

**Applied in** *In re A.R.G.*, — N.C. App. —, 631 S.E.2d 146, 2006 N.C. App. LEXIS 1335 (2006).

## § 7B-907. Permanency planning hearing.

### CASE NOTES

#### Findings of Fact. —

In a case involving G.S. 7B-507(a) and G.S. 7B-907(c), the trial court did not err in granting guardianship of the mother's three older children to the maternal aunt because the best interests of the children were paramount, and the trial court had no assurances the mother had made sufficient progress for the children to be returned to the mother's care. *In re T.K.*, — N.C. App. —, 613 S.E.2d 739, 2005 N.C. App. LEXIS 1191 (2005), *aff'd*, 360 N.C. 163, 622 S.E.2d 494 (2005).

**Burden of proof.** — Trial court's denial of a mother's request to regain legal and physical custody of her minor child, who was in the legal custody of the county department of social services and under the guardianship of the child's grandparents, was reversed and remanded because while the court held multiple proceedings pursuant to G.S. 7B-906, there was never a finding made that guardianship was the permanent plan under G.S. 7B-907; therefore, G.S. 7B-600(b) was inapplicable, and the trial court erred by imposing the burden of proof upon the mother. *In re J.D.C.*, 174 N.C. App. 157, 620 S.E.2d 49, 2005 N.C. App. LEXIS 2250 (2005).

**Failure to timely file termination petition did not prejudice the mother.** — Although the Department of Social Services' fail-

ure to file its termination petition with 60 days violated G.S. 7B-907(e), the mother was not prejudiced; the mother failed to attend the termination hearing and did not assert that she would have attended hearing if the petition had been timely filed. *In re As.L.G.*, 173 N.C. App. 551, 619 S.E.2d 561, 2005 N.C. App. LEXIS 2116 (2005).

**Award of Custody to Great-grandmother.** — Termination of aunt's parental rights and award of permanent custody to the child's maternal great-grandmother was supported by substantial, competent evidence and affirmed, even though they had a pending G.S. ch. 50 custody action, where evidence at the G.S. 7B-907 hearing indicated that the child's aunt, who had been awarded temporary custody, failed to: (1) comply with court orders, including drug testing; (2) make reasonable and timely progress towards permanency, including providing suitable living conditions; (3) prove that it was possible for the child to return to her home within six months; and (4) prove it was in the child's best interests to live with her. *In re C.E.L.*, 171 N.C. App. 468, 615 S.E.2d 427, 2005 N.C. App. LEXIS 1361 (2005).

**Continuing Duty to Consider Child's Best Interest Made Res Judicata Inapplicable.** — Order that deferred to a G.S. ch. 50



custody action but required agency to develop a permanency plan and the child's aunt to take specific steps to comply with it was not a final order; since the trial court also had a continuing G.S. 7B-907 duty to consider evidence regarding the child's best interests, res judicata did not bar it from terminating the aunt's parental rights. In re C.E.L., 171 N.C. App. 468, 615 S.E.2d 427, 2005 N.C. App. LEXIS 1361 (2005).

**Time Limitations.** — Mother was not entitled to relief from the parental rights termination where the termination petitions were filed more than three months after the limitations period under G.S. 7B-907(e), which was directory rather than mandatory, had run; the mother failed to show that she was prejudiced by the period of delay, as the mother did not take advantage of visitation and did not have contact with the petitioning agency, and the mother, pursuant to G.S. 7B-1001, could have appealed from either the review hearing ceasing efforts to reunify the family or from the permanency planning order that changed the permanency plan to termination of parental rights. In re C.L.C., 171 N.C. App. 438, 615 S.E.2d 704, 2005 N.C. App. LEXIS 1316 (2005).

Where the review hearing of the neglect disposition was not held within the time period provided in G.S. 7B-906(a) and where the permanency planning orders were late under G.S. 7B-907(c), the mother was not entitled to relief, as the mother made no attempt to demonstrate

the prejudice required for reversal. In re C.L.C., 171 N.C. App. 438, 615 S.E.2d 704, 2005 N.C. App. LEXIS 1316 (2005).

**Appeals.** —

Allowing the mother to stay the termination proceedings pending an appeal of a custody review order would have precluded compliance with the termination timeline mandated under G.S. 7B-907, G.S. 7B-1109, and G.S. 7B-1110, and this would have been improper. In re R.T.W., 359 N.C. 539, 614 S.E.2d 489, 2005 N.C. LEXIS 646 (2005).

**Concurrent Permanent Placement Plan of Reunification and Adoption Held Proper.** —

Concurrent permanent placement plan of reunification and adoption as allowed by G.S. 7B-507(d) did not conflict with the requirement of G.S. 7B-907(a) to obtain permanent placement within a reasonable period of time; concurrent plans leading to adoption of children by their foster parents and reunification with their mother were proper. In re J.J.L., 170 N.C. App. 368, 612 S.E.2d 404, 2005 N.C. App. LEXIS 1010 (2005).

**Cited in** In re L.M.C., 170 N.C. App. 676, 613 S.E.2d 256, 2005 N.C. App. LEXIS 1089 (2005); In re L.E.B., 169 N.C. App. 375, 610 S.E.2d 424, 2005 N.C. App. LEXIS 598 (2005); In re B.N.H., 170 N.C. App. 157, 611 S.E.2d 888, 2005 N.C. App. LEXIS 885 (2005); In re L.L., 172 N.C. App. 689, 616 S.E.2d 392, 2005 N.C. App. LEXIS 1798 (2005); In re J.S.L., — N.C. App. —, 628 S.E.2d 387, 2006 N.C. App. LEXIS 883 (2006).

## § 7B-908. Post termination of parental rights' placement court review.

### CASE NOTES

**Cited in** In re B.N.H., 170 N.C. App. 157, 611 S.E.2d 888, 2005 N.C. App. LEXIS 885 (2005).

### ARTICLE 10.

## *Modification and Enforcement of Dispositional Orders; Appeals.*

## § 7B-1000. Authority to modify or vacate.

### CASE NOTES

**Applied in** In re R.T.W., 359 N.C. 539, 614 S.E.2d 489, 2005 N.C. LEXIS 646 (2005).

**Cited in** In re H.S.F., — N.C. App. —, 628 S.E.2d 416, 2006 N.C. App. LEXIS 866 (2006).

## § 7B-1001. Right to appeal.

### CASE NOTES

**Immediate Direct Appeal.** —

Mother was not entitled to relief from the

parental rights termination where the termination petitions were filed more than three

months after the limitations period under G.S. 7B-907(e), which was directory rather than mandatory, had run; the mother failed to show that she was prejudiced by the period of delay, as the mother did not take advantage of visitation and did not have contact with the petitioning agency, and the mother, pursuant to G.S. 7B-1001, could have appealed from either the review hearing ceasing efforts to reunify the family or from the permanency planning order that changed the permanency plan to termination of parental rights. In re C.L.C., 171 N.C. App. 438, 615 S.E.2d 704, 2005 N.C. App. LEXIS 1316 (2005).

**Time For Appeal. —**

Any challenge to the neglect adjudication was not properly before the appellate court because the mother did not appeal within 10 days pursuant to G.S. 7B-1001. In re C.L.C., 171 N.C. App. 438, 615 S.E.2d 704, 2005 N.C. App. LEXIS 1316 (2005).

Father's appeal of a trial court's order that a county agency pursue the adoption of the father's child and terminate the father's parental rights was dismissed because the order on appeal was not a final order for purposes of appeal as none of the provisions of G.S. 7B-1001 applied. In re A.R.G., — N.C. App. —, 631 S.E.2d 146, 2006 N.C. App. LEXIS 1335 (2006).

**Initial permanency planning order is not a final order** under G.S. 7B-1001, and is

not subject to an appeal. In re B.N.H., 170 N.C. App. 157, 611 S.E.2d 888, 2005 N.C. App. LEXIS 885 (2005).

Initial permanency planning order directing adoption for a mother's minor son was not a final order under G.S. 7B-1001 and, therefore, her appeal of that order was dismissed; the initial permanency planning order directing adoption did not change the mother's custodial rights or interest in the proceeding and was not immediately appealable. In re B.N.H., 170 N.C. App. 157, 611 S.E.2d 888, 2005 N.C. App. LEXIS 885 (2005).

**Permanency planning order which continued a child's custody with the department and stated that the permanent plan would be adoption did not change the status quo** since custody was given to the department by a previous order, thus the order appealed from did not alter the child's disposition; this was not an order from which the mother was allowed to appeal. In re C.L.S., — N.C. App. —, 623 S.E.2d 61, 2005 N.C. App. LEXIS 2750 (2005).

**Change in Permanency Plan Order Was Dispositional and Hence, Appealable. —**

Because the permanency planning order changed the permanent plan from reunification of the children with the father to that of adoption, it was a final order from which appeal could be taken. In re K.H., — N.C. App. —, 627 S.E.2d 478, 2006 N.C. App. LEXIS 710 (2006).

## § 7B-1003. Disposition pending appeal.

### CASE NOTES

**This section did not deprive the trial court of jurisdiction** to terminate the mother's parental rights during the pendency of the custody review order appeal; G.S. 7B-1003 applied only to dependency proceedings, not to termination proceedings, and allowing parents to delay termination proceedings by appealing custody review orders would have thwarted G.S. 7B-100(5), which sought to place children in safe, permanent houses within a reasonable amount of time. In re R.T.W., 359 N.C. 539, 614 S.E.2d 489, 2005 N.C. LEXIS 646 (2005).

**Lack of Timeliness. —** Mother was not prejudiced by a trial court's delay in entering its order in a child neglect and pendency proceeding because neither the pendency of the trial court's order, nor an appeal, deprived the mother of reunification with her children; if the mother had complied with the trial court's order, she could have requested a review hearing and sought custody of her children. In re T.S., — N.C. App. —, 631 S.E.2d 19, 2006 N.C. App. LEXIS 1299 (2006).

## § 7B-1004. Disposition after appeal.

### CASE NOTES

**Cited in** In re R.T.W., 359 N.C. 539, 614 S.E.2d 489, 2005 N.C. LEXIS 646 (2005).

## ARTICLE 11.

*Termination of Parental Rights.*

## § 7B-1100. Legislative intent; construction of Article.

## CASE NOTES

**Guardian Ad Litem Requirement.** — Although the mother's parental rights were not terminated for dependency under G.S. 7B-1111(a)(6), the trial court erred in failing to appoint the mother a guardian ad litem under former G.S. 7B-1101; the guardian ad litem requirement was triggered because the mother's mental health issues, involving, in part,

bipolar disorder, were central to the termination. In re L.W., — N.C. App. —, 623 S.E.2d 626, 2006 N.C. App. LEXIS 55 (2006).

**Applied** in In re R.T.W., 359 N.C. 539, 614 S.E.2d 489, 2005 N.C. LEXIS 646 (2005).

**Cited** in In re A.C.F., — N.C. App. —, 626 S.E.2d 729, 2006 N.C. App. LEXIS 529 (2006).

## § 7B-1101. Jurisdiction.

## CASE NOTES

**Guardian Ad Litem Requirement.** —

Trial court did not err by not appointing a guardian ad litem for the mother for a termination of parental rights hearing as it was not alleged, pursuant to G.S. 7B-1111(a)(6), that the mother was incapable of properly caring for her children; additionally, whether the trial court should have appointed a guardian ad litem for the mother in a prior dependency proceeding was not an issue before the court on the appeal of the termination of the mother's parental rights. In re O.C., 171 N.C. App. 457, 615 S.E.2d 391, 2005 N.C. App. LEXIS 1272 (2005), cert. denied, — N.C. —, 623 S.E.2d 587 (2005).

Trial court erred when it failed to appoint a guardian ad litem for mother pursuant to prior language of G.S. 7B-1101 after reviewing her psychological evaluation, but still considered her mental illness, even though it never mentioned G.S. 7B-1111(a)(6) as a factor in terminating her parental rights. Accordingly, the mother was entitled to a new termination hearing and the appointment of a guardian ad litem. In re T.W., 173 N.C. App. 153, 617 S.E.2d 702, 2005 N.C. App. LEXIS 1922 (2005).

**Section G.S. 7B-602(b) Analysis Compared to G.S. 7B-1101 Analysis for Appointment of Guardian Ad Litem.** — Court saw no reason why the analysis of the issues arising under G.S. 7B-1101 were not applicable to the same issues arising under G.S. 7B-602(b) with respect to whether to appoint a guardian ad litem; the G.S. 7B-1101 analysis centered on the intertwining of the parent's condition and the child's neglect. In re C.B., 171 N.C. App. 341, 614 S.E.2d 579, 2005 N.C. App. LEXIS 1205 (2005).

While the termination of a mother's parental rights was based on G.S. 7B-1111(a)(1), (7), the original petition alleged grounds for termination pursuant to G.S. 7B-1111(a)(6), and the trial court considered the mother's substance abuse and mental illness in making that determination; therefore, G.S. 7B-1101 required appointment of a guardian ad litem for the mother, and the failure of the trial court to do so was error. In re K.R.S., 170 N.C. App. 643, 613 S.E.2d 318, 2005 N.C. App. LEXIS 1092 (2005).

**Mother Was Not Entitled to Appointment of Guardian Ad Litem.** — Mother was not entitled to the appointment of a guardian ad litem in an action to terminate her parental rights; the mother's sparse references to her need to counseling and drug treatment did not rise to the level of being so intertwined with the neglect of her children and to be virtually inseparable and while the Department of Social Services recommended counseling, there was no significant evidence in the record to suggest that the mother's parental rights were terminated due to any mental illness or substance abuse. In re As.L.G., 173 N.C. App. 551, 619 S.E.2d 561, 2005 N.C. App. LEXIS 2116 (2005).

In termination of parental rights action, the trial court was not required to appoint a guardian ad litem for the mother under G.S. 7B-1101, because the termination did not allege dependency. In re J.S.L., — N.C. App. —, 628 S.E.2d 387, 2006 N.C. App. LEXIS 883 (2006).

Trial court terminated a mother's parental rights based on: (1) neglect; (2) wilfully leaving the children in foster care for more than 12 months without showing reasonable progress; (3) wilfully failing to provide financial support to the children; and (4) abandonment of the



children for at least six months immediately preceding the filing of the petition for termination of parental rights; the mother did not request that a guardian ad litem (GAL) be appointed. Also, the petition for termination of her parental rights did not allege the mother's incapability to parent the children, and no allegations were asserted, and no showing was made that the mother was incompetent; thus, the trial court was not required to appoint a GAL to the mother under either G.S. 7B-1101 and 35A-1101, or G.S. 1A-1-17. In re D.H., — N.C. App. —, 629 S.E.2d 920, 2006 N.C. App. LEXIS 1195 (2006).

**Failure to Appoint Guardian Ad Litem Is Not Reversible Error. —**

In an action to terminate the mother's parental rights, the trial court's failure to appoint the mother a guardian ad litem did not amount to reversible error. There were no circumstances of the type that, of brought to the judge's attention, would have raised a substantial question regarding the mother's competency. In re S.N.H., — N.C. App. —, 627 S.E.2d 510, 2006 N.C. App. LEXIS 717 (2006).

**Court Had Jurisdiction. —** There is no authority that compels dismissal of an action solely because petitioner fails to include the G.S. 7B-1104(7) statement of fact in a termination petition. In re J.D.S., 170 N.C. App. 244, 612 S.E.2d 350, 2005 N.C. App. LEXIS 1013 (2005), cert. denied, — U.S. —, 360 N.C. 64, 623 S.E.2d 584 (2005).

**Jurisdiction During Pendency of Custody Review Order Appeal. —** Where the trial court terminated the mother's parental rights during the pendency of the mother's custody review order appeal, G.S. 1-294 did not deprive the trial court of jurisdiction to terminate the mother's parental rights, as such jurisdiction was granted under G.S. 7B-1101 and G.S. 7B-1103. In re R.T.W., 359 N.C. 539, 614 S.E.2d 489, 2005 N.C. LEXIS 646 (2005).

**Jurisdiction Absent Where Petition Was**

**Insufficient. —** Where a termination of rights petition did not address guardianship issues raised by the noncustodial parent respondent, where no custody order was attached, and where the trial court merely announced that it had decided the claimed guardianship was void, without further explanation, it was impossible to review the trial court's decision and the appeals court was forced to hold that the trial court had lacked subject matter jurisdiction due to the facial defects of the petition. In re Z.T.B., 170 N.C. App. 564, 613 S.E.2d 298, 2005 N.C. App. LEXIS 1093 (2005).

Because the petition for termination of parental rights was not accompanied by a copy of the custody order then in effect, the petition failed to confer subject matter jurisdiction on the trial court; that omission need not have been fatal if the Vance County Department of Social Services (DSS) had simply amended the petition by attaching the proper custody order or otherwise ensured the custody order was made a part of the record before the trial court. Thus, it was the failure by the DSS either to attach the custody order to the petition or to remedy that omission that ultimately deprived the trial court of subject matter jurisdiction. In re T.B., — N.C. App. —, 629 S.E.2d 895, 2006 N.C. App. LEXIS 1224 (2006).

**Jurisdiction Absent Where the Department of Social Services Did Not Have Custody at the Time the Petition Was Filed. —** Since the trial court lacked jurisdiction as the children were not in the custody of the Department of Social Services at the time the petition to terminate the mother's parental rights was filed and the children were not residing in North Carolina pursuant to G.S. 7B-1101, the trial court's order terminating the mother's parental rights was vacated. In re D.D.J., — N.C. App. —, 628 S.E.2d 808, 2006 N.C. App. LEXIS 933 (2006).

**Cited in** In re J.G.B., — N.C. App. —, 628 S.E.2d 450, 2006 N.C. App. LEXIS 978 (2006).

## § 7B-1101.1. Parent's right to counsel; guardian ad litem.

### CASE NOTES

**Appointment of Guardian Ad Litem. —** G.S. 7B-1101.1 requires that a guardian ad litem be appointed in accordance with the provisions of G.S. 1A-1, N.C. R. Civ. P. 17 to represent a parent, meaning that where an allegation is made that parental rights should be terminated, a trial court is required to conduct a hearing to determine whether a guardian ad litem should be appointed to represent the parent, and an allegation under G.S. 7B-1111(a)(6) serves as a triggering mechanism, alerting the trial court that it should conduct a hearing to determine whether a guardian ad

litem should be appointed; at the hearing, the trial court must determine whether the parents are incompetent within the meaning of G.S. 35A-1101, such that the individual would be unable to aid in their defense at the termination of parental rights proceeding, and the trial court should always keep in mind that the appointment of a guardian ad litem will divest the parent of their fundamental right to conduct his or her litigation according to their own judgment and inclination. In re J.A.A., — N.C. App. —, 623 S.E.2d 45, 2005 N.C. App. LEXIS 2706 (2005).

**Appointment of Guardian Ad Litem Not Required.** — When it was alleged that a mother's parental rights to two children should be terminated because she (1) neglected them while they were in an agency's care within the meaning of G.S. 7B-101, under G.S. 7B-1111(a)(1), (2) willfully left the children in foster care for more than 12 months without showing reasonable progress to correct the conditions that led to their removal, under G.S. 7B-1111(a)(2), and (3) willfully failed to pay a reasonable portion of the cost of the children's care while in an agency's custody, under G.S. 7B-1111(a)(3), there was no requirement that a

guardian ad litem be appointed for the parent, even though the petition made reference to the mother's drug abuse and mental illness, because there was no allegation under G.S. 7B-1111(a)(6) that the mother was incapable of caring for her children, she did not seek a guardian ad litem, and the trial court properly inquired into her competency, under G.S. 1A-1, N.C. R. Civ. P. 17. *In re J.A.A.*, — N.C. App. —, 623 S.E.2d 45, 2005 N.C. App. LEXIS 2706 (2005).

**Cited in** *In re J.S.L.*, — N.C. App. —, 628 S.E.2d 387, 2006 N.C. App. LEXIS 883 (2006).

## § 7B-1102. Pending child abuse, neglect, or dependency proceedings.

### CASE NOTES

**Applied in** *In re A.K.*, 360 N.C. 449, 628 S.E.2d 753, 2006 N.C. LEXIS 44 (2006).

**Cited in** *In re P.L.P.*, 173 N.C. App. 1, 618

S.E.2d 241, 2005 N.C. App. LEXIS 1921 (2005), *aff'd*, — N.C. —, 625 S.E.2d 779 (2006).

## § 7B-1103. Who may file a petition or motion.

### CASE NOTES

**Agency's Lack of Standing Based on No Longer Having Custody of a Child.** —

Since it was undisputed that the Department of Social Services (DSS) did not have custody of the children on the date upon which the petition was filed and the children were living in South Carolina at the time, at the time of the filing of the DSS petition, DSS lacked standing to petition for termination of parental rights. *In re D.D.J.*, — N.C. App. —, 628 S.E.2d 808, 2006 N.C. App. LEXIS 933 (2006).

**Guardian ad litem had standing to petition for the termination of a mother's parental rights under G.S. 7B-1103(a)(5),** and the trial court had jurisdiction over the termination proceedings, where the child had continuously lived with the guardian ad litem for over two years when the petition for termination was filed. *In re E.T.S.*, — N.C. App. —, 623 S.E.2d 300, 2005 N.C. App. LEXIS 2724 (2005).

**Jurisdiction to Terminate Parental Rights During Pendency of Custody Review Order Appeal.** — Where the trial court terminated the mother's parental rights during the pendency of the mother's custody review order appeal, G.S. 1-294 did not deprive the trial court of jurisdiction to terminate the mother's parental rights, as such jurisdiction was granted under G.S. 7B-1101 and G.S. 7B-1103. *In re R.T.W.*, 359 N.C. 539, 614 S.E.2d 489, 2005 N.C. LEXIS 646 (2005).

**Two-Year Period in G.S. 7B-1103(a)(5)**

**Not Tolled.** — Two-year period required under G.S. 7B-1103(a)(5) was not tolled until a mother reached the age of majority, even though the mother did not have a guardian ad litem appointed in earlier neglect and dependency proceedings, as the mother was an adult during the entire termination of parental rights proceeding, was represented by counsel, and did not directly attack the prior neglect and dependency proceedings based on the failure to appoint a guardian ad litem for the mother; G.S. 7B-1103(a)(5) was not a statute of limitations, or the equivalent of one. *In re E.T.S.*, — N.C. App. —, 623 S.E.2d 300, 2005 N.C. App. LEXIS 2724 (2005).

While it is a correct statement of the law that a statute of limitations is tolled during the minority of a plaintiff, it does not follow that the two-year requirement of G.S. 7B-1103(a)(5) is a statute of limitations or the equivalent of such; this statute confers standing on the petitioners to file a termination of parental rights proceeding based on their two-year relationship with the child, which is in no manner related to the parent or his or her relationship with the child during that two-year period, and the person or persons with whom legal custody lies during this time period is irrelevant. *In re E.T.S.*, — N.C. App. —, 623 S.E.2d 300, 2005 N.C. App. LEXIS 2724 (2005).

**Jurisdiction Absent Where Petition Was Insufficient.** — Because the petition for termi-



nation of parental rights was not accompanied by a copy of the custody order then in effect, the petition failed to confer subject matter jurisdiction on the trial court; that omission need not have been fatal if the Vance County Department of Social Services (DSS) had simply amended the petition by attaching the proper custody order or otherwise ensured the custody order was made a part of the record before the trial court. Thus, it was the failure by the DSS

either to attach the custody order to the petition or to remedy that omission that ultimately deprived the trial court of subject matter jurisdiction. In re T.B., — N.C. App. —, 629 S.E.2d 895, 2006 N.C. App. LEXIS 1224 (2006).

**Applied** in In re R.T.W., 359 N.C. 539, 614 S.E.2d 489, 2005 N.C. LEXIS 646 (2005); A Child's Hope, LLC v. Doe, — N.C. App. —, 630 S.E.2d 673, 2006 N.C. App. LEXIS 1291 (2006).

## § 7B-1104. Petition or motion.

### CASE NOTES

#### Invocation of Court's Jurisdiction. —

Because the petition for termination of parental rights was not accompanied by a copy of the custody order then in effect, the petition failed to confer subject matter jurisdiction on the trial court; that omission need not have been fatal if the Vance County Department of Social Services (DSS) had simply amended the petition by attaching the proper custody order or otherwise ensured the custody order was made a part of the record before the trial court. Thus, it was the failure by the DSS either to attach the custody order to the petition or to remedy that omission that ultimately deprived the trial court of subject matter jurisdiction. In re T.B., — N.C. App. —, 629 S.E.2d 895, 2006 N.C. App. LEXIS 1224 (2006).

Where Vance County Department of Social Services (DSS) filed a motion for termination of parental rights, the trial court had subject matter jurisdiction only if the record included a copy of an order, in effect when the petition was filed, that awarded DSS custody of the child; that was implicitly recognized by G.S. 7B-1104(5), which set out the requirements for a petition for termination of parental rights, and provided in part that the petition would set forth the name and address of any person or agency to whom custody of the juvenile had been given by a court of North Carolina or any other state, and a copy of the custody order would be attached to the petition or motion for termination. In re T.B., — N.C. App. —, 629 S.E.2d 895, 2006 N.C. App. LEXIS 1224 (2006).

#### Petition Held Sufficient. —

Allegations that the mother did not follow through with all of the components of the case plan, tested positive for marijuana, cocaine, and benzodiazepines, failed to hold a job, failed to obtain and maintain stable housing, and failed to pay child support were sufficient to put the mother on notice of neglect allegations. In re A.D.L., 169 N.C. App. 701, 612 S.E.2d 639, 2005 N.C. App. LEXIS 797 (2005).

There is no authority that compels dismissal of an action solely because petitioner fails to include the G.S. 7B-1104(7) statement of fact in a termination petition. In re J.D.S., 170 N.C. App. 244, 612 S.E.2d 350, 2005 N.C. App. LEXIS 1013 (2005), cert. denied, — U.S. —, 360 N.C. 64, 623 S.E.2d 584 (2005).

#### Petition Held Insufficient. —

Where a termination of rights petition did not address guardianship issues raised by the noncustodial parent respondent, where no custody order was attached, and where the trial court merely announced that it had decided the claimed guardianship was void, without further explanation, it was impossible to review the trial court's decision and the appeals court was forced to hold that the trial court had lacked subject matter jurisdiction due to the facial defects of the petition. In re Z.T.B., 170 N.C. App. 564, 613 S.E.2d 298, 2005 N.C. App. LEXIS 1093 (2005).

**Applied** in In re B.D., 174 N.C. App. 234, 620 S.E.2d 913, 2005 N.C. App. LEXIS 2387 (2005).

**Cited** in In re J.S.L., — N.C. App. —, 628 S.E.2d 387, 2006 N.C. App. LEXIS 883 (2006).

## § 7B-1106. Issuance of summons.

### CASE NOTES

**Service Upon Child.** — Trial court did not err by exercising personal jurisdiction over a mother with regard to terminating her parental rights to her son by serving the summons required by G.S. 7B-1106(a)(5) upon the attor-

ney advocate of the child's guardian ad litem rather than the guardian ad litem, because the guardian ad litem did not object at trial to the sufficiency of service nor did the guardian ad litem argue the issue on appeal; the mother



actually lacked standing to challenge service of the summons in that she was not an aggrieved party on that issue. In re J.B., 172 N.C. App. 1, 616 S.E.2d 264, 2005 N.C. App. LEXIS 1589 (2005).

**Service of Summons.** — Though the child was not served the summons required by G.S. 7B-1106(a)(5), nor was the child's guardian ad litem, but rather, the guardian ad litem's attor-

ney advocate received the summons regarding the termination of parental rights proceeding, such procedural irregularity caused no prejudice to the parents and the guardian ad litem never objected to the same. In re B.D., 174 N.C. App. 234, 620 S.E.2d 913, 2005 N.C. App. LEXIS 2387 (2005).

**Cited in** In re J.S.L., — N.C. App. —, 628 S.E.2d 387, 2006 N.C. App. LEXIS 883 (2006).

## § 7B-1106.1. Notice in pending child abuse, neglect, or dependency cases.

### CASE NOTES

#### **Required Notice.** —

Since each notice contained all of the information required by G.S. 7B-1106.1(b), tracking the actual language used in the statute, and the certificate of service attached to each notice of proceeding included the names of all parties, including the mother and her counsel, there was proper notice in the termination of parental rights case. In re J.T.W., — N.C. App. —, 632 S.E.2d 237, 2006 N.C. App. LEXIS 1677 (2006).

#### **Waiver of Objection to Lack of Notice.** —

Mother in a termination of parental rights action waived any objection to improper notice by appearing with counsel at the hearing and failing to object to any lack of notice. In re J.S.L., — N.C. App. —, 628 S.E.2d 387, 2006 N.C. App. LEXIS 883 (2006).

**Applied in** In re R.T.W., 359 N.C. 539, 614 S.E.2d 489, 2005 N.C. LEXIS 646 (2005).

**Cited in** In re P.L.P., 173 N.C. App. 1, 618 S.E.2d 241, 2005 N.C. App. LEXIS 1921 (2005), *aff'd*, — N.C. —, 625 S.E.2d 779 (2006).

## § 7B-1108. Answer or response of parent.

### CASE NOTES

#### **Reversal for Failure to Appoint Guardian Ad Litem.** —

Trial court erred in failing to appoint a guardian ad litem (GAL) for the child from the beginning of a termination proceeding; a GAL and an attorney advocate performed distinct and separate roles, so the appointment of the attorney advocate as the GAL after three and a half days of testimony was insufficient, even though the advocate had been involved in the case from an earlier time. In re R.A.H., 171 N.C. App. 427, 614 S.E.2d 382, 2005 N.C. App. LEXIS 1256 (2005).

**Failure of the record to disclose guardian ad litem papers** did not require reversal where the guardian ad litem was noted as present at every hearing prior to and including the termination hearing where she represented the interests of the children. In re A.D.L., 169 N.C. App. 701, 612 S.E.2d 639, 2005 N.C. App. LEXIS 797 (2005).

**Applied in** In re B.D., 174 N.C. App. 234, 620 S.E.2d 913, 2005 N.C. App. LEXIS 2387 (2005).

## § 7B-1109. Adjudicatory hearing on termination.

### CASE NOTES

#### **Voluntary Dismissal of First Petition.** —

Fact that county department of social services had dismissed a prior petition for termination of mother's parental rights did not preclude a subsequent petition since the best interests of the children was always the primary focus, with no procedural rule barring the court's continuing jurisdiction over such a matter. In re

L.O.K., — N.C. App. —, 621 S.E.2d 236, 2005 N.C. App. LEXIS 2476 (2005).

#### **Timeline of Termination Proceedings.** —

Allowing the mother to stay the termination proceedings pending an appeal of a custody review order would have precluded compliance with the termination timeline mandated under G.S. 7B-907, G.S. 7B-1109, and G.S. 7B-1110,

and this would have been improper. In re R.T.W., 359 N.C. 539, 614 S.E.2d 489, 2005 N.C. LEXIS 646 (2005).

**Timeliness of Hearing.** — Where the termination of parental rights hearing was initially set for less than one month outside that 90-day window, by agreement of the parties, the hearing was continued, and took place within the 90-day continuance window, and there was no showing of prejudice, there was no due process violation. In re J.T.W., — N.C. App. —, 632 S.E.2d 237, 2006 N.C. App. LEXIS 1677 (2006).

**Failure to Sign Termination Order Within 30 Days.** —

Mother was not entitled to reversal of an order terminating her parental rights despite the fact that it was entered more than 30 days after the hearing because she failed to show that she suffered prejudice as a result of the late order. In re P.L.P., 173 N.C. App. 1, 618 S.E.2d 241, 2005 N.C. App. LEXIS 1921 (2005), *aff'd*, — N.C. —, 625 S.E.2d 779 (2006).

Extraordinary delay of almost one year after the termination hearing in entering the order terminating a mother's parental rights pursuant to G.S. 7B-1109(e), G.S. 7B-1110(a) was sufficient to show prejudice to warrant reversal and a new hearing. In re T.W., 173 N.C. App. 153, 617 S.E.2d 702, 2005 N.C. App. LEXIS 1922 (2005).

Trial court's entry of an order 83 days following the termination of parental rights hearing did not constitute prejudice per se, requiring a new hearing; the mother failed to articulate any prejudice she suffered. In re S.N.H., — N.C. App. —, 627 S.E.2d 510, 2006 N.C. App. LEXIS 717 (2006).

**Delay in Entering Order Requires Prejudice for Reversal.** — Trial court erred by not entering its termination order within the statutory time frame, but reversal was not required since the parents did not show how they were prejudiced by the delay. In re D.R., 172 N.C. App. 300, 616 S.E.2d 300, 2005 N.C. App. LEXIS 1578 (2005).

**Delay in Entering Termination Order.** — Seven month delay between a termination hearing and the trial court's entry of its termination order ran counter to the legislative intent in enacting the 30-day requirement of G.S. 7B-1109(e) and G.S. 7B-1110(a), and prejudiced the mother, who was prevented from filing an appeal until seven months after the hearing; pending the appellate court's determination of the appeal, the child remained in the department's custody, and subsequent court proceedings involving the child were limited to those "temporary" orders authorized by G.S. 7B-1113. In re T.L.T., 170 N.C. App. 430, 612 S.E.2d 436, 2005 N.C. App. LEXIS 1008 (2005).

**Delay in Hearing Due to Request for Counsel.** — The trial court did not err by

holding a hearing on the petition to terminate the mother's parental rights outside of the initial 90-day time requirement where the other's request for appointment of counsel led to the delay. In re S.N.H., — N.C. App. —, 627 S.E.2d 510, 2006 N.C. App. LEXIS 717 (2006).

Where the trial court did not reduce the parental termination to writing until seven months after the termination hearing in violation of the 30-day requirement of G.S. 7B-1109(e), -1110(a), -1111(a); all parties were prejudiced, as the mother and child lost time together, the foster parents were in a state of flux, and the adoptive parents were unable to complete their family plan. In re D.S., — N.C. App. —, 628 S.E.2d 31, 2006 N.C. App. LEXIS 711 (2006).

**Untimely termination of parental rights hearing did not require dismissal of the termination petition** because the father's own motion for a continuance added 68 days to the trial court's original error and the father was not prejudiced thereby. In re D.J.D., 171 N.C. App. 230, 615 S.E.2d 26, 2005 N.C. App. LEXIS 1268 (2005).

**Trial court's failure to timely enter its adjudication and disposition order in a termination of parental rights action did not warrant reversal** because that would only further delay the determination regarding the children's custody in opposition to the intent of G.S. 7B-1109(e) and G.S. 7B-1110(a). In re A.D.L., 169 N.C. App. 701, 612 S.E.2d 639, 2005 N.C. App. LEXIS 797 (2005).

Mother was awarded a new termination of parental rights trial where the written order was not entered until five months after the trial court orally announced its decision; this violated G.S. 7B-1109 and G.S. 7B-1110, which required entry to be made within 30 days, and prejudice was shown, as the delay was unnecessary, closure was not obtained, and records and transcripts were either misplaced or irretrievable. In re C.J.B., 171 N.C. App. 132, 614 S.E.2d 368, 2005 N.C. App. LEXIS 1168 (2005).

**Finding of Neglect.** —

Order terminating mother's parental rights to her four minor children was proper because the children were previously adjudicated neglected, there was a probability of repetition of neglect if returned to the mother, four to five trial placements with the mother had failed, the mother had a history of failing to show a positive response to counseling and educational programs, the mother left a stable job and housing to move to another state where she did not have employment or independent housing, and she had been unable to cope with the pressure of caring for the children at the same time, with such findings being sufficient to establish neglect under G. S. 7B-1111(a)(1). In re L.O.K., — N.C. App. —, 621 S.E.2d 236, 2005 N.C. App. LEXIS 2476 (2005).



**Late Entry of Termination Order Held Reversible Error.** — Trial court reversibly erred in failing to enter an order terminating a mother's parental rights over her children until over 180 days after the termination hearing, in violation of G.S. 7B-1109(e) and G.S. 7B-1110(a), because the long delay was highly prejudicial to the mother, the children, and the foster parent. *In re L.E.B.*, 169 N.C. App. 375, 610 S.E.2d 424, 2005 N.C. App. LEXIS 598 (2005).

**Cited in** *In re B.N.H.*, 170 N.C. App. 157, 611

S.E.2d 888, 2005 N.C. App. LEXIS 885 (2005); *In re C.C.*, 173 N.C. App. 375, 618 S.E.2d 813, 2005 N.C. App. LEXIS 2017 (2005); *In re L.L.*, 172 N.C. App. 689, 616 S.E.2d 392, 2005 N.C. App. LEXIS 1798 (2005); *In re As.L.G.*, 173 N.C. App. 551, 619 S.E.2d 561, 2005 N.C. App. LEXIS 2116 (2005); *In re A.C.F.*, — N.C. App. —, 626 S.E.2d 729, 2006 N.C. App. LEXIS 529 (2006); *A Child's Hope, LLC v. Doe*, — N.C. App. —, 630 S.E.2d 673, 2006 N.C. App. LEXIS 1291 (2006).

## § 7B-1110. Determination of best interests of the juvenile.

### CASE NOTES

**The termination of parental rights statute provides for a two-stage termination proceeding, etc.**

If a petitioner meets its burden of proving at least one ground for termination of parental rights exists under G.S. 7B-1111(a), then a trial court proceeds to the dispositional phase and determines whether termination of parental rights is in the best interest of the child. *In re D.M.W.*, 173 N.C. App. 679, 619 S.E.2d 910, 2005 N.C. App. LEXIS 2308 (2005).

**Timeline of termination proceedings.** — Allowing the mother to stay the termination proceedings pending an appeal of a custody review order would have precluded compliance with the termination timeline mandated under G.S. 7B-907, G.S. 7B-1109, and G.S. 7B-1110, and this would have been improper. *In re R.T.W.*, 359 N.C. 539, 614 S.E.2d 489, 2005 N.C. LEXIS 646 (2005).

**Family Integrity May Be Considered.** —

During the adjudicatory phase of a termination of parental rights proceeding, a trial court does not consider whether there is a relative who can take custody of the minor child, but focuses on whether there is evidence to support termination on the grounds alleged in the petition, and if a fit relative were to come forward and declare their desire to have custody of the child, the court may consider this during the dispositional phase as grounds for why it would not be in the child's best interests to terminate the parent's parental rights. *In re J.A.A.*, — N.C. App. —, 623 S.E.2d 45, 2005 N.C. App. LEXIS 2706 (2005).

**Termination of Parental Rights Supported by Child's Best Interests.** —

Trial court did not abuse its discretion in finding that it was in the best interests of the children under G.S. 7B-1110(a) that the mother's parental rights be terminated; while the mother emphasized the strong bond with the children and that the mother made progress doing what the trial court ordered, the trial

court was entitled to give greater weight to other evidence, including the mother's repeated statements that the mother could not handle the responsibility of parenting the children. *In re C.L.C.*, 171 N.C. App. 438, 615 S.E.2d 704, 2005 N.C. App. LEXIS 1316 (2005).

Trial court did not abuse its discretion in concluding that it was in a child's best interests to terminate a mother's parental rights where: (1) the mother failed to maintain stable housing, was unemployed, and failed to comply with a child support order, (2) the mother had left the child with others, including an incident initiating the child's removal from her custody, (3) the mother had attempted suicide, had not cooperated with social workers, did not follow through with mental health counseling, and did not complete parenting classes, (4) the mother only sporadically visited and contacted the child for over five years, (5) the child had been living with a guardian ad litem (GAL) for over five years and considered the GAL's step-son her big brother, and (6) the mother had been aware of the GAL's intent to adopt the child for three years, yet her personal situation had not improved or stabilized. *In re E.T.S.*, — N.C. App. —, 623 S.E.2d 300, 2005 N.C. App. LEXIS 2724 (2005).

At the dispositional stage, a court is required to issue an order of termination unless it determines that the best interests of the child require that the parental rights of such parent not be terminated; a trial court did not err in refusing to conclude that termination was not in the best interests of the child where it found, *inter alia*, that the father was a convicted sex offender who violated his parole and was returned to prison while the child was in the custody of Department of Social Services, that the father was permitted only supervised visits with the child, was forbidden to reside in the same house with the child, and was ordered to complete sex offender treatment, which he failed to do. *In re S.B.M.*, 173 N.C. App. 634,



619 S.E.2d 583, 2005 N.C. App. LEXIS 2115 (2005).

Termination of the mother's parental rights was in the best interest of the child where, inter alia, the mother demonstrated no ability to establish a safe and stable home for the child, despite repeated offers of funding and logistical assistance from petitioner Durham County Department of Social Services. In re L.A.B., — N.C. App. —, 631 S.E.2d 61, 2006 N.C. App. LEXIS 1409 (2006).

**The evidence supported a finding that termination of parental rights was in the best interest of the child; etc. —**

There were sufficient findings to support the termination of parental rights order, including the fact that the father failed to propose an alternate replacement to take care of the children, that the father failed to provide any contact, love, or affection for the children, and that the father failed to attempt to contact the children while he was incarcerated. In re D.J.D., 171 N.C. App. 230, 615 S.E.2d 26, 2005 N.C. App. LEXIS 1268 (2005).

**Failure to Enter Written Termination Order Within 30 Days. —** Mother was awarded a new termination of parental rights trial where the written order was not entered until five months after the trial court orally announced its decision; this violated G.S. 7B-1109 and G.S. 7B-1110, which required entry to be made within 30 days, and prejudice was shown, as the delay was unnecessary, closure was not obtained, and records and transcripts were either misplaced or irretrievable. In re C.J.B., 171 N.C. App. 132, 614 S.E.2d 368, 2005 N.C. App. LEXIS 1168 (2005).

Trial court's six-month delay in entering order terminating parental rights was so prejudicial to the rights of the parent, the child, and the foster parents who hoped to adopt that the decree was vacated and the matter remanded for a new hearing. In re O.S.W., — N.C. App. —, 623 S.E.2d 349, 2006 N.C. App. LEXIS 70 (2006).

Where the trial court did not reduce the parental termination to writing until seven months after the termination hearing in violation of the 30-day requirement of G.S. 7B-1109(e), -1110(a), -1111(a); all parties were prejudiced, as the mother and child lost time together, the foster parents were in a state of flux, and the adoptive parents were unable to complete their family plan. In re D.S., — N.C. App. —, 628 S.E.2d 31, 2006 N.C. App. LEXIS 711 (2006).

**Delay in Entering Termination Order. —** Seven month delay between a termination hearing and the trial court's entry of its termination order ran counter to the legislative intent in enacting the 30-day requirement of G.S. 7B-1109(e) and G.S. 7B-1110(a), and prejudiced the mother, who was prevented from filing an

appeal until seven months after the hearing; pending the appellate court's determination of the appeal, the child remained in the department's custody, and subsequent court proceedings involving the child were limited to those "temporary" orders authorized by G.S. 7B-1113. In re T.L.T., 170 N.C. App. 430, 612 S.E.2d 436, 2005 N.C. App. LEXIS 1008 (2005).

Extraordinary delay of almost one year after the termination hearing in entering the order terminating a mother's parental rights pursuant to G.S. 7B-1109(e), G.S. 7B-1110(a) was sufficient to show prejudice to warrant reversal and a new hearing. In re T.W., 173 N.C. App. 153, 617 S.E.2d 702, 2005 N.C. App. LEXIS 1922 (2005).

**Delay in Entering Termination Order Requires Prejudice for Reversal. —** Trial court erred by not entering its termination order within the statutory time frame, but reversal was not required since the parents did not show how they were prejudiced by the delay. In re D.R., 172 N.C. App. 300, 616 S.E.2d 300, 2005 N.C. App. LEXIS 1578 (2005).

**Delay in Filing Termination Order. —** Father was required to show prejudice from a trial court's delay in filing its termination order, but his sole argument was that the five-month delay prejudiced him by the delay of his right to appeal and to achieve finality in the relationship with his daughter before he faced a potentially long incarceration; in light of the father's continuous incarceration since before the termination hearing, there was insufficient prejudice to warrant a new trial. In re S.B.M., 173 N.C. App. 634, 619 S.E.2d 583, 2005 N.C. App. LEXIS 2115 (2005).

**Trial court's failure to timely enter its adjudication and disposition order in a termination of parental rights action did not warrant reversal** because that would only further delay the determination regarding the children's custody in opposition to the intent of G.S. 7B-1109(e) and G.S. 7B-1110(a). In re A.D.L., 169 N.C. App. 701, 612 S.E.2d 639, 2005 N.C. App. LEXIS 797 (2005).

Trial court reversibly erred in failing to enter an order terminating a mother's parental rights over her children until over 180 days after the termination hearing, in violation of G.S. 7B-1109(e) and G.S. 7B-1110(a), because the long delay was highly prejudicial to the mother, the children, and the foster parent. In re L.E.B., 169 N.C. App. 375, 610 S.E.2d 424, 2005 N.C. App. LEXIS 598 (2005).

**Applied in** In re J.B., 172 N.C. App. 1, 616 S.E.2d 264, 2005 N.C. App. LEXIS 1589 (2005).

**Cited in** In re P.L.P., 173 N.C. App. 1, 618 S.E.2d 241, 2005 N.C. App. LEXIS 1921 (2005), *aff'd*, — N.C. —, 625 S.E.2d 779 (2006); In re A.C.F., — N.C. App. —, 626 S.E.2d 729, 2006 N.C. App. LEXIS 529 (2006); In re J.S.L., — N.C. App. —, 628 S.E.2d 387, 2006 N.C. App.

LEXIS 883 (2006); *A Child's Hope, LLC v. Doe*, — N.C. App. —, 630 S.E.2d 673, 2006 N.C. App. LEXIS 1291 (2006).

## § 7B-1111. Grounds for terminating parental rights.

### CASE NOTES

- I. General Consideration.
- II. Neglect.
- III. Failure to Pay Reasonable Portion of Cost of Care.
- V. Illustrative Cases.
- VI. Willfully Leaving Child in Foster Care.
- VII. Failure to Establish Paternity, Legitimate Child, or Provide Support or Care.

#### I. GENERAL CONSIDERATION.

**Subject Matter Jurisdiction.** — Trial court had subject matter jurisdiction over a case involving termination of a mother's parental rights to her son, and the trial court did not err in denying the mother's motion to stay the termination proceeding pending resolution of her appeal of a prior custody order, because case law established that the trial court retained jurisdiction to terminate parental rights during the pendency of the custody order appeal and, where a termination order is entered while a prior custody order is pending, the termination order necessarily renders the pending appeal moot. *In re J.B.*, 172 N.C. App. 1, 616 S.E.2d 264, 2005 N.C. App. LEXIS 1589 (2005).

**Appeal With Regard to Deceased Child Not Moot.** — Mother's appeal of termination of parental rights as to her deceased child was not moot because the order terminating her rights as to that child could have a bearing on subsequent proceedings to terminate her rights as to her other child. *In re C.C.*, 173 N.C. App. 375, 618 S.E.2d 813, 2005 N.C. App. LEXIS 2017 (2005).

#### Grounds for Termination. —

Allowing the trial court to terminate the mother's parental rights during the pendency of the custody review order appeal did not prejudice the mother's rights, as the termination proceedings required that a ground for termination under G.S. 7B-1111 be established and the proceedings afforded the mother an opportunity to challenge the termination order on appeal under G.S. 7B-1113. *In re R.T.W.*, 359 N.C. 539, 614 S.E.2d 489, 2005 N.C. LEXIS 646 (2005).

**Finding of Any One of the Enumerated Grounds Is Sufficient to Support Termination.** —

Because the appellate court found grounds for termination of a mother's parental rights were properly established pursuant to G.S. 7B-1111(a)(2), the court did not need to address

the mother's further arguments regarding termination pursuant to G.S. 7B-1111(a)(1) and G.S. 7B-1111(a)(3). *In re O.C.*, 171 N.C. App. 457, 615 S.E.2d 391, 2005 N.C. App. LEXIS 1272 (2005), cert. denied, — N.C. —, 623 S.E.2d 587 (2005).

When it was alleged that a mother's parental rights to two children should be terminated because she (1) neglected them while they were in an agency's care within the meaning of G.S. 7B-101, under G.S. 7B-1111(a)(1), (2) willfully left the children in foster care for more than 12 months without showing reasonable progress to correct the conditions that led to their removal, under G.S. 7B-1111(a)(2), and (3) willfully failed to pay a reasonable portion of the cost of the children's care while in an agency's custody, under G.S. 7B-1111(a)(3), and the petition was sustained on all three grounds, when the mother objected to findings as to only one ground on appeal, the other findings were binding, under N.C. R. App. P. 10, and, as only one ground had to be found to terminate parental rights, it was unnecessary to consider the mother's appellate argument as to the ground she challenged. *In re J.A.A.*, — N.C. App. —, 623 S.E.2d 45, 2005 N.C. App. LEXIS 2706 (2005).

**Evidence was sufficient to support termination, etc. —**

Termination of a father's parental rights was supported by evidence which showed that the father's history of domestic violence toward the child's mother led to the child's removal, that the father agreed to participation in a domestic violence program but failed to complete that program, and failed to show that different counseling he participated in addressed the domestic violence issue. *In re D.M.*, 171 N.C. App. 244, 615 S.E.2d 669, 2005 N.C. App. LEXIS 1263 (2005), aff'd, 360 N.C. 162, 622 S.E.2d 494 (2005).

**Trial court erred in failing to appoint a guardian ad litem for a mother in an action to terminate her parental rights; etc.**

—



Although the mother's parental rights were not terminated for dependency under G.S. 7B-1111(a)(6), the trial court erred in failing to appoint the mother a guardian ad litem under former G.S. 7B-1101; the guardian ad litem requirement was triggered because the mother's mental health issues, involving, in part, bipolar disorder, were central to the termination. In re L.W., — N.C. App. —, 623 S.E.2d 626, 2006 N.C. App. LEXIS 55 (2006).

Trial court erred when it failed to appoint a guardian ad litem for mother pursuant to G.S. 7B-1101 after reviewing her psychological evaluation, but still considered her mental illness, even though it never mentioned G.S. 7B-1111(a)(6) as a factor in terminating her parental rights. Accordingly, the mother was entitled to a new termination hearing and the appointment of a guardian ad litem. In re T.W., 173 N.C. App. 153, 617 S.E.2d 702, 2005 N.C. App. LEXIS 1922 (2005).

**Trial court did not err by not appointing a guardian ad litem for the mother** for a termination of parental rights hearing as it was not alleged, pursuant to G.S. 7B-1111(a)(6), that the mother was incapable of properly caring for her children; additionally, whether the trial court should have appointed a guardian ad litem for the mother in a prior dependency proceeding was not an issue before the court on the appeal of the termination of the mother's parental rights. In re O.C., 171 N.C. App. 457, 615 S.E.2d 391, 2005 N.C. App. LEXIS 1272 (2005), cert. denied, — N.C. —, 623 S.E.2d 587 (2005).

While the termination of a mother's parental rights was based on G.S. 7B-1111(a)(1), (7), the original petition alleged grounds for termination pursuant to G.S. 7B-1111(a)(6), and the trial court considered the mother's substance abuse and mental illness in making that determination; therefore, G.S. 7B-1101 required appointment of a guardian ad litem for the mother, and the failure of the trial court to do so was error. In re K.R.S., 170 N.C. App. 643, 613 S.E.2d 318, 2005 N.C. App. LEXIS 1092 (2005).

**Assignments of Error Abandoned.** — Mother's cursory argument concerning neglect and abandonment was predicated upon not receiving proper notice of the motion to terminate and thus, her assignment of error concerning G.S. 7B-1111 were deemed abandoned under N.C. R. App. P. 28(b)(6). In re P.L.P., 173 N.C. App. 1, 618 S.E.2d 241, 2005 N.C. App. LEXIS 1921 (2005), aff'd, — N.C. —, 625 S.E.2d 779 (2006).

**Failure to Enter Written Termination Order Within 30 Days.** — Where the trial court did not reduce the parental termination to writing until seven months after the termination hearing in violation of the 30-day requirement of G.S. 7B-1109(e), -1110(a), -1111(a); all parties were prejudiced, as the mother and child lost time together, the foster parents were in a state of flux, and the adoptive

parents were unable to complete their family plan. In re D.S., — N.C. App. —, 628 S.E.2d 31, 2006 N.C. App. LEXIS 711 (2006).

**Failure to File Action Within 12-Month Recovery Period.** — Trial court erred in terminating a mother's parental rights pursuant to G.S. 7B-1111(a)(2), as an agency filed the petition inside the statutory 12-month period for showing progress, as the period ran from the entry of the first custody order rather than from the mother's initial voluntary separation from the child. In re A.C.F., — N.C. App. —, 626 S.E.2d 729, 2006 N.C. App. LEXIS 529 (2006).

**Duration Requirement Defined.** — The "for more than 12 months" requirement in G.S. 7B-1111(a)(2) means the duration of time beginning when the child was "left" in foster care or placement outside the home pursuant to a court order, and ending when the motion or petition for termination of parental rights was filed. In re A.C.F., — N.C. App. —, 626 S.E.2d 729, 2006 N.C. App. LEXIS 529 (2006).

**Removal Defined.** — The legislature did not intend for any separation between a parent and a child to trigger the termination ground set forth in G.S. 7B-1111(a)(2), failure to make reasonable progress; instead, the statute refers only to circumstances where a court has entered a court order requiring that a child be in foster care or other placement outside the home. In re A.C.F., — N.C. App. —, 626 S.E.2d 729, 2006 N.C. App. LEXIS 529 (2006).

**Rights Not Properly Terminated.** — Termination of the father's parental rights was reversed where the father voluntarily agreed to and completed the requirements of the case plan, and no finding had been made that the father's failure to pay child support was willful or that father willfully left the children in foster care more than 12 months without making reasonable progress toward reunification. In re J.S.L., — N.C. App. —, 628 S.E.2d 387, 2006 N.C. App. LEXIS 883 (2006).

**Applied** in In re A.K., 360 N.C. 449, 628 S.E.2d 753, 2006 N.C. LEXIS 44 (2006).

**Cited** in In re As.L.G., 173 N.C. App. 551, 619 S.E.2d 561, 2005 N.C. App. LEXIS 2116 (2005); In re S.N.H., — N.C. App. —, 627 S.E.2d 510, 2006 N.C. App. LEXIS 717 (2006); In re D.H., — N.C. App. —, 629 S.E.2d 920, 2006 N.C. App. LEXIS 1195 (2006).

## II. NEGLECT.

### Neglected Juvenile. —

Although G.S. 7B-101(9), G.S. 7B-1111(a)(6) concerned dependency, those provisions are applicable to termination of parental rights proceedings where neglect is pursued. In re L.W., — N.C. App. —, 623 S.E.2d 626, 2006 N.C. App. LEXIS 55 (2006).

**And Must Independently Determine If Neglect Exists at Time of Hearing.** —



Trial court erred in terminating mother's parental rights based on neglect because the Department of Social Services presented no evidence that the mother could not, at the time of the hearing, adequately parent her children. Two of the witnesses presented by the Department had not been involved with the family in the two to three years prior to the termination hearing, and a third, the social worker last assigned to the case, presented no evidence that the mother was unfit as a parent at the time of the hearing. In re C.C., 173 N.C. App. 375, 618 S.E.2d 813, 2005 N.C. App. LEXIS 2017 (2005).

**Termination of parental rights by reason of neglect upheld, etc. —**

Trial court did not abuse its discretion in terminating a mother's parental rights based on neglect where: (1) the mother failed to maintain stable housing and was unemployed, (2) the mother failed to comply with a child support order, (3) the mother had left the child with others, including an incident initiating the child's removal from her custody, (4) the mother failed to provide proper medication for the child, (5) the mother had attempted suicide, had not cooperated with social workers, did not follow through with mental health counseling, and did not complete parenting classes, and (6) the mother only sporadically visited and contacted the child for over five years. In re E.T.S., — N.C. App. —, 623 S.E.2d 300, 2005 N.C. App. LEXIS 2724 (2005).

**Neglect Shown. —**

Order terminating mother's parental rights to her four minor children was proper where the children were previously adjudicated neglected, there was a probability of repetition of neglect if returned to the mother, four to five trial placements with the mother had failed, the mother had a history of failing to show a positive response to counseling and educational programs, the mother left a stable job and housing to move to another state where she did not have employment or independent housing, and she had been unable to cope with the pressure of caring for the children at the same time, with such findings being sufficient to establish neglect under G.S. 7B-1111(a)(1). In re L.O.K., — N.C. App. —, 621 S.E.2d 236, 2005 N.C. App. LEXIS 2476 (2005).

**Neglect Not Shown. —** Trial court erred in concluding that grounds existed under G.S. 7B-1111(a)(1) to terminate the mother's parental rights, where there was no prior adjudication of neglect. There was a prior adjudication of delinquency, but the mother had already lost custody; thus, there was no evidence before the trial court that the mother had neglected the child while the child was in the mother's care. In re J.G.B., — N.C. App. —, 628 S.E.2d 450, 2006 N.C. App. LEXIS 978 (2006).

**Termination Not Upheld. —**

Department of social services did not meet its burden under G.S. 7B-1111(a)(1) of proving by

clear, cogent, and convincing evidence that a mother, at the time of her termination of parental rights hearing, had not taken substantial steps and made reasonable progress under her case plan because, while the mother, who had been incarcerated, did not complete substance abuse treatment, domestic violence counseling, and parenting classes that the department recommended, she did complete alternative treatment and counseling programs. In re D.M.W., 173 N.C. App. 679, 619 S.E.2d 910, 2005 N.C. App. LEXIS 2308 (2005).

Because the trial court's findings did not support the conclusion that the mother failed to make reasonable progress in correcting the conditions that led to a finding of neglect and the child's removal, the mother's rights were improperly terminated. In re J.T.W., — N.C. App. —, 632 S.E.2d 237, 2006 N.C. App. LEXIS 1677 (2006).

### III. FAILURE TO PAY REASONABLE PORTION OF COST OF CARE.

**Ability to Pay. —** Trial court does not err by failing to make a finding of "ability to pay" where the grounds to terminate are those set forth in G.S. 7B-1111(a)(4) or G.S. 7B-1111(a)(5)d. In re J.D.S., 170 N.C. App. 244, 612 S.E.2d 350, 2005 N.C. App. LEXIS 1013 (2005), cert. denied, — U.S. —, 360 N.C. 64, 623 S.E.2d 584 (2005).

**The court erred in failing to make a specific finding as to an incarcerated parent's ability to pay, etc.**

Trial court's order terminating a mother's parental rights under G.S. 7B-1111(a)(3) was reversed because without findings regarding the mother's ability or means to pay to support the child, the trial court erred in terminating the mother's parental rights under § 7B-1111(a)(3). In re D.M.W., 173 N.C. App. 679, 619 S.E.2d 910, 2005 N.C. App. LEXIS 2308 (2005).

### V. ILLUSTRATIVE CASES.

**Mental Illness of Parent. —**

G.S. 7B-1101.1 requires that a guardian ad litem be appointed in accordance with the provisions of G.S. 1A-1, N.C. R. Civ. P. 17 to represent a parent, meaning that where an allegation is made that parental rights should be terminated, a trial court is required to conduct a hearing to determine whether a guardian ad litem should be appointed to represent the parent, and an allegation under G.S. 7B-1111(a)(6) serves as a triggering mechanism, alerting the trial court that it should conduct a hearing to determine whether a guardian ad litem should be appointed; at the hearing, the trial court must determine whether the parents are incompetent within the meaning of G.S. 35A-1101, such that the individual would be unable to aid in their defense at the termination of parental rights proceeding, and the trial court should always keep in mind that the

appointment of a guardian ad litem will divest the parent of their fundamental right to conduct his or her litigation according to their own judgment and inclination. In re J.A.A., — N.C. App. —, 623 S.E.2d 45, 2005 N.C. App. LEXIS 2706 (2005).

#### **Rights Properly Terminated. —**

There were sufficient findings to support the termination of parental rights order, including the fact that the father failed to propose an alternate replacement to take care of the children, that the father failed to provide any contact, love, or affection for the children, and that the father failed to attempt to contact the children while he was incarcerated. In re D.J.D., 171 N.C. App. 230, 615 S.E.2d 26, 2005 N.C. App. LEXIS 1268 (2005).

Mother's parental rights were properly terminated, under G.S. 7B-1111(a)(1) and (2) as she neglected her children and willfully left them in foster care for more than 12 months without showing reasonable progress, after the children had been returned to her once, as clear, cogent and convincing evidence showed she did not (1) complete required parenting, budgeting, and homemaking classes, (2) obtain mental health counseling, (3) have a phone, or (4) keep a clean home, and she offered no specific plan for the children's care while she worked, if they were returned, and the evidence showed her residential instability. In re J.W., 173 N.C. App. 450, 619 S.E.2d 534, 2005 N.C. App. LEXIS 2109 (2005), *aff'd*, — N.C. —, 625 S.E.2d 780 (2006).

G.S. 7B-1111(a)(2) provides for termination of parental rights if a parent has willfully left a juvenile in foster care or placement outside the home for more than 12 months without showing to the satisfaction of the court that reasonable progress under the circumstances has been made in correcting those conditions which led to the removal of the juvenile, and willfulness may be found where a parent has made some attempt to regain custody of the child but has failed to exhibit reasonable progress or a positive response toward the diligent efforts of a department of social services; extremely limited progress is not reasonable progress. In re J.W., 173 N.C. App. 450, 619 S.E.2d 534, 2005 N.C. App. LEXIS 2109 (2005), *aff'd*, — N.C. —, 625 S.E.2d 780 (2006).

Fact that the father could have written but did not do so, that he made no efforts to provide anything for the minor child, that he did not provide any love, nurturing, or support for the minor child, that he would continue to neglect the minor child if she were placed in his care, and that he would be incarcerated until the child reached the age of majority provided clear, cogent, and convincing evidence to support the termination of his parental rights. In re P.L.P., 173 N.C. App. 1, 618 S.E.2d 241, 2005 N.C. App. LEXIS 1921 (2005), *aff'd*, — N.C. —, 625 S.E.2d 779 (2006).

Evidence including the transient state of the mother's housing, the mother's untreated hygiene issues, and the mother's failure to complete parenting classes was sufficient to support termination of the mother's parental rights under G.S. 7B-1111(a)(9). In re L.A.B., — N.C. App. —, 631 S.E.2d 61, 2006 N.C. App. LEXIS 1409 (2006).

**Reasonable Progress Shown. —** Mother made reasonable progress in correcting the conditions that led to the removal of her children during more than 12 months that the children were in the custody of the Department of Social Services; among other things she attended family education sessions and parenting classes, acquired appropriate housing, and maintained her home. In re C.C., 173 N.C. App. 375, 618 S.E.2d 813, 2005 N.C. App. LEXIS 2017 (2005).

**In Determining Whether Adequate Services Were Provided Court Properly Considered Progress Up Until Time of Hearing. —** Nothing in the record supported the mother's contention that the trial court erred in terminating the mother's parental rights because the Department of Social Services failed to provide the mother with adequate services upon the mother's reaching the age of majority. The mother reached the age of majority more than a year before the termination hearing and the trial court properly considered evidence of the mother's progress up until the time of the hearing. In re J.G.B., — N.C. App. —, 628 S.E.2d 450, 2006 N.C. App. LEXIS 978 (2006).

## **VI. WILLFULLY LEAVING CHILD IN FOSTER CARE.**

**Two Part Analysis to Be Performed By the Court. —** Trial court, to find grounds to terminate a parent's rights under G.S. 7B-1111(a)(2), must perform a two part analysis, as the trial court must determine by clear, cogent and convincing evidence: (1) that a child has been willfully left by the parent in foster care or placement outside the home for over 12 months; and (2) as of the time of the hearing, also as demonstrated by clear, cogent and convincing evidence, that the parent has not made reasonable progress under the circumstances to correct the conditions which led to the removal of the child. Evidence and findings which support a determination of reasonable progress may parallel or differ from that which supports the determination of willfulness in leaving the child in placement outside the home. In re O.C., 171 N.C. App. 457, 615 S.E.2d 391, 2005 N.C. App. LEXIS 1272 (2005), *cert. denied*, — N.C. —, 623 S.E.2d 587 (2005).

#### **Failure to Show Progress. —**

Mother's parental rights were terminated, pursuant to G.S. 7B-1111(a)(2), because the mother willfully left her children in foster care for over 12 months, and clear, cogent, and convincing evidence demonstrated that the mother had not made reasonable progress to



correct the conditions which led to the removal of the children as the mother failed to comply with a case plan in that she did not complete substance abuse programs, pursue a General Education Degree, complete parenting classes, or obtain employment. In re O.C., 171 N.C. App. 457, 615 S.E.2d 391, 2005 N.C. App. LEXIS 1272 (2005), cert. denied, — N.C. —, 623 S.E.2d 587 (2005).

Evidence was competent to support termination of the mother's parental rights pursuant to G.S. 7B-1111(a)(2) where the finding indicated that the mother willfully left the children in foster care placement outside the home for more than 12 months without showing that reasonable progress had been made to correct those conditions which led to the removal of the children. In re A.D.L., 169 N.C. App. 701, 612 S.E.2d 639, 2005 N.C. App. LEXIS 797 (2005).

Finding of any one of the grounds enumerated in G.S. 7B-1111 was sufficient to terminate respondent's parental rights, and a trial court's conclusion of law which stated: "The father has willfully left the child in foster care for more than twelve (12) months without showing to the satisfaction of the Court that reasonable progress under the circumstances has been made in correcting those conditions which led to the removal of the child" was a sufficient basis to terminate the father's parental rights. In re S.B.M., 173 N.C. App. 634, 619 S.E.2d 583, 2005 N.C. App. LEXIS 2115 (2005).

Finding of any one of the grounds enumerated in G.S. 7B-1111 was sufficient to terminate respondent's parental rights, and a trial court's conclusion of law which stated: "The father has willfully left the child in foster care for more than twelve (12) months without showing to the satisfaction of the Court that reasonable progress under the circumstances has been made in correcting those conditions which led to the removal of the child" was a sufficient basis to terminate the father's parental rights. In re S.B.M., 173 N.C. App. 634, 619 S.E.2d 583, 2005 N.C. App. LEXIS 2115 (2005).

#### **Time Period for Reasonable Progress. —**

Where the trial court relied upon the incorrect standard when it found that grounds existed to terminate the mother's parental rights under G.S. 7B-1111(a)(2), a provision that provided that termination could occur if the mother willfully left the children in foster care or placement outside their home for more than 12 months without making reasonable progress

in 12 months, the error was harmless, as grounds also existed for termination for neglect under G.S. 7B-1111(a)(1) and for willful abandonment under G.S. 7B-1111(a)(7). In re C.L.C., 171 N.C. App. 438, 615 S.E.2d 704, 2005 N.C. App. LEXIS 1316 (2005).

#### **Leaving Held "Willful." —**

Termination of parental rights of a mother and father were upheld on appeal, pursuant to G.S. 7B-1111, where the evidence showed that the parents were neglectful in leaving the child for over 12 months in foster care, failing to make any progress toward unification, and engaging in sexual abuse with the child. In re B.D., 174 N.C. App. 234, 620 S.E.2d 913, 2005 N.C. App. LEXIS 2387 (2005).

#### **Willful Leaving Not Shown. —**

Where none of the court's findings touched directly on the mother's ability to provide her child with proper care, supervision and discipline, and the findings did not support the conclusion that the mother failed to make reasonable progress in correcting the conditions that led to the child's removal, the court erred in finding the mother willfully left the child in foster care for 12 months. In re J.T.W., — N.C. App. —, 632 S.E.2d 237, 2006 N.C. App. LEXIS 1677 (2006).

**Failure to Adequately Consider Mother's Age. —** In a termination of parental rights action, the trial court failed to adequately address the mother's age, in terms of whether the mother willfully left the child in foster care for 12-months prior to the filing of the petition. The mother's living in the same foster home as the child did not necessarily constitute willfully leaving the child in foster care. In re J.G.B., — N.C. App. —, 628 S.E.2d 450, 2006 N.C. App. LEXIS 978 (2006).

### **VII. FAILURE TO ESTABLISH PATERNITY, LEGITIMATE CHILD, OR PROVIDE SUPPORT OR CARE.**

#### **Termination Appropriate. —**

Denial of an adoption agency's petition for the termination of a father's parental rights was reversed as the trial court did not find that the father, before the petition was filed, established paternity judicially, legitimated the child either through judicial process or marriage to the mother, or provided the mother with substantial financial support or consistent care. A Child's Hope, LLC v. Doe, — N.C. App. —, 630 S.E.2d 673, 2006 N.C. App. LEXIS 1291 (2006).

## **§ 7B-1112. Effects of termination order.**

### **CASE NOTES**

#### **No Standing to Bring Legitimation Action After Termination of Parental Rights.**

— Where father's parental rights had been

terminated under G.S. 7B-1112 in 1999, he lacked standing to bring an action under G.S. 49-10, G.S. 49-11 to legitimate the same child to



whom his parental rights had been terminated. *Gorsuch v. Dees*, 173 N.C. App. 223, 618 S.E.2d 747, 2005 N.C. App. LEXIS 1914 (2005).

**Applied in** *In re R.T.W.*, 359 N.C. 539, 614 S.E.2d 489, 2005 N.C. LEXIS 646 (2005).

## ARTICLE 14.

### *North Carolina Child Fatality Prevention System.*

## § 7B-1414. Administration; funding.

### CASE NOTES

**Cited in** *In re R.T.W.*, 359 N.C. 539, 614 S.E.2d 489, 2005 N.C. LEXIS 646 (2005).

## ARTICLE 15.

### *Purposes; Definitions.*

## § 7B-1500. Purpose.

**Implementation of Treatment Staffing Model at Youth Development Centers.** — Session Laws 2005-276, ss. 16.6(a) through (c), as amended by Session Laws 2006-66, s. 15.6(a), provides: “(a) The Department of Juvenile Justice and Delinquency Prevention shall report December 31, 2005, and quarterly thereafter during the 2005-2007 biennium to the Chairs of the Senate and House of Representatives Appropriations Subcommittees on Justice and Public Safety and to the Joint Corrections, Crime Control, and Juvenile Justice Oversight Committee on the treatment staffing model being piloted at Samarkand and Stonewall Jackson Youth Development Centers. The report shall include a list of total positions at each facility by job class, whether the position is vacant or filled, whether positions were filled from internal employees or new employees, and the training and certification status of each position. The report shall also describe the nature of the treatment program, the criteria for evaluating the program, and how the program is performing in comparison to these criteria. The report shall also describe the training approach to be used to train staff in using treatment methods in youth development centers and provide information on current staff training and staff training planned for the next quarter. The Department shall also develop indicators for evaluating staff performance once the model has been implemented.

“(b) The Department of Juvenile Justice and Delinquency Prevention shall report December 31, 2005, and quarterly thereafter during the 2005-2007 biennium to the Chairs of the Senate and House of Representatives Appropriations

Subcommittees on Justice and Public Safety and the Joint Corrections, Crime Control, and Juvenile Justice Oversight Committee on the implementation of the treatment staffing model at Dobbs, Dillon, and Juvenile Evaluation Center Youth Development Centers. The Department shall identify the number of positions reallocated to the new treatment job classes and the source of funding for those positions.

“(c) The Department of Juvenile Justice and Delinquency Prevention shall report to the Chairs of the Senate and House of Representatives Appropriations Subcommittees on Justice and Public Safety and the Joint Corrections, Crime Control, and Juvenile Justice Oversight Committee by November 10, 2006, on the final recommended staffing plan for youth development centers for the 2007-2008 fiscal year. The report shall include:

“(1) The latest results of the evaluation of the pilot treatment staffing models at the Samarkand and Stonewall Jackson Youth Development Centers and the progress in implementing the model at other youth development centers.

“(2) The total recommended staffing by position classification for each youth development center. Staffing by shift shall be provided for each housing unit as well as justification for the level and type of staff on each shift.

“(3) The total cost and cost per bed for each youth development center to implement the staffing model.

“(4) The primary basis for the number of staff at each youth development center by classification.

“(5) An identification of other states that have

implemented a treatment based staffing model, how the staffing patterns compare to the Department of Juvenile Justice and Delinquency Prevention proposal, and any research on the benefits and outcomes of using the treatment based approach in these states.”

Session Laws 2006-66, s. 1.2, provides: “This act shall be known as ‘The Current Operations and Capital Improvements Appropriations Act of 2006.’”

Session Laws 2006-66, s. 28.3, provides: “Except for statutory changes or other provisions that clearly indicate an intention to have effects beyond the 2006 2007 fiscal year, the textual provisions of this act apply only to funds appropriated for, and activities occurring during, the 2006 2007 fiscal year.”

Session Laws 2006-66, s. 28.6 is a severability clause.

## ARTICLE 16.

### *Jurisdiction.*

#### § 7B-1601. Jurisdiction over delinquent juveniles.

##### CASE NOTES

**Adult Convictions.** — State court’s records relating to defendant’s 1995 convictions revealed that they were adult convictions; although a seventeen-year-old could be tried in North Carolina as either a juvenile or an adult, G.S. 7B-2200 and G.S. 7B-2203, North Carolina’s district courts possessed exclusive, original jurisdiction over any case involving a juvenile who was alleged to be delinquent, G.S. 7B-1601, thus, if defendant was tried and con-

victed as a juvenile, he could have been prosecuted only in a North Carolina district court. The judgments underlying defendant’s 1995 convictions, however, demonstrated that he was convicted and sentenced in the Superior Court of Surry County, North Carolina, and his 1995 Convictions were therefore necessarily adult convictions. *United States v. Allen*, 446 F.3d 522, 2006 U.S. App. LEXIS 11193 (4th Cir. 2006).

## ARTICLE 18.

### *Venue; Petition; Summons.*

#### § 7B-1802. Petition.

##### CASE NOTES

**Fatal Defect in Offense Charged.** — Since there is no statute included in the North Carolina General Statutes for assault with a deadly weapon with intent to inflict serious injury, the offense listed on the juvenile petition, there was

no crime listed on the petition and the petition was fatally defective. *In re R.P.M.*, 172 N.C. App. 782, 616 S.E.2d 627, 2005 N.C. App. LEXIS 1803 (2005).

#### § 7B-1806. Service of summons.

##### CASE NOTES

**Trial Court Properly Exercised Personal Jurisdiction over Juvenile.** —

Trial court did not lack personal jurisdiction over defendant juvenile even though service of process was not made five days prior to the hearing as required by G.S. 7B-1806, where

neither defendant nor his counsel contested service of process or personal jurisdiction at any of the numerous hearings they participated in. *In re D.S.B.*, — N.C. App. —, 634 S.E.2d 633, 2006 N.C. App. LEXIS 1961 (2006).

## ARTICLE 21.

*Law Enforcement Procedures in Delinquency Proceedings.*

## § 7B-2101. Interrogation procedures.

## CASE NOTES

**“Guardian.” —**

Despite juvenile’s contention that his aunt was his guardian, his suppression motion was properly denied, as she was not considered a “party listed” under G.S. 7B-2101, and the aunt

never lived with the juvenile, did not have custody of him, nor acted on his behalf as a parent or his guardian. *State v. Oglesby*, — N.C. App. —, 622 S.E.2d 152, 2005 N.C. App. LEXIS 2624 (2005).

## ARTICLE 22.

*Probable Cause Hearing and Transfer Hearing.*

## § 7B-2200. Transfer of jurisdiction of juvenile to superior court.

## CASE NOTES

**Adult Convictions.** — State court’s records relating to defendant’s 1995 convictions revealed that they were adult convictions; although a seventeen-year-old could be tried in North Carolina as either a juvenile or an adult, G.S. 7B-2200 and G.S. 7B-2203 ( North Carolina’s district courts possessed exclusive, original jurisdiction over any case involving a juvenile who was alleged to be delinquent, G.S. 7B-1601, thus, if defendant was tried and con-

victed as a juvenile, he could have been prosecuted only in a North Carolina district court. The judgments underlying defendant’s 1995 convictions, however, demonstrated that he was convicted and sentenced in the Superior Court of Surry County, North Carolina, and his 1995 Convictions were therefore necessarily adult convictions. *United States v. Allen*, 446 F.3d 522, 2006 U.S. App. LEXIS 11193 (4th Cir. 2006).

## § 7B-2203. Transfer hearing.

## CASE NOTES

**Adult Convictions.** — State court’s records relating to defendant’s 1995 convictions revealed that they were adult convictions; although a seventeen-year-old could be tried in North Carolina as either a juvenile or an adult, G.S. 7B-2200 and G.S. 7B-2203, North Carolina’s district courts possessed exclusive, original jurisdiction over any case involving a juvenile who was alleged to be delinquent, G.S. 7B-1601, thus, if defendant was tried and con-

victed as a juvenile, he could have been prosecuted only in a North Carolina district court. The judgments underlying defendant’s 1995 convictions, however, demonstrated that he was convicted and sentenced in the Superior Court of Surry County, North Carolina, and his 1995 Convictions were therefore necessarily adult convictions. *United States v. Allen*, 446 F.3d 522, 2006 U.S. App. LEXIS 11193 (4th Cir. 2006).

## ARTICLE 24.

*Hearing Procedures.*

## § 7B-2402. Open hearings.

## CASE NOTES

**Open Hearing in Juvenile Action.** — There was no abuse of discretion in denying the

parties’ motion to close juvenile proceeding on involuntary manslaughter charges to public



where the trial court conducted a thorough hearing on the issue, hearing arguments from both parties and testimony from a detective

and respondent's mother. In re K.T.L., — N.C. App. —, 629 S.E.2d 152, 2006 N.C. App. LEXIS 965 (2006).

## § 7B-2405. Conduct of the adjudicatory hearing.

### CASE NOTES

#### I. General Consideration.

##### I. GENERAL CONSIDERATION.

**Applied** in In re T.E.F., 359 N.C. 570, 614 S.E.2d 296, 2005 N.C. LEXIS 642 (2005).

## § 7B-2406. Continuances.

### CASE NOTES

**Continuance For the State.** — Trial court did not abuse its discretion by ordering a juvenile into custody and continuing his disposition hearing with regard to charges of breaking and entering, trespass, and injury to real property, because a fourth charge arose during the juvenile's adjudication hearing as he was seen by a

court counselor mouthing the words "I'm going to kick your ass" to a witness who had just testified against him, therefore, the State was entitled to more time to prepare since the fourth charge of intimidating a witness was added. In re R.D.R., — N.C. App. —, 623 S.E.2d 341, 2006 N.C. App. LEXIS 52 (2006).

## § 7B-2407. When admissions by juvenile may be accepted.

### CASE NOTES

**Acceptance of Admission Was Erroneous.** —

Addressing each of the six issues listed in G.S. 7B-2407(a) is mandatory and a "totality of the circumstances" standard of review is inapplicable; thus, a trial court committed revers-

ible error in taking an admission from a juvenile in an adjudicatory hearing without specifically asking the juvenile if he was satisfied with his counsel as was required by G.S. 7B-2407(a). In re T.E.F., 359 N.C. 570, 614 S.E.2d 296, 2005 N.C. LEXIS 642 (2005).

## § 7B-2412. Legal effect of adjudication of delinquency.

### CASE NOTES

**Use of defendant's prior juvenile adjudication as an aggravator was improper** since it was not a prior conviction, not admitted by defendant, and not proven to a jury beyond a

reasonable doubt. State v. Yarrell, 172 N.C. App. 135, 616 S.E.2d 258, 2005 N.C. App. LEXIS 1428 (2005).

## § 7B-2413. Predisposition investigation and report.

### CASE NOTES

**Continuance For State.** — Trial court did not abuse its discretion by ordering juvenile into custody and continuing his disposition hearing with regard to charges of breaking and entering, trespass, and injury to real property,

because a fourth charge arose during the juvenile's adjudication hearing as he was seen by a court counselor mouthing the words "I'm going to kick your ass" to a witness who had just testified against him; therefore, the State was

entitled to more time to prepare since the fourth charge of intimidating a witness was

added. In re R.D.R., — N.C. App. —, 623 S.E.2d 341, 2006 N.C. App. LEXIS 52 (2006).

## ARTICLE 25.

### *Dispositions.*

## § 7B-2500. Purpose.

### **Implementation of Treatment Staffing Model at Youth Development Centers.** —

Session Laws 2005-276, ss. 16.6(a) through (c), as amended by Session Laws 2006-66, s. 15.6(a), provides: “(a) The Department of Juvenile Justice and Delinquency Prevention shall report December 31, 2005, and quarterly thereafter during the 2005-2007 biennium to the Chairs of the Senate and House of Representatives Appropriations Subcommittees on Justice and Public Safety and to the Joint Corrections, Crime Control, and Juvenile Justice Oversight Committee on the treatment staffing model being piloted at Samarkand and Stonewall Jackson Youth Development Centers. The report shall include a list of total positions at each facility by job class, whether the position is vacant or filled, whether positions were filled from internal employees or new employees, and the training and certification status of each position. The report shall also describe the nature of the treatment program, the criteria for evaluating the program, and how the program is performing in comparison to these criteria. The report shall also describe the training approach to be used to train staff in using treatment methods in youth development centers and provide information on current staff training and staff training planned for the next quarter. The Department shall also develop indicators for evaluating staff performance once the model has been implemented.

“(b) The Department of Juvenile Justice and Delinquency Prevention shall report December 31, 2005, and quarterly thereafter during the 2005-2007 biennium to the Chairs of the Senate and House of Representatives Appropriations Subcommittees on Justice and Public Safety and the Joint Corrections, Crime Control, and Juvenile Justice Oversight Committee on the implementation of the treatment staffing model at Dobbs, Dillon, and Juvenile Evaluation Center Youth Development Centers. The Department shall identify the number of positions reallocated to the new treatment job classes and the source of funding for those positions.

“(c) The Department of Juvenile Justice and Delinquency Prevention shall report to the Chairs of the Senate and House of Representatives Appropriations Subcommittees on Justice and Public Safety and the Joint Corrections, Crime Control, and Juvenile Justice Oversight Committee by November 10, 2006, on the final recommended staffing plan for youth development centers for the 2007-2008 fiscal year. The report shall include:

“(1) The latest results of the evaluation of the pilot treatment staffing models at the Samarkand and Stonewall Jackson Youth Development Centers and the progress in implementing the model at other youth development centers.

“(2) The total recommended staffing by position classification for each youth development center. Staffing by shift shall be provided for each housing unit as well as justification for the level and type of staff on each shift.

“(3) The total cost and cost per bed for each youth development center to implement the staffing model.

“(4) The primary basis for the number of staff at each youth development center by classification.

“(5) An identification of other states that have implemented a treatment based staffing model, how the staffing patterns compare to the Department of Juvenile Justice and Delinquency Prevention proposal, and any research on the benefits and outcomes of using the treatment based approach in these states.”

Session Laws 2006-66, s. 1.2, provides: “This act shall be known as ‘The Current Operations and Capital Improvements Appropriations Act of 2006.’”

Session Laws 2006-66, s. 28.3, provides: “Except for statutory changes or other provisions that clearly indicate an intention to have effects beyond the 2006 2007 fiscal year, the textual provisions of this act apply only to funds appropriated for, and activities occurring during, the 2006 2007 fiscal year.”

Session Laws 2006-66, s. 28.6 is a severability clause.

## CASE NOTES

**Continuance For the State.** — Trial court did not abuse its discretion by ordering a juvenile into custody and continuing his disposition

hearing with regard to charges of breaking and entering, trespass, and injury to real property, because a fourth charge arose during the juvenile

nile's adjudication hearing as he was seen by a court counselor mouthing the words "I'm going to kick your ass" to a witness who had just testified against him, therefore, the State was

entitled to more time to prepare since the fourth charge of intimidating a witness was added. In re R.D.R., — N.C. App. —, 623 S.E.2d 341, 2006 N.C. App. LEXIS 52 (2006).

## § 7B-2501. Dispositional hearing.

### CASE NOTES

**Probationary Conditions Proper.** — Probationary conditions in juvenile defendant's manslaughter adjudication that required defendant to visit and put flowers on the victim's grave site, wear a necklace with the victim's picture, and not participate in certain school functions and activities, did not require publicizing defendant's records or present defendant with the choice of staying at home or enduring public ridicule and were not improper; the trial

court was cognizant of a psychologist's findings concerning defendant's below average cognitive functioning, but did not afford this evidence as much weight as the other evidence of defendant's actions prior to, during, and after his delinquent act, and the trial court properly considered the evidence before it. In re J.B., 172 N.C. App. 747, 616 S.E.2d 385, 2005 N.C. App. LEXIS 1800 (2005), aff'd, 360 N.C. 165, 622 S.E.2d 495 (2005).

## § 7B-2506. Dispositional alternatives for delinquent juveniles.

### CASE NOTES

#### **Delegation of Authority.** —

Because a trial court ordered a juvenile defendant to pay restitution and participate in a residential treatment program, it did not impermissibly delegate authority; instead, defendant was ordered to pay restitution, but the amount was left to be determined until the victim's medical bills were provided to the trial court, which comported with G.S. 7B-2506. In re M.A.B., 170 N.C. App. 192, 611 S.E.2d 886, 2005 N.C. App. LEXIS 894 (2005).

**Confinement Not Authorized.** — When a trial court found that a juvenile appellant violated his probation, it was governed by G.S. 7B-2510, and was authorized to order a new disposition at Level 2, the next higher level from the original disposition at Level 1; commitment was not an allowable Level 2 disposition, so the trial court was not authorized to impose commitment, stayed or unstayed. In re T.B., — N.C. App. —, 631 S.E.2d 857, 2006 N.C. App. LEXIS 1562 (2006).

**Probationary Conditions Proper.** — Probationary conditions in juvenile defendant's manslaughter adjudication that required defendant to visit and put flowers on the victim's grave site, wear a necklace with the victim's picture, and not participate in certain school

functions and activities, did not require publicizing defendant's records or present defendant with the choice of staying at home or enduring public ridicule and were not improper; the trial court was cognizant of a psychologist's findings concerning defendant's below average cognitive functioning, but did not afford this evidence as much weight as the other evidence of defendant's actions prior to, during, and after his delinquent act, and the trial court properly considered the evidence before it. In re J.B., 172 N.C. App. 747, 616 S.E.2d 385, 2005 N.C. App. LEXIS 1800 (2005), aff'd, 360 N.C. 165, 622 S.E.2d 495 (2005).

**Transfer of Custody to Department of Social Services Was Proper.** — Trial court was authorized to grant custody of respondent, who had been adjudicated delinquent based on a finding that respondent committed involuntary manslaughter, to the Department of Social Services for purposes of obtaining necessary evaluation and treatment pursuant to G.S. 7B-2506(1)(c). Respondent had a history of aggressive behavior directed at younger children and a facility that offered 24-hour monitoring would ensure that respondent did not cause any further harm to other children. In re K.T.L., — N.C. App. —, 629 S.E.2d 152, 2006 N.C. App. LEXIS 965 (2006).

## § 7B-2507. Delinquency history levels.

### CASE NOTES

**Cited in** In re K.T.L., — N.C. App. —, 629 S.E.2d 152, 2006 N.C. App. LEXIS 965 (2006).



§ 7B-2508. Dispositional limits for each class of offense and delinquency history level.

CASE NOTES

**Confinement Not Authorized.** — When a trial court found that a juvenile appellant violated his probation, it was governed by G.S. 7B-2510, and was authorized to order a new disposition at Level 2, the next higher level from the original disposition at Level 1; commitment was not an allowable Level 2 disposition,

so the trial court was not authorized to impose commitment, stayed or unstayed. In re T.B., — N.C. App. —, 631 S.E.2d 857, 2006 N.C. App. LEXIS 1562 (2006).

**Cited in** In re K.T.L., — N.C. App. —, 629 S.E.2d 152, 2006 N.C. App. LEXIS 965 (2006).

§ 7B-2510. Conditions of probation; violation of probation.

CASE NOTES

**Violation of Conditions of Probation.** — When a trial court found that a juvenile appellant violated his probation, it was governed by G.S. 7B-2510, and was authorized to order a new disposition at Level 2, the next higher level from the original disposition at Level 1; commitment was not an allowable Level 2 disposition, so the trial court was not authorized to impose commitment, stayed or unstayed. In re T.B., — N.C. App. —, 631 S.E.2d 857, 2006 N.C. App. LEXIS 1562 (2006).

**Probationary Conditions Proper.** — Probationary conditions in juvenile defendant's manslaughter adjudication that required defendant to visit and put flowers on the victim's grave site, wear a necklace with the victim's

picture, and not participate in certain school functions and activities, did not require publicizing defendant's records or present defendant with the choice of staying at home or enduring public ridicule and were not improper; the trial court was cognizant of a psychologist's findings concerning defendant's below average cognitive functioning, but did not afford this evidence as much weight as the other evidence of defendant's actions prior to, during, and after his delinquent act, and the trial court properly considered the evidence before it. In re J.B., 172 N.C. App. 747, 616 S.E.2d 385, 2005 N.C. App. LEXIS 1800 (2005), aff'd, 360 N.C. 165, 622 S.E.2d 495 (2005).

§ 7B-2512. Dispositional order.

CASE NOTES

**Commitment Order Not Authorized.** — When a trial court found that a juvenile appellant violated his probation, it was governed by G.S. 7B-2510, and was authorized to order a new disposition at Level 2, the next higher level from the original disposition at Level 1; commitment

was not an allowable Level 2 disposition, so the trial court was not authorized to impose commitment, stayed or unstayed. In re T.B., — N.C. App. —, 631 S.E.2d 857, 2006 N.C. App. LEXIS 1562 (2006).

ARTICLE 26.

*Modification and Enforcement of Dispositional Orders; Appeals.*

§ 7B-2605. Disposition pending appeal.

CASE NOTES

**Commitment Held Proper.** — Temporary order, which also ordered respondent juvenile

to remain in custody of the Department of Social Services and to be placed in a residential

treatment facility for ninety days for evaluation purposes, was authorized pursuant to G.S. 7B-2605. In re K.T.L., — N.C. App. —, 629 S.E.2d 152, 2006 N.C. App. LEXIS 965 (2006).

## SUBCHAPTER III. JUVENILE RECORDS.

### ARTICLE 31.

#### *Disclosure of Juvenile Information.*

#### **§ 7B-3100. Disclosure of information about juveniles.**

(a) The Department, after consultation with the Conference of Chief District Court Judges, shall adopt rules designating certain local agencies that are authorized to share information concerning juveniles in accordance with the provisions of this section. Agencies so designated shall share with one another, upon request and to the extent permitted by federal law and regulations, information that is in their possession that is relevant to any assessment of a report of child abuse, neglect, or dependency or the provision or arrangement of protective services in a child abuse, neglect, or dependency case by a local department of social services pursuant to the authority granted under Chapter 7B of the General Statutes or to any case in which a petition is filed alleging that a juvenile is abused, neglected, dependent, undisciplined, or delinquent and shall continue to do so until the protective services case is closed by the local department of social services, or if a petition is filed when the juvenile is no longer subject to the jurisdiction of juvenile court. Agencies that may be designated as “agencies authorized to share information” include local mental health facilities, local health departments, local departments of social services, local law enforcement agencies, local school administrative units, the district’s district attorney’s office, the Department of Juvenile Justice and Delinquency Prevention, and the Office of Guardian ad Litem Services of the Administrative Office of the Courts. Any information shared among agencies pursuant to this section shall remain confidential, shall be withheld from public inspection, and shall be used only for the protection of the juvenile and others or to improve the educational opportunities of the juvenile, and shall be released in accordance with the provisions of the Family Educational and Privacy Rights Act as set forth in 20 U.S.C. § 1232g. Nothing in this section or any other provision of law shall preclude any other necessary sharing of information among agencies. Nothing herein shall be deemed to require the disclosure or release of any information in the possession of a district attorney.

(b) Disclosure of information concerning any juvenile under investigation or alleged to be within the jurisdiction of the court that would reveal the identity of that juvenile is prohibited except that publication of pictures of runaways is permitted with the permission of the parents. (1979, c. 815, s. 1; 1987, c. 297; 1994, Ex. Sess., c. 7, s. 1; 1995, c. 462, s. 4; c. 509, s. 5; 1997-459, s. 2; 1998-202, s. 6; 2000-137, s. 3; 2006-205, s. 2.)

**Effect of Amendments.** — Session Laws 2006-205, s. 2, effective August 8, 2006, in the second sentence of subsection (a), substituted “request and to the extent permitted by federal law and regulations” for “request,” added the

language “any assessment of a report . . . Chapter 7B of the General Statutes or to” and “the protective services case is closed by the local department of social services, or if a petition is filed when.”

## ARTICLE 34.

*Parental Authority over Juveniles.***§ 7B-3400. Juvenile under 18 subject to parents' control.**

## CASE NOTES

**Applied** in *In re R.T.W.*, 359 N.C. 539, 614 S.E.2d 489, 2005 N.C. LEXIS 646 (2005).

## ARTICLE 38.

*Interstate Compact on the Placement of Children.***§ 7B-3800. Adoption of Compact.**

## CASE NOTES

**Placement With Relatives.** — When, in a dependency proceeding, a trial court placed a child's custody with the child's foster parents without finding it was contrary to the child's best interests to place her with willing relatives, pursuant to G.S. 7B-903(a)(2)c, this was error because, *inter alia*, exempting review hearings from the requirement to first consider

placement with relatives risked undermining the Interstate Compact on the Placement of Children (ICPC), G.S. 7B-3800, as home studies of out-of-state relatives required by the ICPC were often not completed until a review hearing was held. *In re L.L.*, 172 N.C. App. 689, 616 S.E.2d 392, 2005 N.C. App. LEXIS 1798 (2005).



## Chapter 8. Evidence.

### Article 7.

#### Competency of Witnesses.

waived in child abuse; disclosure of information in impaired driving accident cases.

Sec.

8-53.1. Physician-patient and nurse privilege

### ARTICLE 4.

#### *Other Writings in Evidence.*

## § 8-44.1. Hospital medical records.

### CASE NOTES

**Mental Health Records Previously Admitted Into Evidence.** — Trial court did not err by considering mental health records of a mother contained within the underlying file and previously admitted into evidence in proceedings to terminate her parental rights, because the mental health records challenged by the mother were originally admitted into evidence during a permanency planning review

hearing and were not challenged by the mother at that time. In re J.B., 172 N.C. App. 1, 616 S.E.2d 264, 2005 N.C. App. LEXIS 1589 (2005).

**Mental Health Records Admissible.** — Rutherford County Department of Social Services was not precluded from admitting the mother's mental health records into evidence. In re J.S.L., — N.C. App. —, 628 S.E.2d 387, 2006 N.C. App. LEXIS 883 (2006).

### ARTICLE 7.

#### *Competency of Witnesses.*

## § 8-53. Communications between physician and patient.

### CASE NOTES

- I. General Consideration.
- IV. Compelled Disclosure.

#### I. GENERAL CONSIDERATION.

**Exclusion of Statement From Treating Physician.** — Exclusion of a written response from a treating physician, which was in response to a facsimile sent by defense counsel that detailed three questions regarding causation of an employee's alleged work-related injury and subsequent disability, was proper since the communication was ex parte and consisted of interrogatories to a non-party, which were not authorized by any caselaw precedent nor any rule of evidence. Mayfield v. Parker Hannifin, — N.C. App. —, 621 S.E.2d 243, 2005 N.C. App. LEXIS 2472 (2005).

#### IV. COMPELLED DISCLOSURE.

##### **Disclosure Properly Compelled.** —

When defendant was charged with second-degree murder for causing another's death by

his drunk driving, his medical records, showing the concentration of alcohol in his blood immediately after the incident, were properly admitted, under G.S. 8-53, because the trial court did not abuse its discretion in finding that the admission of such records was necessary for the proper administration of justice. State v. Westbrook, — N.C. App. —, 623 S.E.2d 73, 2005 N.C. App. LEXIS 2704 (2005).

Trial court did not abuse its discretion in ordering a driver to produce privileged medical records, which mentioned or reflected the results of any tests performed to determine the driver's blood alcohol content and the presence of controlled substances in his body at the time of the accident, in the interest of justice. Roadway Express, Inc. v. Hayes, — N.C. App. —, 631 S.E.2d 41, 2006 N.C. App. LEXIS 1297 (2006).

### § 8-53.1. Physician-patient and nurse privilege waived in child abuse; disclosure of information in impaired driving accident cases.

(a) Notwithstanding the provisions of G.S. 8-53 and G.S. 8-53.13, the physician-patient or nurse privilege shall not be a ground for excluding evidence regarding the abuse or neglect of a child under the age of 16 years or regarding an illness of or injuries to such child or the cause thereof in any judicial proceeding related to a report pursuant to the North Carolina Juvenile Code, Chapter 7B of the General Statutes of North Carolina.

(b) Nothing in this Article shall preclude a health care provider, as defined in G.S. 90-21.11, from disclosing information to a law enforcement agency investigating a vehicle crash under the provisions of G.S. 90-21.20B. (1965, c. 472, s. 2; 1971, c. 710, s. 2; 1981, c. 469, s. 24; 1998-202, s. 13(b); 2004-186, s. 16.2; 2006-253, s. 18.)

**Editor's Note.** — Session Laws 2006-253, s. 1, provides: "This act shall be known as 'The Motor Vehicle Driver Protection Act of 2006.'"

**Effect of Amendments.** —

Session Laws 2006-253, s. 18, effective December 1, 2006, and applicable to offenses com-

mitted on or after that date, added "disclosure of information in impaired driving accident cases" at the end of the section heading; designated the existing provisions as subsection (a), and added subsection (b).

### § 8-53.3. Communications between psychologist and client or patient.

#### CASE NOTES

**Authority to Compel Evidence.** — It was not error for a trial court to admit certain evidence in a child neglect and dependency case that violated the mother's psychologist-patient privilege; under G.S. 8-53.3, the court had the authority to compel disclosure of otherwise privileged information if, in his or her opinion, it

was necessary to a proper administration of justice, and the mother's psychological condition was a major issue in the determination that her son was neglected. In re K.D., — N.C. App. —, 631 S.E.2d 150, 2006 N.C. App. LEXIS 1393 (2006).

### § 8-56. Husband and wife as witnesses in civil action.

#### CASE NOTES

#### I. General Consideration.

##### I. GENERAL CONSIDERATION.

Applied in Warner Bros. Records, Inc. v.

Souther, — F. Supp. 2d —, 2006 U.S. Dist. LEXIS 42249 (W.D.N.C. June 1, 2006).

### § 8-57. Husband and wife as witnesses in criminal actions.

#### CASE NOTES

#### I. General Consideration.

##### I. GENERAL CONSIDERATION.

Cited in State v. Lewis, 360 N.C. 1, 619 S.E.2d 830, 2005 N.C. LEXIS 1000 (2005).

## § 8-58.1. Injured party as witness when medical charges at issue.

### CASE NOTES

#### **Failure to Instruct As to Statutory Presumption of Reasonableness Held Not Error. —**

Where evidence challenged whether an injured person's medical treatment and expenses from a collision were reasonable and necessary, and showed that the injured person had been

receiving care for six years before the accident for back pain resulting from a prior collision, the trial court's refusal to charge on the G.S. 8-58.1 presumption as to medical expenses was proper. *Osetek v. Jeremiah*, — N.C. App. —, 621 S.E.2d 202, 2005 N.C. App. LEXIS 2489 (2005).

### ARTICLE 13.

#### *Photographs.*

## § 8-97. Photographs as substantive or illustrative evidence.

### CASE NOTES

#### **Admissibility of Videotape Recordings.**

Defendant's conviction of robbery with a firearm was proper; the State set a proper foundation for the admission of a videotape of the robbery under G.S. 8-97 by presenting testimony that the tape came from a store security camera, and had been in police custody and had not been altered, and the probative value of the videotape was not outweighed by any undue prejudice under G.S. 8C-1, N.C. R. Evid. 403. *State v. Ayscue*, 169 N.C. App. 548, 610 S.E.2d 389, 2005 N.C. App. LEXIS 677 (2005).

Pursuant to G.S. 8-97 and G.S. 8C-1-901, the trial court properly admitted the videotape evidence of defendant committing sexual acts with the victim, a minor child, and the photographs taken therefrom, because: (1) a state agent established an unbroken chain of custody from the time the tape was found in defendant's residence; (2) the state agent testified that the room depicted in the videotape shown to the jury was identical to the master bedroom in defendant's residence and that the man on the videotape was defendant; (3) the victim's mother, who had previously dated defendant, testified that defendant owned a camcorder and a tripod, which he had used to videotape them having sexual intercourse in the master bedroom of defendant's residence; (4) the victim's mother identified the room depicted in the videotape as defendant's master bedroom and the man on the videotape as defendant; (5) the victim's mother identified the young girl on the videotape as the victim, her daughter; (6) there was testimony that defendant's camcorder was in working condition; and (7) there was sufficient evidence from the testimony regarding

the chain of custody to establish that the videotape had not been edited or altered, and that the same videotape seized from defendant's residence was the same videotape reviewed by the jury. *State v. Prentice*, 170 N.C. App. 593, 613 S.E.2d 498, 2005 N.C. App. LEXIS 1086 (2005), cert. denied, appeal dismissed, — N.C. —, 622 S.E.2d 628 (2005).

Videos were properly admitted where there was testimony that the videos accurately depicted the events surrounding the subject incident and that the tape had not been changed or altered, and the portions of the tape that defendant contended were inflammatory were not shown at trial. *State v. Buff*, 170 N.C. App. 374, 612 S.E.2d 366, 2005 N.C. App. LEXIS 998 (2005).

Trial court did not err in admitting an edited videotape of planes flying over the adjoining property owners' property in a case where they sued the airport operators based on the contention that operation of the airport was a private nuisance; the adjoining property owners laid a proper foundation for admission of that evidence and the airport operators did not argue that the videotaping system was not properly maintained or properly functioning. *Broadbent v. Allison*, — N.C. App. —, 626 S.E.2d 758, 2006 N.C. App. LEXIS 524 (2006).

Even assuming that videotapes from a food store were not properly admitted into evidence, reversal was not required because defendant was not prejudiced by their admission given the admittance of defendant's statement in which defendant confessed to using the victim's credit card to purchase beer and cigarettes at the food store. *State v. Brooks*, — N.C. App. —, 631 S.E.2d 54, 2006 N.C. App. LEXIS 1334 (2006).



## Chapter 8C.

### Evidence Code.

#### Article 1.

##### General Provisions.

Rule  
103. Rulings on evidence.

#### Article 7.

##### Opinions and Expert Testimony.

Rule  
702. Testimony by experts.

## § 8C-1. Rules of Evidence.

### CASE NOTES

**Cited** in Robinson v. Polk, 438 F.3d 350, 2006 U.S. App. LEXIS 3454 (Feb. 14, 2006).

#### ARTICLE 1.

##### *General Provisions.*

### Rule 102. Purpose and construction.

### CASE NOTES

**Court Has Inherent Authority to Order Sua Sponte Preliminary Hearing on Evidence.** — Under G.S. 8C-1, N.C. R. Evid. 102(a), 104(a), a trial court has the inherent authority to conduct an evidentiary hearing outside the presence of a jury sua sponte to

clarify questions of admissibility and to prevent undue delay in the proceedings. *State v. Brewington*, 170 N.C. App. 264, 612 S.E.2d 648, 2005 N.C. App. LEXIS 1011 (2005), cert. denied, 360 N.C. 67, 621 S.E.2d 881 (2005).

### Rule 103. Rulings on evidence.

(a) *Effect of erroneous ruling.* — Error may not be predicated upon a ruling which admits or excludes evidence unless a substantial right of the party is affected, and

- (1) **Objection.** — In case the ruling is one admitting evidence, a timely objection or motion to strike appears of record. No particular form is required in order to preserve the right to assert the alleged error upon appeal if the motion or objection clearly presented the alleged error to the trial court;
- (2) **Offer of proof.** — In case the ruling is one excluding evidence, the substance of the evidence was made known to the court by offer or was apparent from the context within which questions were asked.

Once the court makes a definitive ruling on the record admitting or excluding evidence, either at or before trial, a party need not renew an objection or offer of proof to preserve a claim of error for appeal.

(b) *Record of offer and ruling.* — The court may add any other or further statement which shows the character of the evidence, the form in which it was offered, the objection made, and the ruling thereon. It may direct the making of an offer in question and answer form.

(c) *Hearing of jury.* — In jury cases, proceedings shall be conducted, to the extent practicable, so as to prevent inadmissible evidence from being sug-

gested to the jury by any means, such as making statements or offers of proof or asking questions in the hearing of the jury.

(d) *Review of errors where justice requires.* — Notwithstanding the requirements of subdivision (a) of this rule, an appellate court may review errors affecting substantial rights if it determines, in the interest of justice, it is appropriate to do so. (1983, c. 701, s. 1; 2003-101, s. 1; 2006-264, s. 30.5.)

**Effect of Amendments.** — Session Laws 2006-264, s. 30.5, effective August 27, 2006,

transferred the last sentence in subdivision (a)(2) to the last paragraph of subsection (a).

## CASE NOTES

**Applicability of Amendment.** — Although an amendment to G.S. 8C-1-103(a)(2), which provided that due to defendant's lack of objection to the admission of evidence at trial he failed to preserve for appellate review all issues related to the evidence found, was found unconstitutional by a judicial precedent, the appellate court reviewed defendant's assignments of error on the merits regarding a search of his vehicle and with respect to the denial of his suppression motion, as the amendment to G.S. 8C-1-103 went into effect before the trial in the matter, at which time the amendment was under a presumption of constitutionality. *State v. Baublitz*, 172 N.C. App. 801, 616 S.E.2d 615, 2005 N.C. App. LEXIS 1778 (2005).

Because under G.S. 8C-1-103(a)(2), which was later held unconstitutional but had been presumed constitutional at the time of trial, the trial court had assured defendant that he did not need to renew his objections to the evidence when it was offered at trial, the appellate court would review defendant's arguments as to the affected evidence. *State v. Grant*, — N.C. App. —, 632 S.E.2d 258, 2006 N.C. App. LEXIS 1637 (2006).

### **By failing to preserve evidence, etc. —**

Although defendant failed to preserve an evidentiary issue for appellate review, pursuant to G.S. 8C-1-103(a)(2), a review under G.S. 8C-1-403 indicated that the probative value of a letter that he wrote to his daughter, who was the victim of his unlawful sexual conduct, was not outweighed by the potential prejudice, as the meaning and intent of the letter were for the jury to decide. *State v. Dorton*, 172 N.C. App. 759, 617 S.E.2d 97, 2005 N.C. App. LEXIS 1794 (2005), cert. denied, 360 N.C. 69, 623 S.E.2d 775 (2005).

**Substance of Evidence Apparent From Context.** — Substance of the testimony was apparent from the context within which the questions were asked under G.S. 8C-1-103(a)(2), the grounds for admitting the testimony as evidence of the victim's violent character pertinent to defendant's assertion of self-

defense under G.S. 8C-1-404(a)(2) were apparent from the context under N.C. R. App. P. 10(b)(1), and the issue of the testimony's admissibility was properly preserved for appellate review. *State v. Everett*, — N.C. App. —, 630 S.E.2d 703, 2006 N.C. App. LEXIS 1302 (2006).

### **Failure to Offer Proof Precludes Appellate Review. —**

In a medical malpractice case, objection to evidence excluded by motion in limine was not preserved for appellate review where there was no attempt to introduce the evidence during the trial. *Miller v. Forsyth Mem'l Hosp., Inc.*, 173 N.C. App. 385, 618 S.E.2d 838, 2005 N.C. App. LEXIS 2040 (2005).

### **Failure to Object to Admission of Evidence Precludes Appellate Review. —**

Constitution of North Carolina vests the Supreme Court of North Carolina with exclusive authority to make rules of practice and procedure for the appellate division of the courts; while G.S. 8C-1-103(a)(2) permitted appellate review of an evidentiary ruling even though the party failed to object at trial, since G.S. 8C-1-103(a)(2) was inconsistent with N.C. R. App. P. 10(b)(1), G.S. 8C-1-103(a)(2) failed. *State v. Tutt*, 171 N.C. App. 518, 615 S.E.2d 688, 2005 N.C. App. LEXIS 1313 (2005).

**Applied** in *State v. Rose*, 170 N.C. App. 284, 612 S.E.2d 336, 2005 N.C. App. LEXIS 1015 (2005); *State v. Oglesby*, — N.C. App. —, 622 S.E.2d 152, 2005 N.C. App. LEXIS 2624 (2005).

**Cited** in *State v. Fisher*, 171 N.C. App. 201, 614 S.E.2d 428, 2005 N.C. App. LEXIS 1214 (2005); *State v. Tuck*, 173 N.C. App. 61, 618 S.E.2d 265, 2005 N.C. App. LEXIS 1930 (2005); *State v. Highsmith*, 173 N.C. App. 600, 619 S.E.2d 586, 2005 N.C. App. LEXIS 2123 (2005); *State v. Watts*, 172 N.C. App. 58, 616 S.E.2d 290, 2005 N.C. App. LEXIS 1588 (2005); *State v. McKinney*, 174 N.C. App. 138, 619 S.E.2d 901, 2005 N.C. App. LEXIS 2307 (2005); *State v. Brown*, — N.C. App. —, 631 S.E.2d 49, 2006 N.C. App. LEXIS 1311 (2006).

## Rule 104. Preliminary questions.

### CASE NOTES

**Court Has Inherent Authority to Order Sua Sponte Preliminary Hearing on Evidence.** — Under G.S. 8C-1, N.C. R. Evid. 102(a), 104(a), a trial court has the inherent authority to conduct an evidentiary hearing outside the presence of a jury sua sponte to

clarify questions of admissibility and to prevent undue delay in the proceedings. *State v. Brewington*, 170 N.C. App. 264, 612 S.E.2d 648, 2005 N.C. App. LEXIS 1011 (2005), cert. denied, 360 N.C. 67, 621 S.E.2d 881 (2005).

### ARTICLE 2.

#### *Judicial Notice.*

## Rule 201. Judicial notice of adjudicative facts.

### CASE NOTES

#### **Prior Proceedings.** —

In a termination of parental rights hearing, it was not error for a trial court to take judicial notice of previous orders of adjudication, review orders, and permanency planning orders, under G.S. 8C-1, N.C. R. Evid. 201(b), because the trial court, acting as fact-finder, was presumed to disregard any incompetent evidence, and nothing showed that the trial court did not conduct the required independent determination, as the trial court specifically found it considered the testimony offered by both sides in making its determination that a mother neglected her children, for purposes of termination. *In re J.W.*, 173 N.C. App. 450, 619 S.E.2d 534, 2005 N.C. App. LEXIS 2109 (2005), *aff'd*, — N.C. —, 625 S.E.2d 780 (2006).

**Judicial Notice of Assumptions Underlying Abolished Tender Years Doctrine Held Improper.** — Trial court erred in entering a custody order concerning the parties' child; the trial court improperly relied on the tender years presumption in granting custody to the mother, as that presumption had been abolished, and G.S. 50-13.2(a) required that the custody decision be based solely on the best interests of the child, and G.S. 8C-1, Rule 201(b) did not allow the trial court to take judicial notice of the assumptions underlying an abolished doctrine in order to resurrect the doctrine. *Greer v. Greer*, — N.C. App. —, 624 S.E.2d 423, 2006 N.C. App. LEXIS 183 (2006).

**Applied** in *In re J.B.*, 172 N.C. App. 1, 616 S.E.2d 264, 2005 N.C. App. LEXIS 1589 (2005).

### ARTICLE 4.

#### *Relevancy and Its Limits.*

## Rule 401. Definition of "relevant evidence."

### CASE NOTES

- I. General Consideration.
- II. Relevant Evidence.
- III. Irrelevant Evidence.

#### **I. GENERAL CONSIDERATION.**

**Applied** in *State v. Carmon*, 169 N.C. App. 750, 611 S.E.2d 211, 2005 N.C. App. LEXIS 794 (2005); *State v. Augustine*, 359 N.C. 709, 616 S.E.2d 515, 2005 N.C. LEXIS 836 (2005); *State v. King*, — N.C. App. —, 630 S.E.2d 719, 2006

N.C. App. LEXIS 1307 (2006).

**Cited** in *State v. Wells*, 171 N.C. App. 136, 613 S.E.2d 705, 2005 N.C. App. LEXIS 1167 (2005); *State v. Blizzard*, 169 N.C. App. 285, 610 S.E.2d 245, 2005 N.C. App. LEXIS 680 (2005); *State v. Locklear*, 172 N.C. App. 249, 616 S.E.2d 334, 2005 N.C. App. LEXIS 1583 (2005).



## II. RELEVANT EVIDENCE.

### **Police Officer's Opinion Relevant. —**

Deputy's testimony that defendant fell over when the deputy asked defendant to stand on one leg and hop was relevant to the deputy's lay opinion that defendant was impaired. *State v. Streckfuss*, 171 N.C. App. 81, 614 S.E.2d 323, 2005 N.C. App. LEXIS 1190 (2005).

### **Weapons Evidence Admissible. —**

Presence of a gun was relevant to the charges of possession of cocaine with intent to manufacture, sell, or deliver, and trafficking in cocaine. *State v. Boyd*, — N.C. App. —, 628 S.E.2d 796, 2006 N.C. App. LEXIS 854 (2006).

Evidence that defendant who shot a police officer with a shotgun possessed an assault rifle was relevant and was not more prejudicial than probative; evidence showed why defendant was in a field and why he used the shotgun rather than the rifle, and it was also highly probative of defendant's motive for the shooting: not wanting the victim to discover that defendant was violating his probation by possessing firearms. *State v. Grant*, — N.C. App. —, 632 S.E.2d 258, 2006 N.C. App. LEXIS 1637 (2006).

### **Evidence Held Relevant. —**

Trial court did not err by admitting without editing or redacting letters that defendant and his accomplice wrote into evidence, as the letters were relevant under G.S. 8C-1-401 and G.S. 8C-1-402, and the probative value of the letters was not outweighed by prejudice under G.S. 8C-1-403. *State v. Curry*, 171 N.C. App. 568, 615 S.E.2d 327, 2005 N.C. App. LEXIS 1312 (2005).

No plain error existed in the trial court admitting evidence of defendant's empty prescription pill bottle, testimony by an officer identifying the pills from the label, and testimony by a pharmacist about the interaction between the pills and alcohol in defendant's trial for driving while impaired, hit and run, and second degree murder, following an auto accident, as the evidence was relevant to the charges against defendant. *State v. Edwards*, 170 N.C. App. 381, 612 S.E.2d 394, 2005 N.C. App. LEXIS 992 (2005).

Defendant's statement to officers that he was expected to make a living outside prison showed a motive for the robbery and his statement that he wanted to go back to prison showed a possible motive to commit a crime in order to accomplish that objective; the statements were made by defendant himself shortly after the crime and were distinguishable from other evidence, and as such, the statements were probative of motive and intent, so there was no error in admission of the statements. *State v. al-Bayyinah*, 359 N.C. 741, 616 S.E.2d 500, 2005 N.C. LEXIS 844 (2005).

Evidence of prison records on defendant's father were relevant in defendant's rape trial to

eliminate other potential perpetrators of the rape; specifically paternal relative of defendant. *State v. Watson*, — N.C. App. —, 634 S.E.2d 231, 2006 N.C. App. LEXIS 1923 (2006).

## III. IRRELEVANT EVIDENCE.

### **Evidence Properly Excluded. —**

In a termination of parental rights hearing in a case in which a mother's children were removed from her because, inter alia, her house was unsanitary, and the children were adjudicated neglected on that basis, in part, it was proper for the trial court to sustain an objection, at the termination hearing, to questions about the condition of the mother's home the day after the department of social services' initial visit there, because the relevant issue, under G.S. 8C-1, N.C. R. Evid. 401, at the termination hearing was whether the evidence supported a finding of neglect at the time of the termination hearing, rather than the condition of the mother's home before the children were adjudicated neglected. In re J.W., 173 N.C. App. 450, 619 S.E.2d 534, 2005 N.C. App. LEXIS 2109 (2005), *aff'd*, — N.C. —, 625 S.E.2d 780 (2006).

That an unidentified man accused the victim of assault several years before the murder for which defendant was charged took place did not make any fact in the case more probable or less probable, and the trial court's ruling that the testimony was not relevant and was, hence, inadmissible until defendant introduced substantive evidence of self-defense or evidence that the victim was the first aggressor, was not in error. *State v. Campbell*, 359 N.C. 644, 617 S.E.2d 1, 2005 N.C. LEXIS 842 (2005).

### **Evidence Held Irrelevant. —**

In a rape and kidnapping case, evidence that defendant possessed pornographic magazines was not relevant because it did not tend to make the existence of any fact that is of consequence more or less probable since they were not shown to the victim, and they were not used to show dominion and control over a motel room; however, the error was harmless since a different outcome in the case would not have resulted due to overwhelming evidence of guilt. *State v. Moore*, 173 N.C. App. 494, 620 S.E.2d 1, 2005 N.C. App. LEXIS 2103 (2005).

In a rape and kidnapping case, evidence of a criminal citation issued to defendant for drugs a few days before an attack was not relevant because it did not matter whether defendant actually possessed drugs; the admission of the evidence was harmless because the state could have proven the attack at any rate due to the testimony of the victim. *State v. Moore*, 173 N.C. App. 494, 620 S.E.2d 1, 2005 N.C. App. LEXIS 2103 (2005).

In defendant's trial ending in her conviction for second-degree murder, evidence of her prior

conduct in shooting a dog was irrelevant under G.S. § 8C-1-401; the evidence was not necessary to show that defendant was knowledgeable about firearms or had used a gun in the past because defendant had admitted that she shot her victim and whether or not she knew how to use a pistol was not contested, and the evidence was irrelevant to her claim of self-defense. *State v. Everett*, — N.C. App. —, 630 S.E.2d 703, 2006 N.C. App. LEXIS 1302 (2006).

### **Erroneously But Not Prejudicially Admitted. —**

Evidence that defendant, who shot a police officer with a shotgun, possessed a pistol was irrelevant because the pistol was not connected to the shooting in any way; the error was harmless under G.S. 15A-1443(a), however, because of the overwhelming evidence of defendant's guilt. *State v. Grant*, — N.C. App. —, 632 S.E.2d 258, 2006 N.C. App. LEXIS 1637 (2006).

## **Rule 402. Relevant evidence generally admissible; irrelevant evidence inadmissible.**

### **CASE NOTES**

#### **Evidence Held Relevant. —**

Various items of drug paraphernalia, packaging materials, and bus tickets found at accomplice's house were properly placed into evidence because they were clearly relevant to the issue of defendant's guilty of the trafficking of drugs and conspiracy offenses. *State v. Howell*, 169 N.C. App. 741, 611 S.E.2d 200, 2005 N.C. App. LEXIS 795 (2005), cert. denied, 360 N.C. 71, 622 S.E.2d 500 (2005).

Defendant's statement to officers that he was expected to make a living outside prison showed a motive for the robbery and his statement that he wanted to go back to prison showed a possible motive to commit a crime in order to accomplish that objective; the statements were made by defendant himself shortly after the crime and were distinguishable from other evidence, and as such, the statements were probative of motive and intent, so there was no error in admission of the statements. *State v. al-Bayyinah*, 359 N.C. 741, 616 S.E.2d 500, 2005 N.C. LEXIS 844 (2005).

#### **Evidence Properly Admitted. —**

Trial court did not err by admitting without editing or redacting letters that defendant and

his accomplice wrote into evidence, as the letters were relevant under G.S. 8C-1-401 and G.S. 8C-1-402, and the probative value of the letters was not outweighed by prejudice under G.S. 8C-1-403. *State v. Curry*, 171 N.C. App. 568, 615 S.E.2d 327, 2005 N.C. App. LEXIS 1312 (2005).

Where the State presented substantial evidence of guilt of second-degree sexual offense through the testimony of a cellmate, which was corroborated by two other inmates who heard defendant bragging about the sexual assault, the trial court did not commit plain error in admitting evidence of defendant's prior acts. *State v. Locklear*, — N.C. App. —, 621 S.E.2d 254, 2005 N.C. App. LEXIS 2465 (2005).

**Applied** in *State v. Augustine*, 359 N.C. 709, 616 S.E.2d 515, 2005 N.C. LEXIS 836 (2005).

**Cited** in *State v. Streckfuss*, 171 N.C. App. 81, 614 S.E.2d 323, 2005 N.C. App. LEXIS 1190 (2005); *State v. Blizzard*, 169 N.C. App. 285, 610 S.E.2d 245, 2005 N.C. App. LEXIS 680 (2005); *State v. Locklear*, 172 N.C. App. 249, 616 S.E.2d 334, 2005 N.C. App. LEXIS 1583 (2005); *State v. Campbell*, 359 N.C. 644, 617 S.E.2d 1, 2005 N.C. LEXIS 842 (2005).

## **Rule 403. Exclusion of relevant evidence on grounds of prejudice, confusion, or waste of time.**

### **CASE NOTES**

- I. General Consideration.
- II. Photographs and Videotapes.
- III. Prejudicial Evidence, Evidence Excluded Based on Confusion, Etc.
- IV. Admission or Exclusion of Evidence Not Prejudicial.

#### **I. GENERAL CONSIDERATION.**

#### **Specific Finding Not Required So Long as Balancing Test Occurred. —**

Where the State presented substantial evidence of guilt of second-degree sexual offense

through the testimony of a cellmate, which was corroborated by two other inmates who heard defendant bragging about the sexual assault, the trial court did not commit plain error in admitting evidence of defendant's prior acts, despite defendant's claim that the trial court



failed to use a balancing test. *State v. Locklear*, — N.C. App. —, 621 S.E.2d 254, 2005 N.C. App. LEXIS 2465 (2005).

**Factors to Consider in Determining Admissibility.** —

Although the trial court did not state its reason(s) for refusing to allow the persons who made statements regarding defendant's prior acts to testify, the court could have concluded that such testimony would have merely wasted time; thus, defendant's contention that the prosecutor's argument regarding the statements was improper because the evidence was necessarily prejudicial was unpersuasive to the appellate court. *State v. Nguyen*, — N.C. App. —, 632 S.E.2d 197, 2006 N.C. App. LEXIS 1571 (2006).

**Evidence of Intent.** —

3. Evidence of defendant's prior drug conviction was properly admitted to show defendant's intent; in the prior case, defendant sold .82 grams of cocaine in rock-like form to an undercover agent and the average dosage unit of crack cocaine was from .05 grams to .12 grams per rock of cocaine, while in the instant case, defendant had 12 rocks of crack cocaine weighing 1.6 grams; in both cases, the rocks of crack cocaine were not individually packaged. *State v. Carpenter*, — N.C. App. —, 632 S.E.2d 538, 2006 N.C. App. LEXIS 1623 (2006).

**Applied** in *State v. Carmon*, 169 N.C. App. 750, 611 S.E.2d 211, 2005 N.C. App. LEXIS 794 (2005); *State v. Goblet*, 173 N.C. App. 112, 618 S.E.2d 257, 2005 N.C. App. LEXIS 1929 (2005); *State v. Anderson*, — N.C. App. —, 627 S.E.2d 501, 2006 N.C. App. LEXIS 703 (2006); *State v. Boyd*, — N.C. App. —, 628 S.E.2d 796, 2006 N.C. App. LEXIS 854 (2006); *State v. King*, — N.C. App. —, 630 S.E.2d 719, 2006 N.C. App. LEXIS 1307 (2006); *State v. Watson*, — N.C. App. —, 634 S.E.2d 231, 2006 N.C. App. LEXIS 1923 (2006).

**Cited** in *State v. Blizzard*, 169 N.C. App. 285, 610 S.E.2d 245, 2005 N.C. App. LEXIS 680 (2005); *State v. Locklear*, 172 N.C. App. 249, 616 S.E.2d 334, 2005 N.C. App. LEXIS 1583 (2005); *State v. Jacobs*, 172 N.C. App. 220, 616 S.E.2d 306, 2005 N.C. App. LEXIS 1586 (2005); *State v. Moore*, 173 N.C. App. 494, 620 S.E.2d 1, 2005 N.C. App. LEXIS 2103 (2005); *State v. Anderson*, — N.C. App. —, 624 S.E.2d 393, 2006 N.C. App. LEXIS 191 (2006); *State v. Jones*, — N.C. App. —, 627 S.E.2d 265, 2006 N.C. App. LEXIS 589 (2006).

## II. PHOTOGRAPHS AND VIDEOTAPES.

**Trial court did not err in allowing child sexual molestation victim to describe photos she took of defendant and her mother, even though the trial court refused to admit the photos themselves;** the testimony was not significantly different than the daugh-

ter's prior testimony about the sexual relationship between her mother and defendant. *State v. Pendleton*, — N.C. App. —, 622 S.E.2d 708, 2005 N.C. App. LEXIS 2743 (2005).

**Admittance of Videotape Recordings.** —

Defendant's conviction of robbery with a firearm was proper; the State set a proper foundation for the admission of a videotape of the robbery under G.S. 8-97 by presenting testimony that the tape came from a store security camera, and had been in police custody and had not been altered, and the probative value of the videotape was not outweighed by any undue prejudice under G.S. 8C-1, N.C. R. Evid. 403. *State v. Ayscue*, 169 N.C. App. 548, 610 S.E.2d 389, 2005 N.C. App. LEXIS 677 (2005).

Admission of videos did not violate G.S. 8C-1, N.C. R. Evid. 403, since the portions of the tape that defendant contended were inflammatory were not shown at trial. *State v. Buff*, 170 N.C. App. 374, 612 S.E.2d 366, 2005 N.C. App. LEXIS 998 (2005).

**Inability to View Lost Videotape.** — That jurors were unable to view a lost videotape did not, per se, result in a violation of G.S. 8C-1, Rule 403; G.S. 8C-1, Rule 1004 permits admissibility of secondary evidence where the original is lost or destroyed. *State v. Thorne*, 173 N.C. App. 393, 618 S.E.2d 790, 2005 N.C. App. LEXIS 2031 (2005).

## III. PREJUDICIAL EVIDENCE, EVIDENCE EXCLUDED BASED ON CONFUSION, ETC.

**Evidence Improperly Admitted.** —

Although the trial court properly admitted a police officer's testimony about the underlying facts of defendant's prior 1995 conviction for assault inflicting serious injury, the trial court committed reversible error by admitting the state's exhibit of a copy of defendant's criminal conviction for that assault because admitting the bare fact of a non-testifying defendant's prior conviction after testimony had been elicited to establish the factual basis underlying that conviction violated G.S. 8C-1, N.C. R. Evid. 404(b), and 403; the bare fact of the prior conviction was inherently prejudicial. *State v. McCoy*, 174 N.C. App. 105, 620 S.E.2d 863, 2005 N.C. App. LEXIS 2289 (2005).

**Evidence Properly Excluded.** —

Where defendant, after resting defendant's case, moved to reopen the evidence to allow a child witness to rebut defendant's son's testimony that the victim had a bad bicycle wreck, corroborating defendant's story as to why the victim's buttocks were bruised, the trial court did not abuse its discretion under G.S. 15A-1226(b) in denying the motion; the trial court was permitted to exclude the testimony on grounds of undue delay, waste of time, or needless presentation of cumulative evidence under



G.S. 8C-1-403, as defendant could have asked defendant's son before trial whether anyone else had seen the victim wreck on the bicycle and could have cross-examined the son about this, and the child's testimony was cumulative and would have only possibly served to corroborate defendant's testimony or facts brought to the jury's attention during the son's cross-examination. *State v. Phillips*, 171 N.C. App. 622, 615 S.E.2d 382, 2005 N.C. App. LEXIS 1369 (2005), cert. denied, appeal dismissed, — N.C. —, 622 S.E.2d 628 (2005).

Because no evidence proffered at an in camera hearing supported an inference that a victim's prior sexual activity was forced or caused any injuries, evidence of the victim's prior sexual activity was properly excluded under the rape shield statute, G.S. 8C-1, N.C. R. Evid. 412(b)(2); the probative value, if any, to defendant was substantially outweighed by the danger of unfair prejudice to the State and the prosecuting witness under G.S. 8C-1, N.C. R. Evid. 403. *State v. Harris*, 360 N.C. 145, 622 S.E.2d 615, 2005 N.C. LEXIS 1320 (2005).

Trial court in a condemnation proceeding did not err in excluding opinion testimony as to property value offered by four witnesses, where the opinions were based upon prior condemnation sales, which were an improper basis for valuing property in a current condemnation proceeding, or based on sales of property which was insufficiently similar to the property in question. *City of Charlotte v. Ertel*, 170 N.C. App. 346, 612 S.E.2d 438, 2005 N.C. App. LEXIS 1009 (2005).

#### **Evidence Held Prejudicial. —**

Trial court acted within its discretion in ruling that defendant could not inquire of a witness about sexual paraphernalia found in the murder victim's home, in that its probative value was substantially outweighed by the danger of unfair prejudice, G.S. 8C-1, Rule 403. *State v. Campbell*, 359 N.C. 644, 617 S.E.2d 1, 2005 N.C. LEXIS 842 (2005).

**Evidence Properly Admitted. —** Trial court did not abuse its discretion in balancing the probative value of detective's testimony about the contents of a lost surveillance video tape against its prejudicial effect because the testimony provided evidence of the identity of the perpetrator, who was disguised with sunglasses and wore a dark covering over his face; although prejudicial, defendant made no showing that the prejudice was unfair or had the undue tendency to suggest a decision on an improper basis. *State v. Thorne*, 173 N.C. App. 393, 618 S.E.2d 790, 2005 N.C. App. LEXIS 2031 (2005).

Trial court did not abuse its discretion in admitting evidence of a prior robbery under G.S. 8C-1-404(b) because the similarities between the prior robbery and the current offense, which occurred within one week of each

other, were sufficient to support a finding that the probative value of the evidence of the prior robbery was not substantially outweighed by the danger of unfair prejudice. *State v. Hagans*, — N.C. App. —, 628 S.E.2d 776, 2006 N.C. App. LEXIS 719 (2006).

#### **IV. ADMISSION OR EXCLUSION OF EVIDENCE NOT PREJUDICIAL.**

##### **Evidence Properly Admitted. —**

Although defendant failed to preserve an evidentiary issue for appellate review, pursuant to G.S. 8C-1-103(a)(2), a review under G.S. 8C-1-403 indicated that the probative value of a letter that he wrote to his daughter, who was the victim of his unlawful sexual conduct, was not outweighed by the potential prejudice, as the meaning and intent of the letter were for the jury to decide. *State v. Dorton*, 172 N.C. App. 759, 617 S.E.2d 97, 2005 N.C. App. LEXIS 1794 (2005), cert. denied, 360 N.C. 69, 623 S.E.2d 775 (2005).

Trial court did not err by admitting without editing or redacting letters that defendant and his accomplice wrote into evidence, as the letters were relevant under G.S. 8C-1-401 and G.S. 8C-1-402, and the probative value of the letters was not outweighed by prejudice under G.S. 8C-1-403. *State v. Curry*, 171 N.C. App. 568, 615 S.E.2d 327, 2005 N.C. App. LEXIS 1312 (2005).

Defendant was not prejudiced by the trial court admitting into evidence testimony as to defendant's prior acts of being a passenger in a car where an officer smelled marijuana and being found asleep in a car with a bag of marijuana and a scale in plain view to support the case against defendant and his co-defendants for conspiring to possess, manufacture, and distribute marijuana, as the evidence showed that defendant had a propensity to commit the crime. *State v. Harrington*, 171 N.C. App. 17, 614 S.E.2d 337, 2005 N.C. App. LEXIS 1189 (2005), cert. denied, sub nom. *State v. Rattis*, 360 N.C. 70, 623 S.E.2d 36 (2005).

Trial court properly admitted various evidence in defendant's trial pursuant to G.S. 8C-1, Rule 404(b), because the various evidence was not admitted to prove the character of defendant in order to show that he acted in conformity therewith and was not overly prejudicial. *State v. Matthews*, — N.C. App. —, 623 S.E.2d 815, 2006 N.C. App. LEXIS 138 (2006).

In a drug case, the testimony of a probation officer regarding defendant's residence was admissible under G.S. 8C-1, Rule 404(b) because the evidence was only used to establish that defendant occupied a dwelling where drugs were located; moreover, the danger of unfair prejudice was outweighed by the probative value of the evidence. *State v. Shine*, 173 N.C.

App. 699, 619 S.E.2d 895, 2005 N.C. App. LEXIS 2306 (2005).

Use of the descriptive term, “the Last Supper tapestry,” by witnesses and the prosecution to describe a tapestry on the victim’s wall was proper, and the trial court did not abuse its discretion by so ruling; nothing in the record suggested that the description was used excessively and solely to inflame the passions and prejudices of the jury against defendant. As a result, the trial court’s ruling was not so arbitrary that it could not have been the result of a reasoned decision. *State v. Campbell*, 359 N.C. 644, 617 S.E.2d 1, 2005 N.C. LEXIS 842 (2005).

Testimony of a state witness, made after the trial judge conducted voir dire of the witness, was properly admitted as it was relevant to show plan, modus operandi, and identity. Admission of the evidence was upheld under G.S. 8C-1-403 since it did not have an undue tendency to suggest a decision on an improper basis when offered for the limited purpose of showing a common plan or scheme. *State v. Summers*, — N.C. App. —, 629 S.E.2d 902, 2006 N.C. App. LEXIS 1188 (2006).

Evidence that defendant who shot a police officer with a shotgun possessed an assault rifle was relevant and was not more prejudicial than probative; evidence showed why defendant was in a field and why he used the shotgun rather than the rifle, and it was also highly probative of defendant’s motive for the shooting: not wanting the victim to discover that defendant was violating his probation by possessing firearms. *State v. Grant*, — N.C. App. —, 632 S.E.2d 258, 2006 N.C. App. LEXIS 1637 (2006).

#### **Evidence Properly Excluded. —**

Trial court did not abuse its discretion by excluding testimony by a mental health expert retained by the State that in 10 prior cases she had never found a defendant insane at the time of his crime; although the trial court might properly have admitted such evidence, the trial court’s determination to exclude such testimony was not manifestly unsupported by reason. *State v. Durham*, — N.C. App. —, 623 S.E.2d 63, 2005 N.C. App. LEXIS 2752 (2005).

Trial court did not abuse its discretion by excluding testimony by defendant’s brother about the brother’s own mental illness, which was similar to defendant’s mental illness, even though two mental health experts had previously testified that mental illnesses tended to run in families and a mental health expert retained by the State specifically testified that mental illness ran in defendant’s family; defendant’s claim that the brother’s testimony was more compelling evidence that a type of mental illness ran in defendant’s family and bolstered

defendant’s claim of insanity was rejected. *State v. Durham*, — N.C. App. —, 623 S.E.2d 63, 2005 N.C. App. LEXIS 2752 (2005).

#### **Statements Regarding Prior Similar Actions. —**

Trial court did not abuse its discretion by ruling that the evidence regarding a second impersonation of a police officer and robbery incident was admissible in a defendant’s trial for a similar incident because the prior incident occurred two days after the first, involved the assailants’ entry into the victim’s residences under the auspices of legitimate law enforcement activity, and each assailant displayed a bogus search warrant and firearms in an effort to gain entry into the respective residences. *State v. Jacobs*, 174 N.C. App. 1, 620 S.E.2d 204, 2005 N.C. App. LEXIS 2279 (2005).

**Other crimes evidence was properly admitted** under G.S. 8C-1-404(b), as defendant’s statement that if someone did not call him back he was going to “burn you all up,” was admissible to prove a number of the listed purposes, namely defendant’s motive, intent, plan, common scheme, as well as defendant’s identity as the arsonist; the trial court guarded against the possibility of prejudice under G.S. 8C-1-403 by instructing the jury to consider the evidence only for the limited purposes of establishing identity, intent, motive, absence of mistake, and common plan. *State v. Curmon*, 171 N.C. App. 697, 615 S.E.2d 417, 2005 N.C. App. LEXIS 1362 (2005).

Evidence that first-degree murder defendant had robbed drug dealers and hit a drug dealer during a robbery was relevant to refute his contention that he shot a police officer without premeditation and deliberation, while evidence about his illegal acquisition of weapons and his curfew violation was relevant as part of the chain of circumstances leading up to the shooting. *State v. Grant*, — N.C. App. —, 632 S.E.2d 258, 2006 N.C. App. LEXIS 1637 (2006).

#### **Evidence of Other Drug Transactions. —**

Confidential police informant’s testimony as to prior, uncharged drug transactions with defendant was admitted for a proper purpose under G.S. 8C-1, N.C. R. Evid. 404(b), and the trial court did not act arbitrarily in allowing the testimony under G.S. 8C-1, N.C. R. Evid. 403 because the testimony was offered to show intent, knowledge, and common plan or scheme as well as to explain the relationship between the informant and defendant; additionally, an appropriate limiting instruction to that effect was given to the jury both at the time the informant testified and in the jury instructions. *State v. Houston*, 169 N.C. App. 367, 610 S.E.2d 777, 2005 N.C. App. LEXIS 606 (2005).



## Rule 404. Character evidence not admissible to prove conduct; exceptions; other crimes.

### CASE NOTES

- I. General Consideration.
- II. Character Evidence Generally.
- III. Other Crimes and Wrongs.
- IV. Illustrative Cases.

#### I. GENERAL CONSIDERATION.

##### **Defendant's Burden of Proof on Appeal.**

— Appeal by a defendant, who contended that evidence that he performed oral sex on a minor victim should have been excluded, was denied because, in light of defendant's admissions and other evidence admitted concerning defendant's sexual improprieties with the minor victim, defendant failed to show that in the absence of the evidence a different result would have been reached at the trial. *State v. Anderson*, — N.C. App. —, 627 S.E.2d 501, 2006 N.C. App. LEXIS 703 (2006).

**Evidence Held Admissible to Show Motive.** — Follow-up question to first defendant about first defendant's motivation for denying involvement in the subject crime, the fact that if found guilty first defendant would have violated his federal probation for another offense, was admissible for the purpose of showing motive. *State v. Brown*, — N.C. App. —, 628 S.E.2d 787, 2006 N.C. App. LEXIS 882 (2006).

**Cited in** *State v. Jacobs*, 172 N.C. App. 220, 616 S.E.2d 306, 2005 N.C. App. LEXIS 1586 (2005); *State v. Campbell*, 359 N.C. 644, 617 S.E.2d 1, 2005 N.C. LEXIS 842 (2005).

#### II. CHARACTER EVIDENCE GENERALLY.

##### **When Evidence of Character Traits Is Admissible.** —

While the bad acts elicited by the prosecution on redirect of the defendant's girlfriend may have been inadmissible on direct examination under G.S. 8C-1, N.C. R. Evid. 404(b) before the defendant "opened the door" during cross-examination, the prosecution's rebuttal of the defendant's evidence of good character through the use of specific instances of conduct was proper under G.S. 8C-1, N.C. R. Evid. 404(a)(1), (b). *State v. Duke*, 360 N.C. 110, 623 S.E.2d 11, 2005 N.C. LEXIS 1314 (2005).

##### **"Pertinent" Trait to Be Restrictively Construed.** —

In a prosecution for the murder of a child, in which defendant offered evidence of his appropriate behavior around children, while defendant's allegedly peaceable character was pertinent to the charge of first-degree murder, neither his character nor a trait of his character

were essential elements of the charge or his defense, so elicitation of evidence about his character during direct testimony had to be accomplished by opinion or reputation testimony rather than specific opinion testimony, pursuant to G.S. 8C-1-404(a)(1) and G.S. 8C-1-405(a). *State v. Murphy*, 172 N.C. App. 734, 616 S.E.2d 567, 2005 N.C. App. LEXIS 1786 (2005).

##### **Violent Character.** —

Testimony from a witness who saw defendant's victim breaking car windows at an automobile dealership should have been admitted during her murder trial, which ended in her conviction for second-degree murder, as an essential element of her assertion of self-defense under G.S. 8C-1-405(b); the evidence was relevant and admissible as evidence of the victim's violent character to show the jury that defendant's apprehension of death and bodily harm was reasonable. *State v. Everett*, — N.C. App. —, 630 S.E.2d 703, 2006 N.C. App. LEXIS 1302 (2006).

In defendant's murder trial, defendant was not required to make an offer of proof regarding testimony that her victim had told her former employee that he was going to "shoot up his house" that was excluded when the trial court granted the state's motion to strike the testimony. *State v. Everett*, — N.C. App. —, 630 S.E.2d 703, 2006 N.C. App. LEXIS 1302 (2006).

Erroneous exclusion of testimony from a car dealership employee who saw defendant's victim breaking car windows at the dealership, which should have been admitted during defendant's murder trial as evidence of the victim's violent character, was prejudicial even though defendant testified to the same incident on direct and redirect examination. *State v. Everett*, — N.C. App. —, 630 S.E.2d 703, 2006 N.C. App. LEXIS 1302 (2006).

Substance of the testimony was apparent from the context within which the questions were asked under G.S. 8C-1-103(a)(2), the grounds for admitting the testimony as evidence of the victim's violent character pertinent to defendant's assertion of self-defense under G.S. 8C-1-404(a)(2) were apparent from the context under N.C. R. App. P. 10(b)(1), and the issue of the testimony's admissibility was properly preserved for appellate review. *State v. Everett*, — N.C. App. —, 630 S.E.2d 703, 2006



N.C. App. LEXIS 1302 (2006).

**Admission of Evidence Not Prejudicial.**

Although the admission of reputation testimony violated G.S. 8C-1, Rule 404(a), the error was not prejudicial because the evidence regarding one witness's possession of a crack pipe was cumulative and there was ample evidence to convict defendant without the evidence of his brother's reputation as a dealer of drugs. *State v. McBride*, 173 N.C. App. 101, 618 S.E.2d 754, 2005 N.C. App. LEXIS 1897 (2005).

**III. OTHER CRIMES AND WRONGS.**

**Applicability of Subsection (b). —**

Evidence of defendant's other crimes was not admitted pursuant to G.S. 8C-1-404(b), but was admitted to establish one of the elements of a crime that the State of North Carolina was required to prove — possession of a firearm by a felon. Thus, a limiting instruction regarding evidence of other crimes admitted pursuant to Rule 404(b) was not appropriate and the trial court did not err in failing to give that instruction. *State v. Cromartie*, — N.C. App. —, 627 S.E.2d 677, 2006 N.C. App. LEXIS 701 (2006).

**Admissibility. —**

Trial court did not err in admitting evidence that defendant was in a gang and had served time in jail; even though such evidence incidentally touched on his bad character, it was also relevant to establish defendant's identity, and was admissible for that purpose. *State v. Medina*, — N.C. App. —, 622 S.E.2d 176, 2005 N.C. App. LEXIS 2608 (2005).

Defendant's statement to officers that he was expected to make a living outside prison showed a motive for the robbery and his statement that he wanted to go back to prison showed a possible motive to commit a crime in order to accomplish that objective; the statements were made by defendant himself shortly after the crime and were distinguishable from other evidence, and as such, the statements were probative of motive and intent, so there was no error in admission of the statements. *State v. al-Bayyinah*, 359 N.C. 741, 616 S.E.2d 500, 2005 N.C. LEXIS 844 (2005).

**When Evidence of Other Crimes May Be Admitted. —**

Trial court did not abuse its discretion by ruling that the evidence regarding a second impersonation of a police officer and robbery incident was admissible in a defendant's trial for a similar incident because the prior incident occurred two days after the first, involved the assailants' entry into the victim's residences under the auspices of legitimate law enforcement activity, and each assailant displayed a bogus search warrant and firearms in an effort to gain entry into the respective residences. *State v. Jacobs*, 174 N.C. App. 1, 620 S.E.2d

204, 2005 N.C. App. LEXIS 2279 (2005).

**Evidence of Husband's Prior Misconduct Toward His Wife. —**

North Carolina, to prove the disputed issue of defendant's intent to kill after defendant's forensic psychologist testified that defendant was unable to form the specific intent to kill, elicited testimony on defendant's prior misconduct toward his wife; thus, the psychologist's testimony regarding the statements of defendant's prior bad acts was properly admitted under G.S. 8C-1-404(b). *State v. Nguyen*, — N.C. App. —, 632 S.E.2d 197, 2006 N.C. App. LEXIS 1571 (2006).

**Sufficiently Similar Crimes. —**

Evidence that defendant had an outstanding warrant was admissible under G.S. 8C-1, N.C. R. Evid. 404(b), as a possible motive for his decision to flee from officers after drugs were discovered in a car where he was riding as a passenger; also, evidence of the circumstances surrounding defendant's arrest in another state, where defendant was passenger in a car and attempted to flee in that car after drugs were discovered, was properly admitted under that same rule as the circumstances were sufficiently similar to show defendant's propensity or modus operandi to flee after being caught with drugs. *State v. Brewington*, 170 N.C. App. 264, 612 S.E.2d 648, 2005 N.C. App. LEXIS 1011 (2005), cert. denied, 360 N.C. 67, 621 S.E.2d 881 (2005).

In a rape and kidnapping case, evidence of other sexual attacks or attempted sexual attacks were properly admitted under G.S. 8C-1, Rule 404(b) because they showed modus operandi; the crimes were similar in that defendant lured women that he had known for a long period of time into secluded places with the promise of drugs and alcohol before choking and raping them. *State v. Moore*, 173 N.C. App. 494, 620 S.E.2d 1, 2005 N.C. App. LEXIS 2103 (2005).

Evidence of defendant's prior drug conviction was properly admitted to show defendant's intent; in the prior case, defendant sold .82 grams of cocaine in rock-like form to an undercover agent and the average dosage unit of crack cocaine was from .05 grams to .12 grams per rock of cocaine, while in the instant case, defendant had 12 rocks of crack cocaine weighing 1.6 grams; in both cases, the rocks of crack cocaine were not individually packaged. *State v. Carpenter*, — N.C. App. —, 632 S.E.2d 538, 2006 N.C. App. LEXIS 1623 (2006).

**Probative Value Must Be Weighed Against Potential Prejudice. —**

Defendant was not prejudiced by the trial court admitting into evidence testimony as to defendant's prior acts of being a passenger in a car where an officer smelled marijuana and being found asleep in a car with a bag of marijuana and a scale in plain view to support

the case against defendant and his co-defendants for conspiring to possess, manufacture, and distribute marijuana, as the evidence showed that defendant had a propensity to commit the crime. *State v. Harrington*, 171 N.C. App. 17, 614 S.E.2d 337, 2005 N.C. App. LEXIS 1189 (2005), cert. denied, sub nom. *State v. Rattis*, 360 N.C. 70, 623 S.E.2d 36 (2005).

**Admission of 27 Year Old Alleged Sexual Offense Was Error.** — Twenty seven-year lapse between an earlier alleged instance of sexual abuse and the current alleged instance merited against finding that defendant was engaged in an ongoing plan or scheme of sexual abuse, and thus, admission of evidence of the 27-year old alleged incident was error; since the State presented no evidence that defendant's possession of pornographic magazines and women's underwear played any part in the alleged offenses, the evidence was not relevant to prove the charges against him, was merely impermissible character evidence, and admission of the evidence was error but not plain error. *State v. Delsanto*, 172 N.C. App. 42, 615 S.E.2d 870, 2005 N.C. App. LEXIS 1587 (2005).

**Prior Bad Acts Showing Intent, Plan or Design.** —

Other crimes evidence was properly admitted under G.S. 8C-1-404(b), as defendant's statement that if someone did not call him back he was going to "burn you all up," was admissible to prove a number of the listed purposes, namely defendant's motive, intent, plan, common scheme, as well as defendant's identity as the arsonist; the trial court guarded against the possibility of prejudice under G.S. 8C-1-403 by instructing the jury to consider the evidence only for the limited purposes of establishing identity, intent, motive, absence of mistake, and common plan. *State v. Curmon*, 171 N.C. App. 697, 615 S.E.2d 417, 2005 N.C. App. LEXIS 1362 (2005).

Confidential police informant's testimony as to prior, uncharged drug transactions with defendant was admitted for a proper purpose under G.S. 8C-1, N.C. R. Evid. 404(b), and the trial court did not act arbitrarily in allowing the testimony under G.S. 8C-1, N.C. R. Evid. 403 because the testimony was offered to show intent, knowledge, and common plan or scheme as well as to explain the relationship between the informant and defendant; additionally, an appropriate limiting instruction to that effect was given to the jury both at the time the informant testified and in the jury instructions. *State v. Houston*, 169 N.C. App. 367, 610 S.E.2d 777, 2005 N.C. App. LEXIS 606 (2005).

Evidence of defendant's prior sexual relations with his older half-daughter from about nine years before he began to have sexual relations with the victim, his younger daughter, was properly admitted under G.S. 8C-1-404(b)

to show a common scheme or plan. *State v. Bullock*, — N.C. App. —, 631 S.E.2d 868, 2006 N.C. App. LEXIS 1572 (2006).

DNA evidence showing that defendant was the father of the victim's child, and thus must have had sexual intercourse with her, was admissible to show a common scheme or plan under G.S. 8C-1-404(b). *State v. Bullock*, — N.C. App. —, 631 S.E.2d 868, 2006 N.C. App. LEXIS 1572 (2006).

**Prior Convictions Showing Intent or Knowledge.** —

Evidence pertaining to defendant's prior convictions for possession with intent to manufacture, sell, and deliver cocaine was properly admitted under G.S. 8C-1, Rule 404(b) to show intent and knowledge, and the trial court properly gave a limiting instruction to the jury; furthermore, while testimony from the deputy clerk was inadmissible under G.S. 8C-1, Rule 404(b), the error was harmless when defendant testified and was properly cross-examined about the convictions. *State v. Renfro*, — N.C. App. —, 621 S.E.2d 221, 2005 N.C. App. LEXIS 2483 (2005).

**Prior Bad Act Showing Intent, Malice, Premeditation, and Deliberation.** —

Evidence that first-degree murder defendant had robbed drug dealers and hit a drug dealer during a robbery was relevant to refute his contention that he shot a police officer without premeditation and deliberation, while evidence about his illegal acquisition of weapons and his curfew violation was relevant as part of the chain of circumstances leading up to the shooting. *State v. Grant*, — N.C. App. —, 632 S.E.2d 258, 2006 N.C. App. LEXIS 1637 (2006).

**Evidence of Prior DWI Admissible to Show Malice.** — Evidence as to defendant's prior convictions for driving while impaired and driving while license revoked was properly admitted, under G.S. 8C-1, N.C. R. Evid. 404(b), as the evidence was relevant to show malice to support defendant's charge for second degree murder following an auto accident in which defendant was driving while impaired. *State v. Edwards*, 170 N.C. App. 381, 612 S.E.2d 394, 2005 N.C. App. LEXIS 992 (2005).

**Prior Acts Showing Motive or Conduct.** —

Evidence that defendant had an outstanding warrant was admissible under G.S. 8C-1, N.C. R. Evid. 404(b), as a possible motive for his decision to flee from officers after drugs were discovered in a car where he was riding as a passenger; also, evidence of the circumstances surrounding defendant's arrest in another state, where defendant was passenger in a car and attempted to flee in that car after drugs were discovered, was properly admitted under that same rule as the circumstances were sufficiently similar to show defendant's propensity or modus operandi to flee after being caught



with drugs. *State v. Brewington*, 170 N.C. App. 264, 612 S.E.2d 648, 2005 N.C. App. LEXIS 1011 (2005), cert. denied, 360 N.C. 67, 621 S.E.2d 881 (2005).

#### **Prior Assault. —**

Although the trial court properly admitted a police officer's testimony about the underlying facts of defendant's prior 1995 conviction for assault inflicting serious injury, the trial court committed reversible error by admitting the state's exhibit of a copy of defendant's criminal conviction for that assault because admitting the bare fact of a non-testifying defendant's prior conviction after testimony had been elicited to establish the factual basis underlying that conviction violated G.S. 8C-1, N.C. R. Evid. 404(b), and 403; the bare fact of the prior conviction was inherently prejudicial. *State v. McCoy*, 174 N.C. App. 105, 620 S.E.2d 863, 2005 N.C. App. LEXIS 2289 (2005).

**Improper Impeachment of Witness's Statement by Extrinsic Evidence. —** Defendant was granted a new trial on his convictions involving the sexual abuse of his grandchildren; the trial court committed prejudicial error under G.S. 15A-1443(a) by allowing the State to impeach by extrinsic evidence testimony by defendant's son and two daughters that defendant had never sexually abused them, and the error was so highly prejudicial that it likely affected the verdict, and because the evidence of prior sexual misconduct was not admissible under a hearsay exception, G.S. 8C-1, N.C. R. Crim. P. 404(b). *State v. Mitchell*, 169 N.C. App. 417, 610 S.E.2d 260, 2005 N.C. App. LEXIS 682 (2005).

#### **Evidence Properly Admitted. —**

Trial court properly admitted various evidence in defendant's trial pursuant to G.S. 8C-1, Rule 404(b), because the various evidence was not admitted to prove the character of defendant in order to show that he acted in conformity therewith and was not overly prejudicial. *State v. Matthews*, — N.C. App. —, 623 S.E.2d 815, 2006 N.C. App. LEXIS 138 (2006).

#### **Inadmissible Evidence Admitted but Held Harmless Error. —**

Where defendant did not object to the prosecutor cross-examining him as to his alleged prior assaults, the appellate court's review of the record and transcripts satisfied that court that the defendant did not meet the test for finding plain error because the State presented strong evidence of defendant's guilt through the testimony of three eye witnesses who were present when the victim, a police officer, was shot, with all three giving consistent testimony identifying defendant as the shooter; therefore it was not possible for the appellate court to say that the cross-examination amounted to a miscarriage of justice or denied defendant a fundamental right. *State v. Augustine*, 359 N.C. 709, 616 S.E.2d 515, 2005 N.C. LEXIS 836 (2005).

**Failure to Show Admissibility. —** When a patient in a medical malpractice case argued that statistical reports dealing with infections would be admissible under G.S. 8C-1, N.C. R. Evid. 404(b), but did not explain to what issue in the case a pattern, practice, plan, or modus operandi would be relevant, the appellate court could not conclude that the trial court's ruling denying her request for the reports was manifestly unreasonable. *Diggs v. Novant Health, Inc.*, — N.C. App. —, 628 S.E.2d 851, 2006 N.C. App. LEXIS 983 (2006).

### **IV. ILLUSTRATIVE CASES.**

#### **Evidence Held Admissible. —**

When defendant was charged with second-degree murder for causing another's death by his drunk driving, his nine-year-old conviction for driving while impaired was properly admitted, under G.S. 8C-1, N.C. R. Evid. 404(b), because it showed malice, which was a proper purpose for admitting it, and the fact that it was nine years old did not render it too remote to be relevant. *State v. Westbrook*, — N.C. App. —, 623 S.E.2d 73, 2005 N.C. App. LEXIS 2704 (2005).

Trial court did not abuse its discretion when it admitted evidence consisting of defendant's post-Miranda statements to an officer that, inter alia, the defendant gave persons meth in exchange for work. A similar transaction with the victim was a sale under G.S. 90-95. *State v. Yelton*, — N.C. App. —, 623 S.E.2d 594, 2006 N.C. App. LEXIS 44 (2006).

In a drug case, the testimony of a probation officer regarding defendant's residence was admissible under G.S. 8C-1, Rule 404(b) because the evidence was only used to establish that defendant occupied a dwelling where drugs were located; moreover, the danger of unfair prejudice was outweighed by the probative value of the evidence. *State v. Shine*, 173 N.C. App. 699, 619 S.E.2d 895, 2005 N.C. App. LEXIS 2306 (2005).

Trial court did not abuse its discretion in admitting evidence of a prior robbery under G.S. 8C-1-404(b) because the similarities between the prior robbery and the current offense, which occurred within one week of each other, were sufficient to support a finding that the probative value of the evidence of the prior robbery was not substantially outweighed by the danger of unfair prejudice. *State v. Hagans*, — N.C. App. —, 628 S.E.2d 776, 2006 N.C. App. LEXIS 719 (2006).

Testimony of a detective regarding defendant's involvement in a second robbery was admissible under G.S. 8C-1-404(b), because the second robbery was sufficiently similar. *State v. Jones*, — N.C. App. —, 627 S.E.2d 265, 2006 N.C. App. LEXIS 589 (2006).

Testimony of a state witness, made after the



trial judge conducted voir dire of the witness, was properly admitted as it was relevant to show plan, modus operandi, and identity. Among other things, the testimony of the witness included a positive identification of defendant as the perpetrator of the crime against her, that the offense against her occurred within three miles of the offense against the victim, that both attacks occurred in the evening and during the hours of darkness, that the attacker was armed on each occurrence, and that the victims were similar in age and were both white females. *State v. Summers*, — N.C. App. —, 629 S.E.2d 902, 2006 N.C. App. LEXIS 1188 (2006).

Admission of evidence of other crimes was not prejudicial where the trial court instructed the jury that the evidence was being received for limited purpose of showing defendant's motive, opportunity, intent, and knowledge. *State v. Calvino*, — N.C. App. —, 632 S.E.2d 839, 2006 N.C. App. LEXIS 1834 (2006).

Admission of photographs of nude women was not erroneous because they were admitted for a permissible purpose other than to show defendant's character in conformity therewith; the photographs served to corroborate the victim's testimony and provided evidence of a plan and preparation to engage in sexual activities with the victim. *State v. Brown*, — N.C. App. —, 631 S.E.2d 49, 2006 N.C. App. LEXIS 1311 (2006).

In light of uncontested evidence of defendant's prior convictions, defendant failed to show that the state's cross-examination of defendant regarding the prior convictions as improper under G.S. 8C-1-404. *State v. Mewborn*, — N.C. App. —, 631 S.E.2d 224, 2006 N.C. App. LEXIS 1411 (2006).

Admission of evidence of a power of attorney defendant obtained naming her as attorney in fact, personal papers and identification belonging to the victims, and the purchase of a vehicle with the power of attorney, did not violate G.S.

8C-1-404(b), as it was relevant and offered to show a common plan or scheme and the absence of mistake, and defendant failed to show that the admission of the evidence was manifestly unsupported by reason and was so arbitrary that it could not have been the result of a reasoned decision. *State v. King*, — N.C. App. —, 630 S.E.2d 719, 2006 N.C. App. LEXIS 1307 (2006).

**Evidence of Prior Abuse Toward Other Child.** — Admission of testimony by the victim's sister regarding defendant's prior abuse toward her was not erroneous because the testimony concerned defendant's actions towards the sister when she was approximately the same age, illustrating a continuing pattern of sexual abuse and an intent to commit incest. *State v. Locklear*, 172 N.C. App. 249, 616 S.E.2d 334, 2005 N.C. App. LEXIS 1583 (2005).

Where defendant was charged with indecent liberties with a child and with statutory sex offense, it was proper to admit testimony by three witnesses about other acts allegedly committed by defendant, in light of the similarity between the ages of the girls at the time of the acts, their placement with defendant because of familial or quasi-familial relationships, defendant's purported modus operandi in each instance, and the warning he allegedly gave each girl. *State v. Bradley*, — N.C. App. —, 634 S.E.2d 258, 2006 N.C. App. LEXIS 1968 (2006).

**Admission of Evidence Not Plain Error.** — Admission of evidence as to defendant's pornography business and a confidential informant's testimony that defendant handed him pornographic tapes was not impermissible evidence of defendant's character under a plain error analysis as its admission was not an error that was so fundamental as to result in a miscarriage of justice or that had a likely impact on the outcome of the trial as there was substantial evidence establishing defendant's commission of trafficking in cocaine by possession. *State v. Williams*, — N.C. App. —, 630 S.E.2d 216, 2006 N.C. App. LEXIS 1219 (2006).

## Rule 405. Methods of proving character.

### CASE NOTES

#### Cross-Examination as to Specific Instances of Defendant's Conduct. —

Since the defendant's sister gave her opinion as to the character of the defendant, under G.S. 8C-1, N.C. R. Evid. 405(a), the cross-examiner could test that opinion with questioning on specific acts of conduct, such as his threats against the life of the sister, a person with whom he alleged a deep emotional bond; also, since the examination was in the death penalty phase, the State was allowed to present, by competent relevant evidence, any aspect of the

defendant's character or record and any of the circumstances of the offense that could substantially support the imposition of the death penalty or that was contrary to the assertion of one of the defendant's proposed mitigating circumstances. *State v. Duke*, 360 N.C. 110, 623 S.E.2d 11, 2005 N.C. LEXIS 1314 (2005).

#### Consideration of Defendant's Character Evidence. —

In a prosecution for the murder of a child, in which defendant offered evidence of his appropriate behavior around children, while defen-

dent's allegedly peaceable character was pertinent to the charge of first-degree murder, neither his character nor a trait of his character were essential elements of the charge or his defense, so elicitation of evidence about his character during direct testimony had to be accomplished by opinion or reputation testi-

mony rather than specific opinion testimony, pursuant to G.S. 8C-1-404(a)(1) and G.S. 8C-1-405(a). *State v. Murphy*, 172 N.C. App. 734, 616 S.E.2d 567, 2005 N.C. App. LEXIS 1786 (2005).

**Cited in** *State v. Browning*, — N.C. App. —, 629 S.E.2d 299, 2006 N.C. App. LEXIS 1079 (2006).

## Rule 412. Rape or sex offense cases; relevance of victim's past behavior.

### CASE NOTES

#### I. General Consideration.

##### I. GENERAL CONSIDERATION.

###### **Cross-Examination Properly Limited.** —

Trial court did not err in denying defendant's request to inquire into the victim's previous sexual activity for the purpose of attacking her credibility as a witness, where defendant was on trial for having committed sexual offenses against the victim, his 16-year-old daughter, as he failed to show that such examination was within any of the four very narrow situations that were excepted from that prohibition under the Rape Shield Statute. *State v. Dorton*, 172 N.C. App. 759, 617 S.E.2d 97, 2005 N.C. App. LEXIS 1794 (2005), cert. denied, 360 N.C. 69, 623 S.E.2d 775 (2005).

###### **Exclusion of Evidence Upheld.** —

Because no evidence proffered at an in camera hearing supported an inference that a victim's prior sexual activity was forced or caused any injuries, evidence of the victim's prior sexual activity was properly excluded under the rape shield statute, G.S. 8C-1, N.C. R. Evid. 412(b)(2); the probative value, if any, to defendant was substantially outweighed by the danger of unfair prejudice to the State and the prosecuting witness under G.S. 8C-1, N.C. R. Evid. 403. *State v. Harris*, 360 N.C. 145, 622 S.E.2d 615, 2005 N.C. LEXIS 1320 (2005).

### ARTICLE 6.

#### *Witnesses.*

## Rule 601. General rule of competency; disqualification of witness.

### CASE NOTES

- I. General Consideration.
- II. Persons Interested in the Event of the Action.

##### I. GENERAL CONSIDERATION.

**Cited in** *In re M.G.T.-B.*, — N.C. App. —, 629 S.E.2d 916, 2006 N.C. App. LEXIS 1182 (2006).

##### II. PERSONS INTERESTED IN THE EVENT OF THE ACTION.

###### **Dead Man's Statute.** —

Affidavit, in which a nephew averred that he never took any action on behalf of his aunts without their knowledge and consent, never converted any assets to his own benefit or engaged in inappropriate conduct as attorney-in-fact for the aunts, and denied fraud, did not violate G.S. 8C-1, Rule 601. *Forbis v. Neal*, —

N.C. App. —, 624 S.E.2d 387, 2006 N.C. App. LEXIS 189 (2006).

Trial court erred in admitting the testimony of the brother's wife about conversations she had with decedent, and about conversations she overheard between decedent and the brother; since the wife was an interested party because she stood to inherit the property the brother was seeking if his specific performance action to enforce decedent's contract to make a will in the brother's favor was resolved in the brother's favor, she was barred from testifying about what a dead man had said in that regard. *Taylor v. Abernethy*, 174 N.C. App. 93, 620 S.E.2d 242, 2005 N.C. App. LEXIS 2281 (2005).

## Rule 602. Lack of personal knowledge.

### CASE NOTES

#### **Testimony Establishing Personal Knowledge. —**

Store clerk had personal knowledge of the robber when she was able to look at him through his mask and otherwise observe for 45 seconds during the robbery. *State v. Tuck*, 173 N.C. App. 61, 618 S.E.2d 265, 2005 N.C. App. LEXIS 1930 (2005).

Investigator was permitted to testify that defendant had no brother based on research he conducted. *State v. Watson*, — N.C. App. —, 634 S.E.2d 231, 2006 N.C. App. LEXIS 1923 (2006).

**Assertions in Affidavit Held Improper. —** Where an affidavit filed to support a motion to dismiss under N.C. R. Civ. P. 12(b)(2) contained assertions made “upon information and belief,” the court would not consider those assertions because such an affidavit had to be based upon personal knowledge. *Banc of Am. Secs. LLC v.*

*Evergreen Int’l Aviation, Inc.*, 169 N.C. App. 690, 611 S.E.2d 179, 2005 N.C. App. LEXIS 799 (2005).

#### **Testimony Held Proper. —**

In a trial for attempted murder, the trial court properly admitted testimony by the victim that it was defendant who shot him, as the victim had sufficient personal knowledge under G.S. 8C-1, N.C. R. Evid. 602, and the victim’s opinion was rationally based on his perception of the shooting as required by G.S. 8C-1, N.C. R. Evid. 701. *State v. Watkins*, 169 N.C. App. 518, 610 S.E.2d 746, 2005 N.C. App. LEXIS 683 (2005), cert. denied, appeal dismissed, — N.C. —, 624 S.E.2d 632 (2005).

**Cited in** *Elliott v. Muehlbach*, 173 N.C. App. 709, 620 S.E.2d 266, 2005 N.C. App. LEXIS 2226 (2005).

## Rule 606. Competency of juror as witness.

### CASE NOTES

#### **Jurors’ Affidavits Held Not Extraneous Information. —**

Information contained in jurors’ affidavits as to the reading of dictionary definitions of “malice” could not be used to impeach the verdict under G.S. 15A-1240 as under the caselaw,

definitions in standard dictionaries were not extraneous information within the meaning of G.S. 8C-1-606(b). *State v. Bauberger*, — N.C. App. —, 626 S.E.2d 700, 2006 N.C. App. LEXIS 523 (2006).

## Rule 608. Evidence of character and conduct of witness.

### CASE NOTES

- II. Opinion and Reputation Evidence of Character.
- III. Specific Instances of Conduct.

#### **II. OPINION AND REPUTATION EVIDENCE OF CHARACTER.**

##### **Evidence Held Admissible. —**

Guidance counselor’s testimony that she believed the victim’s account of rape, made in the context of her role as a guidance counselor who suspected a child had been abused and admitted for corroboration, was admissible. *State v. Browning*, — N.C. App. —, 629 S.E.2d 299, 2006 N.C. App. LEXIS 1079 (2006).

#### **III. SPECIFIC INSTANCES OF CONDUCT.**

##### **Cross-Examination Held Proper. —**

State was properly allowed to cross-examine and impeach defendant by questioning defendant

about false statement made to police. *State v. Browning*, — N.C. App. —, 629 S.E.2d 299, 2006 N.C. App. LEXIS 1079 (2006).

By defendant’s own admission, G.S. 8C-1-608 was inapplicable because the state’s questioning on cross-examination about defendant’s prior convictions was neither a reference to a specific act, nor probative of defendant’s truthfulness. *State v. Mewborn*, — N.C. App. —, 631 S.E.2d 224, 2006 N.C. App. LEXIS 1411 (2006).

**Admission of Evidence Not Prejudicial Error. —** Where defendant did not object to the prosecutor cross-examining him as to his alleged prior assaults, the appellate court’s review of the record and transcripts satisfied that court that the defendant did not meet the test for finding plain error because the State pre-



sented strong evidence of defendant's guilt through the testimony of three eyewitnesses who were present when the victim, a police officer, was shot, with all three giving consistent testimony identifying defendant as the shooter; therefore it was not possible for the

appellate court to say that the cross-examination amounted to a miscarriage of justice or denied defendant a fundamental right. *State v. Augustine*, 359 N.C. 709, 616 S.E.2d 515, 2005 N.C. LEXIS 836 (2005).

## Rule 609. Impeachment by evidence of conviction of crime.

### CASE NOTES

**Applicability.** — G.S. 8C-1, Rule 609 addresses the use of evidence of prior convictions to impeach a testifying witness; a trial court did not err in holding that G.S. 8C-1, Rule 609 was inapplicable to statements made by a non-testifying defendant. *State v. al-Bayyinah*, 359 N.C. 741, 616 S.E.2d 500, 2005 N.C. LEXIS 844 (2005).

#### **When Evidence of Defendant's Prior Convictions Is Admissible.** —

Evidence pertaining to defendant's prior convictions for possession with intent to manufacture, sell, and deliver cocaine was properly admitted under G.S. 8C-1, Rule 404(b) to show intent and knowledge, and the trial court properly gave a limiting instruction to the jury; furthermore, while testimony from the deputy clerk was inadmissible under G.S. 8C-1, Rule 404(b), the error was harmless when defendant testified and was properly cross-examined

about the convictions. *State v. Renfro*, — N.C. App. —, 621 S.E.2d 221, 2005 N.C. App. LEXIS 2483 (2005).

#### **Cross-Examination Upheld.** —

State did not exceed the scope of proper cross-examination under G.S. 8C-1-609 when, in response to defendant's testimony, the state suggested the reason police officers searched defendant's home was because they knew defendant had been convicted of selling drugs. *State v. Mewborn*, — N.C. App. —, 631 S.E.2d 224, 2006 N.C. App. LEXIS 1411 (2006).

**Cited in** *State v. Edwards*, 170 N.C. App. 381, 612 S.E.2d 394, 2005 N.C. App. LEXIS 992 (2005); *State v. McCoy*, 174 N.C. App. 105, 620 S.E.2d 863, 2005 N.C. App. LEXIS 2289 (2005); *State v. Brown*, — N.C. App. —, 628 S.E.2d 787, 2006 N.C. App. LEXIS 882 (2006); *State v. Browning*, — N.C. App. —, 629 S.E.2d 299, 2006 N.C. App. LEXIS 1079 (2006).

## Rule 611. Mode and order of interrogation and presentation.

### CASE NOTES

#### **The scope of cross-examination is limited to those matters that are relevant, etc.** —

Defendant was entitled to a new trial because the trial court erred in depriving defendant of the right to the closing argument to the jury where defendant did not introduce any evidence within the meaning of N.C. Gen. R. Prac. Super. & Dist. Ct. 10 during defendant's cross-examination of a witness about inconsistencies between two statements the witness gave about the shooting. *State v. Wells*, 171 N.C. App. 136, 613 S.E.2d 705, 2005 N.C. App. LEXIS 1167 (2005).

#### **Scope of Cross-Examination Is Subject to Court's Control.** —

Trial court did not err in its rulings regarding the railroad's cross-examination of witnesses; in particular, it did not err in not allowing the railroad to cross-examine the expert for the employee, who had brought a negligence action against the railroad for exposure to asbestos, as

cross-examination regarding a pathology report would not have been proper since the expert was not relying on the report. *Williams v. CSX Transp., Inc.*, — N.C. App. —, 626 S.E.2d 716, 2006 N.C. App. LEXIS 532 (2006).

#### **Cross-Examination of Expert Upheld.** —

Trial court properly permitted the prosecutor to question whether defendant's forensic psychologist adequately considered certain recorded statements in diagnosing defendant because the impeachment of the testimony given by the psychologist on direct examination was within the broad scope of cross-examination allowed by the courts in North Carolina. *State v. Nguyen*, — N.C. App. —, 632 S.E.2d 197, 2006 N.C. App. LEXIS 1571 (2006).

#### **Leading Questions Upheld When Delicate Subject Matter Was Involved.** —

In an action charging defendant with six counts of first-degree statutory sexual offense, two counts of attempted first-degree statutory sexual offense, seven counts of taking indecent

liberties with a minor, and six counts of lewd and lascivious conduct with a minor, the State was properly permitted to ask leading questions of the child victim where the victim, who was 11 years old at the time of trial, was hesitant to answer questions regarding sexual matters of a delicate nature. *State v. Bates*, 172 N.C. App. 27, 616 S.E.2d 280, 2005 N.C. App. LEXIS 1585 (2005).

**Cross-Examination of Defendant Upheld.** —

Where the State, on cross-examination, introduced evidence of defendant's phone conversation in which defendant allegedly made an admission that conflicted with defendant's trial

testimony, this did not violate G.S. 8C-1-611(b); testing credibility and impeaching explanations were relevant and within scope of cross-examination. *State v. Phillips*, 171 N.C. App. 622, 615 S.E.2d 382, 2005 N.C. App. LEXIS 1369 (2005), cert. denied, appeal dismissed, — N.C. —, 622 S.E.2d 628 (2005).

**Illustrative Cases.** —

Questions to defendant regarding the existence and location of a rubber vagina were premissible where the purpose of the questions was used to impeach defendant. *State v. Hill*, — N.C. App. —, 632 S.E.2d 777, 2006 N.C. App. LEXIS 1636 (2006).

## Rule 613. Prior statements of witnesses.

### CASE NOTES

**Failure to Prove Prior Statement Was Requested.** — When defense counsel failed to request that a bench conference be recorded, resulting in a lack of proof that defense counsel asked for and failed to receive the contents of

defendant's prior statement, there was no violation of G.S. 8C-1, N.C. R. Evid. 613. *State v. Turner*, — N.C. App. —, 628 S.E.2d 464, 2006 N.C. App. LEXIS 979 (2006).

## Rule 614. Calling and interrogation of witnesses by court.

### CASE NOTES

**Clarification of Testimony.** —

Trial court asking questions of a witness during defendant's felonious breaking and entering trial was upheld on appeal, because the trial court was merely seeking clarification of the testimony and did not rise to the level of expressing an opinion that defendant was guilty. *State v. Carmon*, 169 N.C. App. 750, 611 S.E.2d 211, 2005 N.C. App. LEXIS 794 (2005).

Defendant's conviction of first-degree murder under G.S. 14-17, was affirmed; the trial court properly denied defendant's requested jury instructions on voluntary intoxication and second-degree murder, as defendant showed no signs of intoxication when he committed the crime, and the evidence of premeditation was very strong, and the trial court did not abuse its

authority to question witnesses under G.S. 8C-1, N.C. R. Crim. P. 614(b), as the trial court only questioned jurors to focus the witness, or to clarify the testimony. *State v. Rios*, 169 N.C. App. 270, 610 S.E.2d 764, 2005 N.C. App. LEXIS 685 (2005), appeal dismissed, cert. denied, — N.C. —, 623 S.E.2d 37 (2005).

**Partiality of Judge.** — Defendant's rights were not violated when the trial court "moved the trial forward" by maintaining control over certain witness examinations by defense counsel; while the trial court was not allowed to show partiality toward a party, it did have the discretionary power to supervise and control the trial and no abuse of that discretion was shown. *State v. Bethea*, 173 N.C. App. 43, 617 S.E.2d 687, 2005 N.C. App. LEXIS 1907 (2005).

## Rule 615. Exclusion of witnesses.

### CASE NOTES

**Denial of Motion to Sequester Witnesses Held Proper.** —

Denial of defendants' motions to sequester was not improper where the trial court's ruling showed adequate deliberation and weighing of

the merits, and neither defendant identified any instance of a witness conforming testimony to that of another witness. *State v. Brown*, — N.C. App. —, 628 S.E.2d 787, 2006 N.C. App. LEXIS 882 (2006).



## ARTICLE 7.

*Opinions and Expert Testimony.***Rule 701. Opinion testimony by lay witness.**

## CASE NOTES

**Test for the admissibility of an opinion, etc.**

Trial court did not err in admitting the testimony of the employee's former co-workers as lay opinion testimony regarding the employee's exposure to asbestos, as the employee showed that the former co-workers had rationally based perceptions since they worked around the employee and that their testimony would be helpful to understanding the employee's exposure to asbestos. *Williams v. CSX Transp., Inc.*, — N.C. App. —, 626 S.E.2d 716, 2006 N.C. App. LEXIS 532 (2006).

**Shorthand Statements of Fact. —**

Trial court properly admitted, under G.S. 8C-1, Rule 701, G.S. 8C-1, Rule 704, lay opinion testimony of various law enforcement officers that defendant "tried to kill" one of the responding officers because their testimony amounted to nothing more than shorthand statements of fact based on their knowledge and observations and did not implicate defendant's guilt, mental state, or intent. The officers' testimony was based on their perceptions after witnessing defendant shoot the officer, and was not objectionable merely because it embraced an ultimate issue to be decided by the trier of fact. *State v. McVay*, 174 N.C. App. 335, 620 S.E.2d 883, 2005 N.C. App. LEXIS 2402 (2005).

**Lay Opinion Regarding Property Value in Condemnation Proceeding. —** Trial court in a condemnation proceeding did not err in excluding opinion testimony as to property value offered by four witnesses, where the opinions were based upon prior condemnation sales, which were an improper basis for valuing property in a current condemnation proceeding, or based on sales of property which was insufficiently similar to the property in question. *City of Charlotte v. Ertel*, 170 N.C. App. 346, 612 S.E.2d 438, 2005 N.C. App. LEXIS 1009 (2005).

**Lay Opinion On Drugs. —** Admissible testimony and opinions of woman who, with victim who died from smoking methamphetamine and defendant, smoked an eight-ball of meth was sufficient evidence to convict defendant of possession and its sale, by exchange for work, under G.S. 90-95 and involuntary manslaughter under G.S. 14-18. *State v. Yelton*, — N.C. App. —, 623 S.E.2d 594, 2006 N.C. App. LEXIS 44 (2006).

Testimony and opinions of woman who, with victim who died from smoking methamphetamine (meth) and defendant, smoked an eight-ball of it was admissible based upon her six-year meth smoking experiences, that it was meth and that the victim smoked some of it. The testimony was admissible to prove elements of the charged crimes and to prove that defendant possessed the meth and gave it to the victim, and assisted the jury to otherwise understand what transpired. *State v. Yelton*, — N.C. App. —, 623 S.E.2d 594, 2006 N.C. App. LEXIS 44 (2006).

**Same — Murder Trial. —**

Murder defendant was mentally retarded so he was not sentenced to death under G.S. 15A-2005(a)(1); but (1) experts testified he was competent under G.S. 15A-1001(a) to stand trial; and (2) evidence and his girlfriend's opinion testimony under G.S. 8C-1, N.C. R. Evid. 701, that he was "fine" and "not mentally retarded," indicated he was able to form the requisite "deliberation" and "cool state of blood" (as defined *State v. Ruof* jury instructions and which were properly given to the jury in response to a deliberation question under G.S. 15A-1234(a)(1)) when he shot a coworker who teased him about being mentally retarded. *State v. McClain*, 169 N.C. App. 657, 610 S.E.2d 783, 2005 N.C. App. LEXIS 804 (2005).

**Police Officer's Testimony Regarding Intoxication. —**

Deputy's testimony that defendant fell over when the deputy asked defendant to stand on one leg and hop was relevant to the deputy's lay opinion that defendant was impaired. *State v. Streckfuss*, 171 N.C. App. 81, 614 S.E.2d 323, 2005 N.C. App. LEXIS 1190 (2005).

**Testimony by Police Officer Which Required No Expertise Upheld. —**

Trial court did not abuse its discretion by admitting testimony of police captain concerning the gait of a robber on a surveillance tape where the officer testified that, as part of his training as an undercover narcotics officer, he studied different mannerisms and characteristics of people and was trained to notice differences in the actual ways people walk; furthermore, he was experienced in watching people both in person and on film and had attended several schools for electronic and technical surveillance, and his testimony bore on the jury's



determination of the identity of the perpetrator and was not barred by G.S. 8C-1, Rule 701. *State v. Thorne*, 173 N.C. App. 393, 618 S.E.2d 790, 2005 N.C. App. LEXIS 2031 (2005).

Court properly allowed a police officer to testify concerning the type of pistol used in assault as the officer's testimony regarding the location of shell casings when a bullet was fired from two different weapons was based not upon any specialized expertise or training, but merely upon his own personal experience and observations in firing different kinds of weapons; defendant's due process rights were not violated by the destruction of the shell casings as the police had no duty to preserve the casings when defendant did not file a discovery request for the casings. *State v. Fisher*, 171 N.C. App. 201, 614 S.E.2d 428, 2005 N.C. App. LEXIS 1214 (2005).

**Testimony Upheld. —**

Officer's testimony regarding defendant's pretrial statements to the police implicating a man as an accomplice in a felonious breaking and entering was properly admitted at trial where the testimony of the alleged accomplice's denial of involvement was admissible not as to his general credibility and character, but rather as an explanation for why he was not arrested. *State v. Carmon*, 169 N.C. App. 750, 611 S.E.2d

211, 2005 N.C. App. LEXIS 794 (2005).

In a trial for attempted murder, the trial court properly admitted testimony by the victim that it was defendant who shot him, as the victim had sufficient personal knowledge under G.S. 8C-1, N.C. R. Evid. 602, and the victim's opinion was rationally based on his perception of the shooting as required by G.S. 8C-1, N.C. R. Evid. 701. *State v. Watkins*, 169 N.C. App. 518, 610 S.E.2d 746, 2005 N.C. App. LEXIS 683 (2005), cert. denied, appeal dismissed, — N.C. —, 624 S.E.2d 632 (2005).

**Testimony Held Inadmissible. —**

Affidavit of licensed social worker and counselor who had counseled decedent for alcohol and substance abuse was not sufficient to raise a genuine issue of material fact and preclude summary judgment in a case where the claimant was trying to recover as a beneficiary under decedent's life insurance policy; the policy excluded recovery for an insured's ingestion of a drug, medicine, or sedative, except as prescribed by a physician, and the licensed social worker and counselor's opinions contained in the affidavit regarding decedent's ingestion of methadone were neither based on his personal knowledge nor proffered as expert opinions. *Duncan v. Cuna Mut. Ins. Soc'y*, 171 N.C. App. 403, 614 S.E.2d 592, 2005 N.C. App. LEXIS 1207 (2005).

## Rule 702. Testimony by experts.

(a) If scientific, technical or other specialized knowledge will assist the trier of fact to understand the evidence or to determine a fact in issue, a witness qualified as an expert by knowledge, skill, experience, training, or education, may testify thereto in the form of an opinion.

(a1) A witness, qualified under subsection (a) of this section and with proper foundation, may give expert testimony solely on the issue of impairment and not on the issue of specific alcohol concentration level relating to the following:

- (1) The results of a Horizontal Gaze Nystagmus (HGN) Test when the test is administered by a person who has successfully completed training in HGN.
- (2) Whether a person was under the influence of one or more impairing substances, and the category of such impairing substance or substances. A witness who has received training and holds a current certification as a Drug Recognition Expert, issued by the State Department of Health and Human Services, shall be qualified to give the testimony under this subdivision.

(b) In a medical malpractice action as defined in G.S. 90-21.11, a person shall not give expert testimony on the appropriate standard of health care as defined in G.S. 90-21.12 unless the person is a licensed health care provider in this State or another state and meets the following criteria:

- (1) If the party against whom or on whose behalf the testimony is offered is a specialist, the expert witness must:
  - a. Specialize in the same specialty as the party against whom or on whose behalf the testimony is offered; or
  - b. Specialize in a similar specialty which includes within its specialty the performance of the procedure that is the subject of the complaint and have prior experience treating similar patients.

- (2) During the year immediately preceding the date of the occurrence that is the basis for the action, the expert witness must have devoted a majority of his or her professional time to either or both of the following:
- a. The active clinical practice of the same health profession in which the party against whom or on whose behalf the testimony is offered, and if that party is a specialist, the active clinical practice of the same specialty or a similar specialty which includes within its specialty the performance of the procedure that is the subject of the complaint and have prior experience treating similar patients; or
  - b. The instruction of students in an accredited health professional school or accredited residency or clinical research program in the same health profession in which the party against whom or on whose behalf the testimony is offered, and if that party is a specialist, an accredited health professional school or accredited residency or clinical research program in the same specialty.
- (c) Notwithstanding subsection (b) of this section, if the party against whom or on whose behalf the testimony is offered is a general practitioner, the expert witness, during the year immediately preceding the date of the occurrence that is the basis for the action, must have devoted a majority of his or her professional time to either or both of the following:
- (1) Active clinical practice as a general practitioner; or
  - (2) Instruction of students in an accredited health professional school or accredited residency or clinical research program in the general practice of medicine.
- (d) Notwithstanding subsection (b) of this section, a physician who qualifies as an expert under subsection (a) of this Rule and who by reason of active clinical practice or instruction of students has knowledge of the applicable standard of care for nurses, nurse practitioners, certified registered nurse anesthetists, certified registered nurse midwives, physician assistants, or other medical support staff may give expert testimony in a medical malpractice action with respect to the standard of care of which he is knowledgeable of nurses, nurse practitioners, certified registered nurse anesthetists, certified registered nurse midwives, physician assistants licensed under Chapter 90 of the General Statutes, or other medical support staff.
- (e) Upon motion by either party, a resident judge of the superior court in the county or judicial district in which the action is pending may allow expert testimony on the appropriate standard of health care by a witness who does not meet the requirements of subsection (b) or (c) of this Rule, but who is otherwise qualified as an expert witness, upon a showing by the movant of extraordinary circumstances and a determination by the court that the motion should be allowed to serve the ends of justice.
- (f) In an action alleging medical malpractice, an expert witness shall not testify on a contingency fee basis.
- (g) This section does not limit the power of the trial court to disqualify an expert witness on grounds other than the qualifications set forth in this section.
- (h) Notwithstanding subsection (b) of this section, in a medical malpractice action against a hospital, or other health care or medical facility, a person may give expert testimony on the appropriate standard of care as to administrative or other nonclinical issues if the person has substantial knowledge, by virtue of his or her training and experience, about the standard of care among hospitals, or health care or medical facilities, of the same type as the hospital, or health care or medical facility, whose actions or inactions are the subject of the testimony situated in the same or similar communities at the time of the alleged act giving rise to the cause of action.



(i) A witness qualified as an expert in accident reconstruction who has performed a reconstruction of a crash, or has reviewed the report of investigation, with proper foundation may give an opinion as to the speed of a vehicle even if the witness did not observe the vehicle moving. (1983, c. 701, s. 1; 1995, c. 309, s. 1; 2006-253, s. 6.)

**Editor's Note.** — Session Laws 2006-253, s. 1, provides: "This act shall be known as 'The Motor Vehicle Driver Protection Act of 2006.'"

**Effect of Amendments.** — Session Laws

2006-253, s. 6, effective December 1, 2006, and applicable to offenses committed on or after that date, added subsections (a1) and (i).

## CASE NOTES

- I. General Consideration.
- II. Qualification of Expert.
- III. Expert Opinion Not Admissible.
- IV. Expert Opinion Admissible.

### I. GENERAL CONSIDERATION.

**Cited in** *Elliott v. Muehlbach*, 173 N.C. App. 709, 620 S.E.2d 266, 2005 N.C. App. LEXIS 2226 (2005); *Worthey v. York*, — F. Supp. 2d —, 2005 U.S. Dist. LEXIS 37263 (W.D.N.C. Sept. 13, 2005); *Formyduval v. Britt*, — N.C. App. —, 630 S.E.2d 192, 2006 N.C. App. LEXIS 1222 (2006).

### II. QUALIFICATION OF EXPERT.

#### Qualifications of Expert. —

Neurologist could testify, as an expert witness for the patient about the relevant standard of care in a medical malpractice case because the witness, a board certified neurologist, specialized in the same specialty as one of the health care providers, who had a specialty in general consulting neurology. *Billings v. Rosenstein*, 174 N.C. App. 191, 619 S.E.2d 922, 2005 N.C. App. LEXIS 2293 (2005).

#### Police Officer. —

Trial court did not abuse its discretion in allowing the investigating officer to testify as an expert under G.S. 8C-1-702(a) regarding the lividity of pooled blood found at the homicide crime scene and as to approximate time of death, as the State offered ample evidence, which included the officer's education, experience, and specialized training, that the officer was better qualified to give an opinion on the subject than the trier of fact; although the officer was not a medical expert, the applicable standard did not require an expert to be licensed or a specialist in the field in which the expert testified. *State v. Steelmon*, — N.C. App. —, 627 S.E.2d 492, 2006 N.C. App. LEXIS 693 (2006).

**Nurse Engaged in Clinical Nursing.** — In a medical malpractice case, a patient had forecast sufficient evidence that a nurse was qualified to testify under G.S. 8C-1, N.C. R. Evid. 702(b)(2). The nurse's deposition testimony that she worked in the clinical practice of nursing part of the time and that she served as

a legal consultant part of the time did not necessarily contradict her affidavit that she devoted the majority of her time to clinical nursing; furthermore, defendants had not contradicted her statements that a registered nurse could be a "floor nurse" and that there was no "floor nursing" specialty. *Diggs v. Novant Health, Inc.*, — N.C. App. —, 628 S.E.2d 851, 2006 N.C. App. LEXIS 983 (2006).

### III. EXPERT OPINION NOT ADMISSIBLE.

**Expert's Failure to Make Independent Diagnosis.** — In medical malpractice case, trial court did not err by refusing to allow expert testimony from a physician who did not make his own independent diagnosis or conduct independent testing to determine the cause of pain experienced after an injection. *Miller v. Forsyth Mem'l Hosp., Inc.*, 173 N.C. App. 385, 618 S.E.2d 838, 2005 N.C. App. LEXIS 2040 (2005).

**Children's Symptoms of Post-Traumatic Stress Disorder.** — Trial court erred in admitting an expert's testimony regarding the children's symptoms of post-traumatic stress disorder as no instruction was given that the testimony was to be considered for corroborative purposes, so it had to be assumed that the testimony was admitted to prove that the children had been sexually assaulted; however, the error was not plain error in light of the overwhelming evidence of defendant's guilt. *State v. Brigman*, — N.C. App. —, 632 S.E.2d 498, 2006 N.C. App. LEXIS 1298 (2006).

#### Credibility. —

It was plain error for a medical expert to bolster the credibility of the victim in violation of G.S. 8C-1, N.C. R. Evid. 702(a), so defendant did not have to preserve the claim for review pursuant to N.C.R. App. P. 10(b)(1); however, the error did not prejudice defendant as the State presented sufficient evidence from other



sources to establish the victim's credibility. *State v. Blizzard*, 169 N.C. App. 285, 610 S.E.2d 245, 2005 N.C. App. LEXIS 680 (2005).

Trial court erred in admitting expert testimony that, *inter alia*, "these children suffered sexual abuse by (defendant)," as the opinion did not relate to a diagnosis derived from the expert's examination of the prosecuting witnesses in the course of treatment, making it improper opinion testimony concerning the children's credibility; however, the error was not plain error in light of the overwhelming evidence of defendant's guilt. *State v. Brigman*, — N.C. App. —, 632 S.E.2d 498, 2006 N.C. App. LEXIS 1298 (2006).

#### IV. EXPERT OPINION ADMISSIBLE.

##### Physician. —

Expert witness was properly allowed to give his opinion as to defendant's state of mind based on the fact that the victim was found lying prone on the floor; as a psychiatrist, the witness was trained to recognize links between behavior and a person's state of mind, therefore he had specialized knowledge to assist the trier of fact to understand the evidence or to determine a fact in issue, G.S. 8C-1, Rule 702(a), and his testimony was not improperly allowed. *State v. Campbell*, 359 N.C. 644, 617 S.E.2d 1, 2005 N.C. LEXIS 842 (2005).

In a wrongful death action based on a medical specialist's medical malpractice, the trial court erred in failing to allow the specialist to cross-examine the medical expert for the decedent's estate as to whether the other treating doctor, a former codefendant, acted in accordance with the standard of care, because evidence of the former co-defendant's standard of care was relevant to show whether the specialist's conduct was the proximate cause of the injury, as G.S. 90-21.12 permits a physician, otherwise qualified under G.S. 8C-1, Rule 702, to testify regarding the applicable standard of care in a medical malpractice case. However, any error was harmless because there was other expert testimony admitted for both parties that contained the same substance, and it could not be said that a different outcome would have resulted. *Boykin v. Kim*, 174 N.C. App. 278, 620 S.E.2d 707, 2005 N.C. App. LEXIS 2396 (2005).

Trial court did not err in admitting the testimony of the employee's physicians as expert witnesses, as they were qualified by experience,

training, and education with specialized scientific knowledge regarding the development of mesothelioma. *Williams v. CSX Transp., Inc.*, — N.C. App. —, 626 S.E.2d 716, 2006 N.C. App. LEXIS 532 (2006).

**Opinion on Helpfulness of Autopsy Photographs.** — Expert witness was properly permitted to testify that in the expert's opinion each of the autopsy photographs admitted into evidence depicted aspects of the victim's wounds, and each would be helpful to illustrate the victim's wounds to the jury, since such opinions were within the doctor's area of expertise and were relevant and appropriate to show the number and severity of the wounds. *State v. Taylor*, — N.C. App. —, 632 S.E.2d 218, 2006 N.C. App. LEXIS 1575 (2006).

##### S.B.I. Lab Technician. —

S.B.I. agent was properly allowed to give her expert opinion as to why the seizure of defendant's police frequency book was important, testifying that finding a police frequency book and a radio scanner could indicate those acting illegally might have a "jump start" if they knew which police frequencies to monitor; that testimony was within the witness's expertise and was likely to assist the jury in inferring why such evidence was considered important and why it was seized during a search of defendant's residence for a methamphetamine laboratory. *State v. Alderson*, 173 N.C. App. 344, 618 S.E.2d 844, 2005 N.C. App. LEXIS 2033 (2005).

##### Expert in Child Physical Abuse Case. —

In a prosecution for the murder of a child, it was proper, under G.S. 8C-1-702(a), for properly qualified experts to offer the opinion that the victim's death was not caused by an accidental injury, as: (1) both based their opinions on their years of experience as pathologists, during which they performed and consulted on numerous autopsies; and (2) the experts offered the basis of their opinions. *State v. Murphy*, 172 N.C. App. 734, 616 S.E.2d 567, 2005 N.C. App. LEXIS 1786 (2005).

**Ballistics Expert.** — Defendant's conviction of first degree murder was affirmed, as the trial court properly admitted an expert's ballistic testimony pursuant to G.S. 8C-1, Rule 702, and defendant's claims concerning violation of the Daubert standard were irrelevant as North Carolina did not recognize the Daubert standard. *State v. Anderson*, — N.C. App. —, 624 S.E.2d 393, 2006 N.C. App. LEXIS 191 (2006).

## Rule 703. Bases of opinion testimony by experts.

#### CASE NOTES

##### Expert need not testify from personal knowledge, etc.

Where the expert witness testified that he

viewed the racetrack (although not while it was in use), reviewed aerial photos and topographical maps of the area, listened to recordings of

the sound generated by the all terrain vehicles, and discussed the racetrack noise with several of the landowners in their nuisance case against their neighbors, the neighbors made no showing and presented no argument suggesting that this information was an inadequate basis under G.S. 8C-1, N.C. R. Evid. 703, for the expert's opinions; without such a showing, the appellate court not hold that the trial court erred in denying the neighbors' motion to strike the expert's testimony. *Elliott v. Muehlbach*, 173 N.C. App. 709, 620 S.E.2d 266, 2005 N.C. App. LEXIS 2226 (2005).

**Otherwise Inadmissible Hearsay Evidence May Be Allowed. —**

Trial court did not err in admitting into evidence the crime laboratory reports upon which the expert, whether hearsay or not, permissibly based the expert opinion under G.S. 8C-1-703, as disclosure of the basis of the

expert's opinion was essential to assessment of credibility and was not hearsay under G.S. 8C-1-801. *State v. Lyles*, 172 N.C. App. 323, 615 S.E.2d 890, 2005 N.C. App. LEXIS 1424 (2005), appeal dismissed, 360 N.C. 73, 622 S.E.2d 625 (2005).

**Testimony Regarding Results of Experiments. —**

Trial court did not err in admitting the testimony of an expert regarding the findings of another expert about what the nontestifying expert learned and reported in regard to ballistics tests performed on the weapon allegedly used to shoot the two victims in defendant's case; the expert's testimony was not offered for the truth of the matter asserted, but was offered to show the basis of his opinion, that he was relying on the nontestifying expert's report. *State v. Bethea*, 173 N.C. App. 43, 617 S.E.2d 687, 2005 N.C. App. LEXIS 1907 (2005).

## Rule 704. Opinion on ultimate issue.

### CASE NOTES

**This rule allows testimony on ultimate issues, etc.**

Trial court properly admitted, under G.S. 8C-1, Rule 701, G.S. 8C-1, Rule 704, lay opinion testimony of various law enforcement officers that defendant "tried to kill" one of the responding officers because their testimony amounted to nothing more than shorthand statements of fact based on their knowledge and observations and did not implicate defendant's guilt, mental state, or intent. The officers' testimony was based on their perceptions after witnessing defendant shoot the officer, and was not objectionable merely because it embraced an ultimate issue to be decided by the trier of fact. *State v. McVay*, 174 N.C. App. 335, 620 S.E.2d 883, 2005 N.C. App. LEXIS 2402 (2005).

**Constructive Possession in Drug Case.**

— Officer's testimony was not improper on the

issue of constructive possession of drugs; the officer never testified that defendant was in constructive possession, but to the underlying facts of defendant's location in proximity to the drugs. *State v. Hart*, — N.C. App. —, 633 S.E.2d 102, 2006 N.C. App. LEXIS 1675 (2006).

**"Intentional Injury" in Child Abuse Case. —**

In a prosecution for the murder of a child, it was proper, under G.S. 8C-1-704, for properly qualified experts to offer opinions on the ultimate issue that the victim's death was not caused by an accidental injury, as: (1) both based their opinions on their years of experience as pathologists, during which they performed and consulted on numerous autopsies; and (2) the experts offered the basis of their opinions. *State v. Murphy*, 172 N.C. App. 734, 616 S.E.2d 567, 2005 N.C. App. LEXIS 1786 (2005).

## Rule 705. Disclosure of facts or data underlying expert opinion.

### CASE NOTES

**Testimony Properly Excluded. —**

Because the State did not choose to explore the basis for defendant's expert's opinion at trial, the trial court was not obligated to allow the expert to testify as to certain conversations that he had with defendant that formed the basis for his opinion. *State v. Edwards*, — N.C. App. —, 621 S.E.2d 333, 2005 N.C. App. LEXIS 2487 (2005).

**Testimony As to Final Conclusion. —**

Trial court properly allowed the expert to testify as to his final conclusion even though it may have touched on an ultimate issue in the case. *Taylor v. Abernethy*, 174 N.C. App. 93, 620 S.E.2d 242, 2005 N.C. App. LEXIS 2281 (2005).



## ARTICLE 8.

*Hearsay.***Rule 801. Definitions and exception for admissions of a party-opponent.**

## CASE NOTES

**Agency. —**

North Carolina Industrial Commission did not err when it allowed a professional football player's agent to testify regarding statements made by the team's scouting director, its position coach, and the assistant special teams coach because those individuals had authority to discuss the team's needs and a player's performance as their opinion would be considered in determining the team's final roster. *Renfro v. Richardson Sports, Ltd. Partners*, 172 N.C. App. 176, 616 S.E.2d 317, 2005 N.C. App. LEXIS 1435 (2005).

**Statements Admissible to Explain Subsequent Conduct. —**

In a drug case, a trial court did not err by allowing an officer to testify about a conversation with another person that led to defendant's arrest under G.S. 8C-1, N.C. R. Evid. 801(c) because (1) defendant opened the door during cross-examination and (2) the testimony was offered to explain subsequent conduct of the officers. *State v. Cardenas*, 169 N.C. App. 404, 610 S.E.2d 240, 2005 N.C. App. LEXIS 681 (2005).

Trial court did not err in finding that police detective was the custodian or other qualified witness of pawn shop records for purposes of admissibility of his testimony regarding his review of those records, nor did it err in admitting the detective's testimony regarding said records, as his testimony regarding his review and his resulting actions was admissible to show the basis for those actions, explained his conduct, and was not hearsay. *State v. Goblet*, 173 N.C. App. 112, 618 S.E.2d 257, 2005 N.C. App. LEXIS 1929 (2005).

Testimony regarding an officer's interaction with a detective and a third individual was non-hearsay since it was not admitted to prove the truth of the matter asserted, but rather to show how the officer formed a reasonable suspicion that defendant was involved in the robbery at issue, which in turn justified including defendant's photo in a lineup shown to the robbery victim. *State v. Alexander*, — N.C. App. —, 628 S.E.2d 434, 2006 N.C. App. LEXIS 843 (2006).

**Admission by Party Opponent. —**

Defendant's statement that he would "be guilty" was admissible under G.S. 8C-1-

801(d)(A) because it was defendant's own statement offered against his own interest. *State v. Laney*, — N.C. App. —, 631 S.E.2d 522, 2006 N.C. App. LEXIS 1398 (2006).

**Statements of coconspirators made prior to or subsequent to the conspiracy, etc.**

Because there was no evidence that a conspiracy to rob a convenience store was in existence at the time statements in question were made, the trial court erred in admitting the hearsay statements as a statement by a co-conspirator under G.S. 8C-1, Rule 801(d); however, the error was harmless pursuant to G.S. 15A-1443(b) because the remaining evidence that defendant took part in the robbery was overwhelming. *State v. Stephens*, — N.C. App. —, 623 S.E.2d 610, 2006 N.C. App. LEXIS 50 (2006).

**Evidence Not Hearsay. —**

Trial court did not err in admitting into evidence the crime laboratory reports upon which the expert, whether hearsay or not, permissibly based the expert opinion under G.S. 8C-1-703, as disclosure of the basis of the expert's opinion was essential to assessment of credibility and was not hearsay under G.S. 8C-1-801. *State v. Lyles*, 172 N.C. App. 323, 615 S.E.2d 890, 2005 N.C. App. LEXIS 1424 (2005), appeal dismissed, 360 N.C. 73, 622 S.E.2d 625 (2005).

With regard to a defendant's conviction for first-degree felony murder as to the death of his ex-girlfriend, the trial court did not err by admitting the testimony of a man who had been watching a movie with the victim at her home just prior to her death, which detailed why the man ran from the scene instead of confronting the defendant who broke into the victim's home, because the testimony was offered not for the truth of the matter asserted but for purposes of explaining why the man chose to run, to seek out the police, and not confront defendant single-handedly, which was admissible non-hearsay. *State v. Byers*, — N.C. App. —, 623 S.E.2d 357, 2006 N.C. App. LEXIS 59 (2006).

Trial court did not err in admitting into evidence two letters from decedent to the brother, as well as the envelopes which contained those letters; the letters and envelopes



were not hearsay because they were not offered for the truth of the matter, but were offered to provide a sample of decedent's handwriting so that the jury could compare it to the signature on a contract at issue, and the letters were properly authenticated by a witness familiar with decedent's handwriting. *Taylor v. Abernethy*, 174 N.C. App. 93, 620 S.E.2d 242, 2005 N.C. App. LEXIS 2281 (2005).

Football player was properly permitted to testify as to why he was released from another team where he offered personal knowledge as to why he was released and he stated that he could not "perform as needed on the field;" the statement did not meet the definition of hearsay because it occurred while the football player was testifying at a hearing. *Swift v. Richardson Sports, Ltd.*, 173 N.C. App. 134, 620 S.E.2d 533, 2005 N.C. App. LEXIS 1898 (2005).

North Carolina Industrial Commission did not err under G.S. 8C-1, Rule 801(c) by allowing a former professional football player to testify about the reason for his termination from another professional team after his first professional team released the player because the player offered personal knowledge about why he was released and his testimony was not hearsay. *Swift v. Richardson Sports, Inc.*, — N.C. App. —, — S.E.2d —, 2005 N.C. App. LEXIS 725 (Apr. 5, 2005).

**Evidence Held Admissible. —**

No limiting instruction was required relating to defendant's statements to officers which established his motive for a robbery during which a store owner was killed, as defendant's statements were properly admitted as admissions of a party opponent. *State v. al-Bayyinah*, 359 N.C. 741, 616 S.E.2d 500, 2005 N.C. LEXIS 844 (2005).

In defendant's murder trial, defendant was not required to make an offer of proof regarding testimony that her victim had told her former employee that he was going to "shoot up his house" that was excluded when the trial court granted the state's motion to strike the testi-

mony. *State v. Everett*, — N.C. App. —, 630 S.E.2d 703, 2006 N.C. App. LEXIS 1302 (2006).

**Evidence Held Inadmissible. —**

Trial court erred in granting summary judgment to an employer because the statements in the affidavits made by three affiants to establish an employee's on-call pay rate, and in the exhibits submitted in support of their affidavits, were hearsay under G.S. 8C-1, N.C. R. Evid. 801(c) and were inadmissible under G.S. 1A-1, N.C. R. Civ. P. 56(e) to prove the employee's on-call pay rate because only the employer's management team had knowledge of the employee's on call pay rate. However, there was no evidence that the affiants were members of the employer's management team or were otherwise involved in the establishment of the on-call pay rate for the employer; therefore, any knowledge the affiants had of the on-call pay rate was only through a statement made by another, namely the employer's management team. *Gilreath v. N.C. HHS*, — N.C. App. —, 629 S.E.2d 293, 2006 N.C. App. LEXIS 1077 (2006).

**Admission of Non-Hearsay Raised No Confrontation Clause Concerns. —**

Admission of nonhearsay raises no Confrontation Clause concerns; testimony regarding an officer's interaction with a detective and a third individual was non-hearsay, and raised no Confrontation Clause concerns, since it was not admitted to prove the truth of the matter asserted, but rather to show how the officer formed a reasonable suspicion that defendant was involved in the robbery at issue, which in turn justified including defendant's photo in a lineup shown to the robbery victim. *State v. Alexander*, — N.C. App. —, 628 S.E.2d 434, 2006 N.C. App. LEXIS 843 (2006).

**Applied** in *State v. Lawson*, 173 N.C. App. 270, 619 S.E.2d 410, 2005 N.C. App. LEXIS 2036 (2005).

**Cited** in *State v. Lewis*, 360 N.C. 1, 619 S.E.2d 830, 2005 N.C. LEXIS 1000 (2005); *In re M.G.T.-B.*, — N.C. App. —, 629 S.E.2d 916, 2006 N.C. App. LEXIS 1182 (2006).

## Rule 802. Hearsay rule.

### CASE NOTES

**Evidence Held Admissible. —**

Trial court did not err in finding that police detective was the custodian or other qualified witness of pawn shop records for purposes of admissibility of his testimony regarding his review of those records, nor did it err in admitting the detective's testimony regarding said records, as his testimony regarding his review and his resulting actions was admissible to show the basis for those actions, explained his

conduct, and was not hearsay. *State v. Goblet*, 173 N.C. App. 112, 618 S.E.2d 257, 2005 N.C. App. LEXIS 1929 (2005).

**Applied** in *State v. Cardenas*, 169 N.C. App. 404, 610 S.E.2d 240, 2005 N.C. App. LEXIS 681 (2005).

**Cited** in *State v. Lewis*, 360 N.C. 1, 619 S.E.2d 830, 2005 N.C. LEXIS 1000 (2005); *State v. Boyd*, — N.C. App. —, 628 S.E.2d 796, 2006 N.C. App. LEXIS 854 (2006).

## Rule 803. Hearsay exceptions; availability of declarant immaterial.

### CASE NOTES

- I. General Consideration.
- II. Present Sense Impression.
- III. Excited Utterances.
- IV. Mental, Emotional or Physical Condition.
- V. Statements for Diagnosis or Treatment.
- VII. Records of Regularly Conducted Activity.
- VIII. Public Records and Reports.
- XIII. Other Exceptions.

#### I. GENERAL CONSIDERATION.

**Cited** in *State v. Lewis*, 360 N.C. 1, 619 S.E.2d 830, 2005 N.C. LEXIS 1000 (2005); *State v. Scanlon*, — N.C. App. —, 626 S.E.2d 770, 2006 N.C. App. LEXIS 541 (2006); *State v. Brigman*, — N.C. App. —, 629 S.E.2d 307, 2006 N.C. App. LEXIS 1071 (2006); *In re M.G.T.-B.*, — N.C. App. —, 629 S.E.2d 916, 2006 N.C. App. LEXIS 1182 (2006).

#### II. PRESENT SENSE IMPRESSION.

##### **Explanation of Event. —**

Calls to 911 that reported that decedent's tractor trailer appeared to have struck tire debris in the road and had run off the roadway and that the caller's husband checked the driver and that he was breathing were admissible as present sense impression under the hearsay exception set forth in G.S. 8C-1-803(1). *Wooten v. Newcon Transp., Inc.*, — N.C. App. —, 632 S.E.2d 525, 2006 N.C. App. LEXIS 1670 (2006).

#### III. EXCITED UTTERANCES.

##### **Statement Admissible as Excited Utterance. —**

Statement made by defendant's girlfriend, "We gots to be more careful," was admissible as an excited utterance exception to the hearsay rule where it was made in reaction to the startling event of arriving home late in the evening, being seized in the front yard, and being led handcuffed into her own residence; an eyewitness testified that she the girlfriend made the statement she was upset and shaking, and immediately after making it, she burst into tears. *State v. Boyd*, — N.C. App. —, 628 S.E.2d 796, 2006 N.C. App. LEXIS 854 (2006).

#### IV. MENTAL, EMOTIONAL OR PHYSICAL CONDITION.

##### **Statement of Intent to Engage in Future Act. —**

Victim's statement to the victim's sister regarding the victim's intention to meet defen-

dant was admissible under G.S. 8C-1-803(3) because the statement tended to show the victim's plan or intent to engage in a future act. *State v. Taylor*, — N.C. App. —, 632 S.E.2d 218, 2006 N.C. App. LEXIS 1575 (2006).

In defendant's murder trial, defendant was not required to make an offer of proof regarding testimony that her victim had told her former employee that he was going to "shoot up his house" that was excluded when the trial court granted the state's motion to strike the testimony. *State v. Everett*, — N.C. App. —, 630 S.E.2d 703, 2006 N.C. App. LEXIS 1302 (2006).

#### V. STATEMENTS FOR DIAGNOSIS OR TREATMENT.

##### **Statements of Child Victim of Sexual Abuse to Health Care Professional. —**

Videotapes of the nurses' interviews of the children regarding defendant's sexual abuse of the children were admissible under the hearsay exception for statements made for the purpose of medical diagnosis and treatment under G.S. 8C-1-803(4); the statements were made in a medical atmosphere, a hospital, the statements were taken by nurses prior to a medical examination, the statements were taken for the children's first treatment after the abuse, and the statements, including identification of defendant, aided diagnosis of psychological problems and treatment for those problems. *State v. Lewis*, 172 N.C. App. 97, 616 S.E.2d 1, 2005 N.C. App. LEXIS 1439 (2005).

#### VII. RECORDS OF REGULARLY CONDUCTED ACTIVITY.

**Fingerprint Records. —** Because a fingerprint card created upon defendant's arrest, and contained in the Automated Fingerprint Identification System database, was a business record and therefore non-testimonial, the trial court did not violate defendant's Sixth Amendment right to confrontation by admitting into evidence law enforcement record cards allegedly bearing his fingerprints. *State v. Windley*, 173 N.C. App. 187, 617 S.E.2d 682, 2005 N.C. App. LEXIS 1927 (2005).



**DNA Results Properly Admitted.** — State investigative reports that gave the results of DNA tests incriminating defendant were properly admitted at his trial for murder and rape as business records under G.S. 8C-1, N.C. R. Evid. 803(6), even though the investigator who made the reports did not testify. His supervisor testified, and the reports were not testimonial but were neutral and were not prepared exclusively for trial. *State v. Forte*, 360 N.C. 427, 629 S.E.2d 137, 2006 N.C. LEXIS 45 (2006).

**Sex Offender Registration.** — Notice of Pending Registration and a Sex Offender Registration Worksheet were properly admitted under G.S. 8C-1-803(6). *State v. Wise*, — N.C. App. —, 630 S.E.2d 732, 2006 N.C. App. LEXIS 1293 (2006).

**Foundational Requirements for Business Records.** — Trial court erred in considering affidavits at summary judgment because none of the affidavits addressed the foundational requirements for the admission of evidence to establish an employee's on-call pay rate through a business record under G.S. 8C-1, N.C. R. Evid. 803(6), and thus did not present personal knowledge setting forth facts admissible in evidence. Further, nothing in one affiant's affidavit established a foundation that a facsimile cover page was a record of regularly conducted activity, which would fall under the business records exception to the hearsay rule, because the affiant relied on a hand-written note on a cover page that purported to summarize the contents of missing memos. *Gilreath v. N.C. HHS*, — N.C. App. —, 629 S.E.2d 293, 2006 N.C. App. LEXIS 1077 (2006).

## VIII. PUBLIC RECORDS AND REPORTS.

**Relation to Business Records Exception.** — Where defendant argued that the language of G.S. 8C-1-803(8), regarding the hearsay exception for public records and reports, restricted the business records exception of G.S. 8C-1-803(6), the argument failed; G.S. 8C-1-803(8) was adopted without the intention of changing the common law rule allowing admissions of public records of purely ministerial observations, as the intended purpose of G.S. 8C-1-803(8) was to prevent prosecutors from attempting to prove their cases through police officers' reports of their observations during the investigation of crime. *State v. Lyles*, 172 N.C. App. 323, 615 S.E.2d 890, 2005 N.C. App. LEXIS 1424 (2005), appeal dismissed, 360 N.C. 73, 622 S.E.2d 625 (2005).

**Prison records.** — Prison records on defendant's father were admissible under the public records exception to the hearsay rule. *State v. Watson*, — N.C. App. —, 634 S.E.2d 231, 2006 N.C. App. LEXIS 1923 (2006).

**DNA Reports Properly Admitted.** — State investigative reports that gave the results of

DNA tests incriminating defendant were properly admitted at his trial for murder and rape under G.S. 8C-1, N.C. R. Evid. 803(8), as public records, even though the investigator who made the records did not testify. His supervisor testified, the reports concerned routine matters and recorded only ministerial observations, and defendant's right of confrontation was not violated. *State v. Forte*, 360 N.C. 427, 629 S.E.2d 137, 2006 N.C. LEXIS 45 (2006).

## XIII. OTHER EXCEPTIONS.

### Trustworthiness of Child Victim's Out-of-Court Statements in Sexual Abuse Case.

Three boys' statements possessed equivalent guarantees of trustworthiness for purposes of the residual hearsay exception as, inter alia: (1) the discussion of sexual matters was initiated spontaneously by the children; (2) the adults to whom the statements were made were credible witnesses; (3) the nature of the statements tended to show that they were trustworthy as they were very explicit sexual statements that would not ordinarily be stated by boys of their age unless the statements were true; and (4) the trial court had an opportunity to see the boys on the witness stand at the motion hearing and it appeared obvious that their presence on the witness stand in front of defendant was traumatic for them. *State v. Brigman*, — N.C. App. —, 632 S.E.2d 498, 2006 N.C. App. LEXIS 1298 (2006).

**Notice of Intent to Use Hearsay at Trial Insufficient.** — Witness's hearsay statement identifying the perpetrator was not admissible under G.S. 8C-1, Rule 803 because the State did not provide sufficient written notice to defendant of its intent to use the statement prior to trial. *State v. Lawson*, 173 N.C. App. 270, 619 S.E.2d 410, 2005 N.C. App. LEXIS 2036 (2005).

### Evidence Held Admissible.

As two children were available to testify, although neither the State nor defendant called them to testify, defendant waived her right to confront the children; additionally, none of the challenged statements constituted formal statements to the police or other government officers because the statements were not procured by a government officer but by the children's foster parents, and although the statements were conveyed both to the department of social services and the police, the statements were not formal testimonial statements. *State v. Brigman*, 171 N.C. App. 305, 615 S.E.2d 21, 2005 N.C. App. LEXIS 1264 (2005), cert. denied, 360 N.C. 67, 621 S.E.2d 881 (2005).

Children's statements to their foster parents were properly admitted under the residual hearsay exception as, inter alia: (1) the children were unavailable as they had no memory of the subject matter; (2) the statements were evi-



dence of material facts; (3) the statements were not covered by any of the hearsay exceptions listed in G.S. 8C-1-804(b)(1)-(4) and G.S. 8C-1-803(1)-(23); and (4) the statements possessed

equivalent circumstantial guarantees of trustworthiness. *State v. Brigman*, — N.C. App. —, 632 S.E.2d 498, 2006 N.C. App. LEXIS 1298 (2006).

## Rule 804. Hearsay exceptions; declarant unavailable.

### CASE NOTES

II. Unavailability as a Witness.

VI. Other Exceptions.

#### II. UNAVAILABILITY AS A WITNESS.

##### Trustworthiness Shown. —

Three boys' statements possessed equivalent guarantees of trustworthiness for purposes of the residual hearsay exception as, inter alia: (1) the discussion of sexual matters was initiated spontaneously by the children; (2) the adults to whom the statements were made were credible witnesses; (3) the nature of the statements tended to show that they were trustworthy as they were very explicit sexual statements that would not ordinarily be stated by boys of their age unless the statements were true; and (4) the trial court had an opportunity to see the boys on the witness stand at the motion hearing and it appeared obvious that their presence on the witness stand in front of defendant was traumatic for them. *State v. Brigman*, — N.C. App. —, 632 S.E.2d 498, 2006 N.C. App. LEXIS 1298 (2006).

##### Trustworthiness Not Shown. —

Witness's hearsay statement identifying the perpetrator was not admissible under G.S. 8C-1, Rule 804 since the trial court did not find the witness to be unavailable and there was no indicia of reliability regarding the statement. *State v. Lawson*, 173 N.C. App. 270, 619 S.E.2d 410, 2005 N.C. App. LEXIS 2036 (2005).

##### Unavailability Requirement Not Satisfied. —

Trial court erred in admitting testimony of a witness regarding another parties' statements regarding duplicate keys defendant allegedly made for the victim's home because the trial court failed to make any findings regarding the declarant's availability to testify and the reliability of her statements; however, the error did not require reversal. *State v. Scanlon*, — N.C. App. —, 626 S.E.2d 770, 2006 N.C. App. LEXIS 541 (2006).

**Effect of Unavailability of Witness on Defendant's Right to Confrontation.** — For purposes of a claim of a confrontation clause violation under N.C. Const. art. I, § 23, a trial court's confrontation clause analysis of a statement should proceed as follows: the initial determination is whether the statement is testimonial or nontestimonial, and if the state-

ment is testimonial, the trial court must then ask whether the declarant is available or unavailable to testify during the trial; if the declarant is unavailable pursuant to the G.S. 8C-1, N.C. R. Evid. 804(b)(5) hearsay exception, the trial court must determine whether the accused had a prior opportunity to cross-examine the declarant about this statement, and if the accused had such an opportunity, the statement may be admissible if it is not otherwise excludable hearsay, but if the accused did not have this opportunity, the statement must be excluded. *State v. Lewis*, 360 N.C. 1, 619 S.E.2d 830, 2005 N.C. LEXIS 1000 (2005).

**Defendant's Right to Confrontation of Witnesses.** — Appellate court erred in finding that defendant's right to confrontation pursuant to N.C. Const. art. I, § 23 was violated by allowing an officer to testify pursuant to G.S. 8C-1, N.C. R. Evid. 804(b)(5), that the deceased victim picked defendant from a lineup; although the hearsay statement was testimonial, and thus implicated the confrontation clause, the error was harmless pursuant to G.S. 15A-1443(b), as the outcome of the trial probably would have been the same if the lineup was excluded based on the victim's independent identification of defendant as the perpetrator. *State v. Lewis*, 360 N.C. 1, 619 S.E.2d 830, 2005 N.C. LEXIS 1000 (2005).

##### Statement Held Admissible. —

Because the child's statements were made to a person close to him (his foster mother) and without the reasonable belief that the statements would be used at a subsequent trial, the statements were not testimonial and therefore did not violate the Confrontation Clause; additionally, although the child was unavailable to testify, the trial court did not err in admitting the statements as hearsay exceptions. *State v. Brigman*, 171 N.C. App. 305, 615 S.E.2d 21, 2005 N.C. App. LEXIS 1264 (2005), cert. denied, 360 N.C. 67, 621 S.E.2d 881 (2005).

Children's statements to their foster parents were properly admitted under the residual hearsay exception as, inter alia: (1) the children were unavailable as they had no memory of the subject matter; (2) the statements were evidence of material facts; (3) the statements were

not covered by any of the hearsay exceptions listed in G.S. 8C-1-804(b)(1)-(4) and G.S. 8C-1-803(1)-(23); and (4) the statements possessed equivalent circumstantial guarantees of trustworthiness. *State v. Brigman*, — N.C. App. —, 632 S.E.2d 498, 2006 N.C. App. LEXIS 1298 (2006).

## VI. OTHER EXCEPTIONS.

### **Circumstances Indicating Trustworthiness.** —

Trial court erroneously admitted, under the residual exception of G.S. 8C-1-804(b)(5), the hearsay statements made by the witness to the police detective; in finding that the proffered

statements were trustworthy, the trial court erroneously considered the corroborative nature of the witness's statements. *State v. Champion*, 171 N.C. App. 716, 615 S.E.2d 366, 2005 N.C. App. LEXIS 1364 (2005).

### **Admission of Evidence Upheld.** —

Out-of-court statements the children made to their foster parents and pediatrician were admissible under the residual exception to the hearsay rule because they were evidence of material facts in the case and were more probative than any other evidence the State could produce through reasonable efforts. *State v. Brigman*, — N.C. App. —, 629 S.E.2d 307, 2006 N.C. App. LEXIS 1071 (2006).

## Rule 805. Hearsay within hearsay.

### CASE NOTES

**Cited in** *Wooten v. Newcon Transp., Inc.*, — N.C. App. —, 632 S.E.2d 525, 2006 N.C. App. LEXIS 1670 (2006).

## ARTICLE 9.

### *Authentication and Identification.*

## Rule 901. Requirement of authentication or identification.

### CASE NOTES

**Authentication of Letters.** — Trial court did not err in admitting into evidence two letters from decedent to the brother, as well as the envelopes which contained those letters; the letters and envelopes were not hearsay because they were not offered for the truth of the matter, but were offered to provide a sample of decedent's handwriting so that the jury could compare it to the signature on a contract at issue, and the letters were properly authenticated by a witness familiar with decedent's handwriting. *Taylor v. Abernethy*, 174 N.C. App. 93, 620 S.E.2d 242, 2005 N.C. App. LEXIS 2281 (2005).

### **Evidence Held Admissible.** —

Pursuant to G.S. 8-97 and G.S. 8C-1-901, the trial court properly admitted the videotape evidence of defendant committing sexual acts with the victim, a minor child, and the photographs taken therefrom, because: (1) a state agent established an unbroken chain of custody from the time the tape was found in defendant's residence; (2) the state agent testified that the room depicted in the videotape shown to the

jury was identical to the master bedroom in defendant's residence and that the man on the videotape was defendant; (3) the victim's mother, who had previously dated defendant, testified that defendant owned a camcorder and a tripod, which he had used to videotape them having sexual intercourse in the master bedroom of defendant's residence; (4) the victim's mother identified the room depicted in the videotape as defendant's master bedroom and the man on the videotape as defendant; (5) the victim's mother identified the young girl on the videotape as the victim, her daughter; (6) there was testimony that defendant's camcorder was in working condition; and (7) there was sufficient evidence from the testimony regarding the chain of custody to establish that the videotape had not been edited or altered, and that the same videotape seized from defendant's residence was the same videotape reviewed by the jury. *State v. Prentice*, 170 N.C. App. 593, 613 S.E.2d 498, 2005 N.C. App. LEXIS 1086 (2005), cert. denied, appeal dismissed, — N.C. —, 622 S.E.2d 628 (2005).

In a suit brought against a store to recover for personal injuries a customer sustained when he tripped on a stock cart in an aisle of the store, the trial court did not err in admitting the store's employee safety handbook into evidence because the testimony of the store's manager, identifying the document, stating that he obtained a copy of the handbook effective at the time of the customer's injury, and testifying that it was the same handbook required to be distributed to all store employees, was sufficient to support a finding that the document produced by the customer was a copy of the store's employee handbook in effect at the time of the customer's accident. *Herring v. Food Lion, LLC*, — N.C. App. —, 623 S.E.2d 281, 2005 N.C. App. LEXIS 2754 (2005).

Text messages were sufficiently authenticated when a manager of the Nextel branch

testified that the subject messages were those that the manager retrieved as the stored incoming and outgoing messages for a specific cellular phone. *State v. Taylor*, — N.C. App. —, 632 S.E.2d 218, 2006 N.C. App. LEXIS 1575 (2006).

**Evidence Held Inadmissible. —**

Where petitioners challenged a city annexation ordinances, the trial court properly ruled that their spreadsheets could not be offered to show that the city's methodology was not calculated to provide reasonably accurate results, as required by G.S. 160A-54, because they presented no expert testimony about the spreadsheets, and testimony of the city's principal planner was insufficient to establish a foundation for their admissibility. *Brown v. City of Winston-Salem*, — N.C. App. —, 626 S.E.2d 747, 2006 N.C. App. LEXIS 531 (2006).

## Rule 902. Self-authentication.

### CASE NOTES

**Public records. —** Extrinsic evidence of authenticity is not a condition precedent for the admissibility of documents bearing seal and

certified copies of public records. *State v. Watson*, — N.C. App. —, 634 S.E.2d 231, 2006 N.C. App. LEXIS 1923 (2006).

### ARTICLE 10.

#### *Contents of Writings, Recordings and Photographs.*

## Rule 1004. Admissibility of other evidence of contents.

### CASE NOTES

**Best Evidence Rule Not Violated. —**

That jurors were unable to view a lost videotape did not, per se, result in a violation of G.S. 8C-1, Rule 403; G.S. 8C-1, Rule 1004 permits

admissibility of secondary evidence where the original is lost or destroyed. *State v. Thorne*, 173 N.C. App. 393, 618 S.E.2d 790, 2005 N.C. App. LEXIS 2031 (2005).

## Rule 1006. Summaries.

### CASE NOTES

**Admission in Summary Form. —** Trial court did not err in admitting voluminous videotape recordings in summary form, as such an approach to the evidence was permitted under the North Carolina Rules of Civil Procedure and the jury was informed that the videos,

taken for use in a private nuisance case, were edited from many hours of tape recorded over a period of several months. *Broadbent v. Allison*, — N.C. App. —, 626 S.E.2d 758, 2006 N.C. App. LEXIS 524 (2006).



## Chapter 9.

### Jurors.

#### Article 2.

##### Petit Jurors.

Sec.

9-10. Summons to jurors.

#### ARTICLE 1.

### *Jury Commissions, Preparation of Jury Lists, and Drawing of Panels.*

## § 9-3. Qualifications of prospective jurors.

#### CASE NOTES

##### Excuse Based on Age. —

There was no error in defendant's murder case when a trial judge refused to disqualify a juror who was over the age of 65; a prospective juror over that age had a right under G.S. 9-3 to serve, and while such a juror had a right under G.S. 9-6.1 to request an exemption, the trial judge had discretion whether to excuse any juror. The language of G.S. 9-6.1 9-6(a) gave the court considerable latitude to deal with prospective jurors and particular problems, and the trial judge, after questioning the prospective juror, genuinely exercised his judicial discretion in refusing to excuse her. *State v. Elliott*, 360 N.C. 400, 628 S.E.2d 735, 2006 N.C. LEXIS 46 (2006).

There was no error in defendant's murder case when a trial judge refused to disqualify a juror who was over the age of 65; a prospective juror over that age had a right under G.S. 9-3 to serve, and while such a juror had a right under

G.S. 9-6.1 to request an exemption, the trial judge had discretion whether to excuse any juror. Judge asked juror if she was able to sit and listen to the evidence, she said that she was, and the court did not abuse its discretion in not excusing her. *State v. Elliott*, 360 N.C. 400, 628 S.E.2d 735, 2006 N.C. LEXIS 46 (2006).

There was no error in defendant's murder case when a trial judge refused to disqualify a juror who was over the age of 65; a prospective juror over that age had a right under G.S. 9-3 to serve. It was also clear from the text of G.S. 9-3, 9-6(a), and 9-6.1, that whether a juror should be excused from jury service is a decision which rests in the sound discretion of the trial court, and after questioning the prospective juror as to whether or not she thought that she could sit and listen to the evidence, the trial court did not abuse its discretion in allowing her to sit as a juror. *State v. Elliott*, 360 N.C. 400, 628 S.E.2d 735, 2006 N.C. LEXIS 46 (2006).

## § 9-6. Jury service a public duty; excuses to be allowed in exceptional cases; procedure.

#### CASE NOTES

##### Judges' Power to Excuse Jurors. —

There was no error in defendant's murder case when a trial judge refused to disqualify a juror who was over the age of 65; a prospective juror over that age had a right under G.S. 9-3 to serve. It was also clear from the text of G.S. 9-3, 9-6(a), and 9-6.1, that whether a juror should be excused from jury service is a decision which rests in the sound discretion of the trial court, and after questioning the prospective juror as to whether or not she thought that she could sit

and listen to the evidence, the trial court did not abuse its discretion in allowing her to sit as a juror. *State v. Elliott*, 360 N.C. 400, 628 S.E.2d 735, 2006 N.C. LEXIS 46 (2006).

There was no error in defendant's murder case when a trial judge refused to disqualify a juror who was over the age of 65; a prospective juror over that age had a right under G.S. 9-3 to serve, and while such a juror had a right under G.S. 9-6.1 to request an exemption, the trial judge had discretion whether to excuse any

juror. The language of G.S. 9-6(a) gave the court considerable latitude to deal with prospective jurors and particular problems, and the trial judge, after questioning the prospective juror,

genuinely exercised his judicial discretion in refusing to excuse her. *State v. Elliott*, 360 N.C. 400, 628 S.E.2d 735, 2006 N.C. LEXIS 46 (2006).

## § 9-6.1. Requests to be excused.

### CASE NOTES

#### **Excuse Based on Age. —**

There was no error in defendant's murder case when a trial judge refused to disqualify a juror who was over the age of 65; a prospective juror over that age had a right under G.S. 9-3 to serve, and while such a juror had a right under G.S. 9-6.1 to request an exemption, the trial judge had discretion whether to excuse any juror. Judge asked juror if she was able to sit and listen to the evidence, she said that she was, and the court did not abuse its discretion in not excusing her. *State v. Elliott*, 360 N.C. 400, 628 S.E.2d 735, 2006 N.C. LEXIS 46 (2006).

There was no error in defendant's murder case when a trial judge refused to disqualify a juror who was over the age of 65; a prospective juror over that age had a right under G.S. 9-3 to serve. It was also clear from the text of G.S. 9-3, 9-6(a), and 9-6.1, that whether a juror should be excused from jury service is a decision which rests in the sound discretion of the trial court, and after questioning the prospective juror as to whether or not she thought that she could sit and listen to the evidence, the trial court did not abuse its discretion in allowing her to sit as a juror. *State v. Elliott*, 360 N.C. 400, 628 S.E.2d 735, 2006 N.C. LEXIS 46 (2006).

### ARTICLE 2.

#### *Petit Jurors.*

## § 9-10. Summons to jurors.

(a) The register of deeds shall, within three days after the receipt of numbers drawn, deliver the list of prospective jurors to the sheriff of the county, who shall summon the persons named therein. The summons shall be served personally, or by leaving a copy thereof at the place of residence of the juror, or by telephone or first-class mail, at least 15 days before the session of court for which the juror is summoned. Service by telephone, or by first-class mail if mailed to the correct current address of the juror on or before the fifteenth day before the day the court convenes, shall be valid and binding on the person served, and he shall be bound to appear in the same manner as if personally served. The summons shall contain information as to the time, place, and authority before whom applications for excuses from jury service may be heard.

(b) All summons served personally or by mail under this section or under G.S. 9-11 shall inform the prospective juror that persons 72 years of age or older are entitled to establish in writing exemption from jury service for good cause, shall contain a statement for claiming such exemption and stating the cause and a place for the prospective juror's signature, and shall state the mailing address of the clerk of superior court and the date by which such request for exemption must be received. (1779, c. 157, ss. 4, 6, P.R.; R.C., c. 31, s. 29; 1868-9, c. 9, s. 12; Code, s. 1733; Rev., s. 1976; C.S., s. 2320; 1967, c. 218, s. 1; 1979, 2nd Sess., c. 1207, s. 3; 1985, c. 609, s. 3; 2006-226, s. 8; 2006-264, ss. 30(a), 30(c).)

#### **Editor's Note. —**

Session Laws 2006-264, s. 30(a), which had substituted "72 years" for "65 years" in subsec-

tion (b), was repealed by Session Laws 2006-264, s. 30(c), which provided that "If Senate Bill 1479, 2005 Regular Session (Session Laws

2006-226), becomes law, this section is repealed." Session Laws 2006-226 became law on August 10, 2006.

**Effect of Amendments.** — Session Laws

2006-226, s. 8, effective August 10, 2006, substituted "72 years" for "65 years" in subsection (b).

## ARTICLE 5.

### *Discharge of Jurors Prohibited.*

## § 9-32. Discharge of juror unlawful.

### CASE NOTES

**Dissent Erred In Claiming That Issue of Waiver Ex Mero Motu Could Be Addressed.** — Dissent erred in raising an issue as to the waiver of sovereign immunity under G.S. 9-32 as the claim was not raised by the parties; the dissent's claim that issue of waiver ex mero motu could be addressed because the North Carolina Board of Nursing moved to dismiss the complaint pursuant to N.C. R. Civ. P. 12(b)(1) and 12(b)(2) was rejected as: (1) the

Board only moved to dismiss a negligent infliction of emotional distress claim pursuant to Rule 12(b)(1) and 12(b)(2), (2) the Board moved to dismiss the violation of G.S. 9-32 claim pursuant to N.C. R. Civ. P. 12(b)(6), and (3) the parties stipulated that the trial court had both subject matter jurisdiction and personal jurisdiction. *Abbott v. N.C. Bd. of Nursing*, — N.C. App. —, 627 S.E.2d 482, 2006 N.C. App. LEXIS 714 (2006).



**Chapter 10B.**  
**Notaries.**

**Article 1.**

**Notary Public Act.**

**Part 1. General Provisions.**

Sec.

10B-3. Definitions.

**Part 2. Commissioning.**

10B-5. Qualifications.

10B-7. Statement of personal qualification.

10B-10. Commission; oath of office.

10B-11. Recommissioning.

**Part 3. Notarial Acts, Powers, and  
Limitations.**

10B-20. Powers and limitations.

10B-23. Improper records.

**Part 4. Fees.**

10B-31. Fees for notarial acts.

**Part 5. Signature and Seal.**

10B-35. Official signature.

10B-36. Official seal.

10B-37. Seal image.

**Part 6. Certificate Forms.**

Sec.

10B-40. Notarial certificates in general.

10B-41. Notarial certificate for an acknowledgment.

10B-42. Notarial certificate for a verification or of subscribing witness.

10B-42.1. Notarial certificate for a verification of nonsubscribing witness.

10B-43. Notarial certificate for an oath or affirmation.

**Part 8. Enforcement, Sanctions, and  
Remedies.**

10B-60. Enforcement and penalties.

**Part 9. Validation of Notarial Acts.**

10B-67. Erroneous commission expiration date cured.

10B-68. Technical defects cured.

10B-69. Official forms cured.

10B-70 through 10B-98. [Reserved.]

10B-99. Presumption of regularity.

**Article 2.**

**Electronic Notary Act.**

**Part 2. Registration.**

10B-106. Registration with the Secretary of State.

**ARTICLE 1.**

*Notary Public Act.*

**Part 1. General Provisions.**

**§ 10B-1. Short title.**

**Editor's Note. —**

Session Laws 2006-59, s. 32, provides: "The General Statutes Commission shall study the need for additional changes to laws relating to notaries public, the notarization of documents, and the registration of instruments notarized in other jurisdictions. The Commission shall determine whether there is a need for addi-

tional conforming changes in the law that arise from changes made by this act and recommend to the General Assembly any legislation to address the needs identified by this study. The General Statutes Commission shall report the results of its study to either the 2007 or 2009 General Assembly."

**§ 10B-3. Definitions.**

The following definitions apply in this Chapter:

- (1) Acknowledgment. — A notarial act in which a notary certifies that at a single time and place all of the following occurred:

- a. An individual appeared in person before the notary and presented a record.
  - b. The individual was personally known to the notary or identified by the notary through satisfactory evidence.
  - c. The individual did either of the following:
    - i. Indicated to the notary that the signature on the record was the individual's signature.
    - ii. Signed the record while in the physical presence of the notary and while being personally observed signing the record by the notary.
- (2) Affirmation. — A notarial act which is legally equivalent to an oath and in which a notary certifies that at a single time and place all of the following occurred:
- a. An individual appeared in person before the notary.
  - b. The individual was personally known to the notary or identified by the notary through satisfactory evidence.
  - c. The individual made a vow of truthfulness on penalty of perjury, based on personal honor and without invoking a deity or using any form of the word "swear".
- (3) Attest or attestation. — The completion of a certificate by a notary who has performed a notarial act.
- (4) Commission. — The empowerment to perform notarial acts and the written evidence of authority to perform those acts.
- (5) Credible witness. — An individual who is personally known to the notary and to whom all of the following also apply:
- a. The notary believes the individual to be honest and reliable for the purpose of confirming to the notary the identity of another individual.
  - b. The notary believes the individual is not a party to or beneficiary of the transaction.
- (6) Department. — The North Carolina Department of the Secretary of State.
- (7) Director. — The Division Director for the North Carolina Department of the Secretary of State Notary Public Section.
- (8) Jurat. — A notary's certificate evidencing the administration of an oath or affirmation.
- (9) Moral turpitude. — Conduct contrary to expected standards of honesty, morality, or integrity.
- (10) Nickname. — A descriptive, familiar, or shortened form of a proper name.
- (11) Notarial act, notary act, and notarization. — The act of taking an acknowledgment, taking a verification or proof or administering an oath or affirmation that a notary is empowered to perform under G.S. 10B-20(a).
- (12) Notarial certificate and certificate. — The portion of a notarized record that is completed by the notary, bears the notary's signature and seal, and states the facts attested by the notary in a particular notarization.
- (13) Notary public and notary. — A person commissioned to perform notarial acts under this Chapter. A notary is a public officer of the State of North Carolina and shall act in full and strict compliance with this act.
- (14) Oath. — A notarial act which is legally equivalent to an affirmation and in which a notary certifies that at a single time and place all of the following occurred:
- a. An individual appeared in person before the notary.

- b. The individual was personally known to the notary or identified by the notary through satisfactory evidence.
  - c. The individual made a vow of truthfulness on penalty of perjury while invoking a deity or using any form of the word “swear”.
- (15) Official misconduct. — Either of the following:
- a. A notary’s performance of a prohibited act or failure to perform a mandated act set forth in this Chapter or any other law in connection with notarization.
  - b. A notary’s performance of a notarial act in a manner found by the Secretary to be negligent or against the public interest.
- (16) Personal appearance and appear in person before a notary. — An individual and a notary are in close physical proximity to one another so that they may freely see and communicate with one another and exchange records back and forth during the notarization process.
- (17) Personal knowledge or personally know. — Familiarity with an individual resulting from interactions with that individual over a period of time sufficient to eliminate every reasonable doubt that the individual has the identity claimed.
- (18) Principal. — One of the following:
- a. In the case of an acknowledgment, the individual whose identity and due execution of a record is being certified by the notary.
  - b. In the case of a verification or proof, the individual other than a subscribing witness, whose:
    - i. Identity and due execution of the record is being proven; or
    - ii. Signature is being identified as genuine.
  - c. In the case of an oath or affirmation, the individual who makes a vow of truthfulness on penalty of perjury.
- (19) Record. — Information that is inscribed on a tangible medium and called a traditional or paper record.
- (20) Regular place of work or business. — A location, office or other workspace, where an individual regularly spends all or part of the individual’s work time.
- (21) Revocation. — The cancellation of the notary’s commission stated in the order of revocation.
- (22) Satisfactory evidence. — Identification of an individual based on either of the following:
- a. At least one current document issued by a federal, state, or federal or state-recognized tribal government agency bearing the photographic image of the individual’s face and either the signature or a physical description of the individual.
  - b. The oath or affirmation of one credible witness who personally knows the individual seeking to be identified.
- (23) Seal or stamp. — A device for affixing on a paper record an image containing a notary’s name, the words “notary public,” and other information as required in G.S. 10B-37.
- (24) Secretary. — The North Carolina Secretary of State or the Secretary’s designee.
- (25) Repealed by Session Laws 2006-59, s. 1, effective October 1, 2006, except as otherwise set forth in the act, and applicable to notarial acts performed on or after October 1, 2006.
- (26) Subscribing witness. — A person who signs a record for the purpose of being a witness to the principal’s execution of the record or to the principal’s acknowledgment of his or her execution of the record. A subscribing witness may give proof of the execution of the record as provided in subdivision (28) of this section.
- (27) Suspension and restriction. — The termination of a notary’s commission for a period of time stated in an order of restriction or suspension.



The terms “restriction” or “suspension” or a combination of both terms shall be used synonymously.

- (28) Verification or proof. — A notarial act in which a notary certifies that all of the following occurred:
- a. An individual appeared in person before the notary.
  - b. The individual was personally known to the notary or identified by the notary through satisfactory evidence.
  - c. The individual was not a party to or beneficiary of the transaction.
  - d. The individual took an oath or gave an affirmation and testified to one of the following:
    - i. The individual is a subscribing witness and the principal who signed the record did so while being personally observed by the subscribing witness.
    - ii. The individual is a subscribing witness and the principal who signed the record acknowledged his or her signature to the subscribing witness.
    - iii. The individual recognized either the signature on the record of the principal or the signature on the record of the subscribing witness and the signature was genuine. (1991, c. 683, s. 2; 1998-228, s. 2; 2005-391, s. 4; 2006-59, s. 1.)

**Effect of Amendments.** — Session Laws 2006-59, s. 1, effective October 1, 2006, and except as otherwise set forth in this act, appli-

cable to notarial acts performed on or after that date, rewrote the section.

## Part 2. Commissioning.

### § 10B-5. Qualifications.

(a) Except as provided in subsection (d) of this section, the Secretary shall commission as a notary any qualified person who submits an application in accordance with this Chapter.

(b) A person qualified for a notarial commission shall meet all of the following requirements:

- (1) Be at least 18 years of age or legally emancipated as defined in Article 35 of Chapter 7B of the General Statutes.
- (2) Reside or have a regular place of work or business in this State.
- (3) Reside legally in the United States.
- (4) Speak, read, and write the English language.
- (5) Possess a high school diploma or equivalent.
- (6) Pass the course of instruction described in this Article, unless the person is a licensed member of the North Carolina State Bar.
- (7) Purchase and keep as a reference the most recent manual approved by the Secretary that describes the duties and authority of notaries public.
- (8) Submit an application containing no significant misstatement or omission of fact. The application form shall be provided by the Secretary and be available at the register of deeds office in each county. Every application shall include the signature of the applicant written with pen and ink, and the signature shall be acknowledged by the applicant before a person authorized to administer oaths.
- (9) Obtain the recommendation of one publicly elected official in North Carolina and submit the recommendation with the application. The requirement of this subdivision shall not apply to any applicant who seeks to receive the oath of office from the register of deeds of a county where more than 15,000 active notaries public are on record on January 1 of the year when the application is filed.

(c) The notary shall be commissioned in his or her county of residence, unless the notary is not a North Carolina resident, in which case he or she shall be commissioned in the county of his or her employment or business.

(d) The Secretary may deny an application for commission or recommission if any of the following apply to an applicant:

- (1) Submission of an incomplete application or an application containing material misstatement or omission of fact.
- (2) The applicant's conviction or plea of admission or nolo contendere to a felony or any crime involving dishonesty or moral turpitude. In no case may a commission be issued to an applicant within 10 years after release from prison, probation, or parole, whichever is later.
- (3) A finding or admission of liability against the applicant in a civil lawsuit based on the applicant's deceit.
- (4) The revocation, suspension, restriction, or denial of a notarial commission or professional license by this or any other state or nation. In no case may a commission be issued to an applicant within five years after the completion of all conditions of any disciplinary order.
- (5) A finding that the applicant has engaged in official misconduct, whether or not disciplinary action resulted.
- (6) An applicant knowingly using false or misleading advertising in which the applicant as a notary represents that the applicant has powers, duties, rights, or privileges that the applicant does not possess by law.
- (7) A finding by a state bar or court that the applicant has engaged in the unauthorized practice of law. (Code, ss. 3304, 3305; Rev., ss. 2347, 2348; C.S., s. 3172; 1927, c. 117; 1959, c. 1161, s. 2; 1969, c. 563, s. 1; c. 912, s. 1; 1973, c. 680, s. 1; 1983, c. 427, ss. 1, 2; c. 713, s. 22; 1991, c. 683, s. 2; 1995, c. 226, s. 1; 1998-228, s. 3; 1999-337, s.3(a); 2001-450, s. 1; 2002-126, s. 29A.21; 2005-75, s. 1. ; 2005-391, s. 4; 2006-59, s. 2.)

**Effect of Amendments.** — Session Laws 2006-59, s. 2, effective October 1, 2006, and except as otherwise set forth in this act, applicable to notarial acts performed on or after that date, rewrote subdivision (b)(9).

## § 10B-7. Statement of personal qualification.

(a) The application for a notary commission shall include at least all of the following:

- (1) The applicant's full legal name and the name to be used for commissioning, excluding nicknames.
- (2) The applicant's date of birth.
- (3) The mailing address for the applicant's residence, the street address for the applicant's residence, and the telephone number for the applicant's residence.
- (4) The applicant's county of residence.
- (5) The name of the applicant's employer, the street and mailing address for the applicant's employer, and telephone number for the applicant's employer.
- (6) The applicant's last four digits of the applicant's social security number.
- (7) The applicant's personal and business e-mail addresses.
- (8) A declaration that the applicant is a citizen of the United States or proof of the applicant's legal residency in this country.
- (9) A declaration that the applicant can speak, read, and writes in the English language.
- (10) A complete listing of any issuances, denials, revocations, suspensions, restrictions, and resignations of a notarial commission, profes-

sional license, or public office involving the applicant in this or any other state or nation.

(11) A complete listing of any criminal convictions of the applicant, including any pleas of admission or nolo contendere, in this or any other state or nation.

(12) A complete listing of any civil findings or admissions of fault or liability regarding the applicant's activities as a notary, in this or any other state or nation.

(b) The information provided in an application that relates to subdivisions (2), (3), (6), and (7) of subsection (a) of this section shall be considered confidential information and shall not be subject to disclosure under Chapter 132 of the General Statutes. (2005-391, s. 4; 2006-59, s. 3.)

**Effect of Amendments.** — Session Laws 2006-59, s. 3, effective October 1, 2006, and except as otherwise set forth in this act, applicable to notarial acts performed on or after that date, rewrote subsection (b).

## § 10B-10. Commission; oath of office.

(a) If the Secretary grants a commission to an applicant, the Secretary shall notify the appointee and shall instruct the appointee regarding the proper procedure for taking the oath at the register of deeds office in the county of the appointee's commissioning.

(b) The appointee shall appear before the register of deeds no later than 45 days after commissioning and shall be duly qualified by taking the general oath of office prescribed in G.S. 11-11 and the oath prescribed for officers in G.S. 11-7.

(c) After the appointee qualifies by taking the oath of office required under subsection (b) of this section, the register of deeds shall place the notary record in a book designated for that purpose, or the notary record may be recorded in the Consolidated Document Book and indexed in the Consolidated Real Property Index under the notary's name in the grantor index. The notary record may be kept in electronic format so long as the signature of the notary public may be viewed and printed. The notary record shall contain the name and the signature of the notary as commissioned, the effective date and expiration date of the commission, the date the oath was administered, and the date of any restriction, suspension, revocation, or resignation. The record shall constitute the official record of the qualification of notaries public.

(d) The register of deeds shall deliver the commission to the notary following completion of the requirements of this section and shall notify the Secretary of the delivery.

(e) If the appointee does not appear before the register of deeds within 45 days of commissioning, the register of deeds must return the commission to the Secretary, and the appointee must reapply for commissioning. If the appointee reapplies within one year of the granting of the commission, the Secretary may waive the educational requirements of this Chapter. (Code, ss. 3304, 3305; Rev., ss. 2347, 2348; C.S., s. 3173; 1969, c. 912, s. 2; 1973, c. 680, s. 1; 1991, c. 683, s. 2; 2005-391, s. 4; 2006-59, s. 4.)

**Effect of Amendments.** — Session Laws 2006-59, s. 4, effective October 1, 2006, and except as otherwise set forth in this act, applicable to notarial acts performed on or after that date, in subsection (c), inserted "After the appointee qualifies by taking the oath of office required under subsection (b) of this section," preceding "register of deeds shall" and deleted "then" thereafter in the first sentence.



## § 10B-11. Recommissioning.

(a) A commissioned notary may apply for recommissioning no earlier than 10 weeks prior to the expiration date of the notary's commission.

(b) A notary whose commission has not expired must comply with the following requirements to be recommissioned:

- (1) Submit a new application meeting the requirements of G.S. 10B-6, except for G.S. 10B-6(2).
- (2) Meet all the requirements of G.S. 10B-5(b), except for G.S. 10B-5(b)(5), (6), and (9).
- (3) Achieve a passing score on the written examination required under G.S. 10B-8(b). This requirement does not apply if the notary is a licensed member of the North Carolina State Bar, or if the notary has been continuously commissioned in North Carolina since July 10, 1991, and has never been disciplined by the Secretary.

(c) An individual may apply for recommissioning within one year after the expiration of the individual's commission. The individual must comply with the requirement of subsection (b) of this section. The individual must also fulfill the educational requirement under G.S. 10B-8(a), unless the Secretary waives that requirement. (1991, c. 683, s. 2; 1995, c. 226, s. 2; 2005-391, s. 4; 2006-59, s. 5.)

### Editor's Note. —

Session Laws 2006-59, s. 33, makes the amendment to subsection (b)(3) of this section effective July 1, 2006. The remainder of the act is effective October 1, 2006, and except as

otherwise set forth in the act, applies to notarial acts performed on or after that date.

**Effect of Amendments.** — Session Laws 2006-59, s. 5, effective July 1, 2006, rewrote subdivisions (b)(1) through (b)(3).

## Part 3. Notarial Acts, Powers, and Limitations.

## § 10B-20. Powers and limitations.

(a) A notary may perform any of the following notarial acts:

- (1) Acknowledgments.
- (2) Oaths and affirmations.
- (3) Repealed by Session Laws 2006-59, s. 6, effective October 1, 2006, and except as otherwise set forth in the act, applicable to notarial acts performed on or after October 1, 2006.
- (4) Verifications or proofs.

(b) A notarial act shall be attested by all of the following:

- (1) The signature of the notary, exactly as shown on the notary's commission.
- (2) The legible appearance of the notary's name exactly as shown on the notary's commission. The legible appearance of the name may be ascertained from the notary's typed or printed name near the notary's signature or from elsewhere in the notarial certificate or from the notary's seal if the name is legible.
- (3) The clear and legible appearance of the notary's stamp or seal.
- (4) A statement of the date the notary's commission expires. The statement of the date that the notary's commission expires may appear in the notary's stamp or seal or elsewhere in the notarial certificate.

(c) A notary shall not perform a notarial act if any of the following apply:

- (1) The principal or subscribing witness is not in the notary's presence at the time the notarial act is performed. However, nothing in this Chapter shall require a notary to complete the notarial certificate attesting to the notarial act in the presence of the principal or subscribing witness.

- (2) The principal or subscribing witness is not personally known to the notary or identified by the notary through satisfactory evidence.
- (2a) The credible witness is not personally known to the notary.
- (3), (4) Repealed by Session Laws 2006-59, s. 8, effective October 1, 2006, and except as otherwise set forth in the act, applicable to notarial acts performed on or after October 1, 2006.
- (5) The notary is a signer of, party to, or beneficiary of the record, that is to be notarized. However, a disqualification under this subdivision shall not apply to a notary who is named in a record solely as the trustee in a deed of trust, the drafter of the record, the person to whom a registered document should be mailed or sent after recording, or the attorney for a party to the record, so long as the notary is not also a party to the record individually or in some other representative or fiduciary capacity.
- (6) The notary will receive directly from a transaction connected with the notarial act any commission, fee, advantage, right, title, interest, cash, property, or other consideration exceeding in value the fees specified in G.S. 10B-31, other than fees or other consideration paid for services rendered by a licensed attorney, a licensed real estate broker or salesperson, a motor vehicle dealer, or a banker.
- (d) A notary may certify the affixation of a signature by mark on a record presented for notarization if:
  - (1) The mark is affixed in the presence of the notary;
  - (2) The notary writes below the mark: "Mark affixed by (name of signer by mark) in presence of undersigned notary"; and
  - (3) The notary notarizes the signature by performing an acknowledgment, oath or affirmation, jurat, or verification or proof.
- (e) If a principal is physically unable to sign or make a mark on a record presented for notarization, that principal may designate another person as his or her designee, who shall be a disinterested party, to sign on the principal's behalf pursuant to the following procedure:
  - (1) The principal directs the designee to sign the record in the presence of the notary and two witnesses unaffected by the record;
  - (2) The designee signs the principal's name in the presence of the principal, the notary, and the two witnesses;
  - (3) Both witnesses sign their own names to the record near the principal's signature;
  - (4) The notary writes below the principal's signature: "Signature affixed by designee in the presence of (names and addresses of principal and witnesses)"; and
  - (5) The notary notarizes the signature through an acknowledgment, oath or affirmation, jurat, or verification or proof.
- (f) A notarial act performed in another jurisdiction in compliance with the laws of that jurisdiction is valid to the same extent as if it had been performed by a notary commissioned under this Chapter if the notarial act is performed by a notary public of that jurisdiction or by any person authorized to perform notarial acts in that jurisdiction under the laws of that jurisdiction, the laws of this State, or federal law.
- (g) Persons authorized by federal law or regulation to perform notarial acts may perform the acts for persons serving in or with the United States armed forces, their spouses, and their dependents.
- (h) The Secretary and register of deeds in the county in which a notary qualified may certify to the commission of the notary.
- (i) A notary public who is not an attorney licensed to practice law in this State who advertises the person's services as a notary public in a language other than English, by radio, television, signs, pamphlets, newspapers, other



written communication, or in any other manner, shall post or otherwise include with the advertisement the notice set forth in this subsection in English and in the language used for the advertisement. The notice shall be of conspicuous size, if in writing, and shall state: "I AM NOT AN ATTORNEY LICENSED TO PRACTICE LAW IN THE STATE OF NORTH CAROLINA, AND I MAY NOT GIVE LEGAL ADVICE OR ACCEPT FEES FOR LEGAL ADVICE." If the advertisement is by radio or television, the statement may be modified but must include substantially the same message.

(j) A notary public who is not an attorney licensed to practice law in this State is prohibited from representing or advertising that the notary public is an "immigration consultant" or expert on immigration matters unless the notary public is an accredited representative of an organization recognized by the Board of Immigration Appeals pursuant to Title 8, Part 292, section 2(a-e) of the Code of Federal Regulations (8 C.F.R. § 292.2(a-e)).

(k) A notary public who is not an attorney licensed to practice law in this State is prohibited from rendering any service that constitutes the unauthorized practice of law. A nonattorney notary shall not assist another person in drafting, completing, selecting, or understanding a record or transaction requiring a notarial act.

(l) A notary public required to comply with the provisions of subsection (i) of this section shall prominently post at the notary public's place of business a schedule of fees established by law, which a notary public may charge. The fee schedule shall be written in English and in the non-English language in which the notary services were solicited and shall contain the notice required in subsection (i) of this section, unless the notice is otherwise prominently posted at the notary public's place of business.

(m) If notarial certificate wording is not provided or indicated for a record, a notary who is not also a licensed attorney shall not determine the type of notarial act or certificate to be used. This does not prohibit a notary from offering the selection of certificate forms recognized in this Chapter or as otherwise authorized by law.

(n) A notary shall not claim to have powers, qualifications, rights, or privileges that the office of notary does not provide, including the power to counsel on immigration matters.

(o) Before signing a notarial certificate and except as provided in this subsection, a notary shall cross out or mark through all blank lines or spaces in the certificate. However:

- (1) Notwithstanding the provisions of this section, a notary shall not be required to complete, cross out, or mark through blank lines or spaces in the notary certificate form provided for in G.S. 47-43 indicating when and where a power of attorney is recorded if that recording information is not known to the notary at the time the notary completes and signs the certificate;
- (2) A notary's failure to cross out or mark through blank lines or spaces in a notarial certificate shall not affect the sufficiency, validity, or enforceability of the certificate or the related record; and
- (3) A notary's failure to cross out or mark through blank lines or spaces in a notarial certificate shall not be grounds for a register of deeds to refuse to accept a record for registration. (1866, c. 30; 1879, c. 128; Code, s. 3307; Rev., ss. 2350, 2351a, 2352; C.S., ss. 3175, 3177, 3179; 1951, c. 1006, s. 1; 1953, c. 836; 1961, c. 733; 1967, c. 24, s. 22; c. 984; 1973, c. 680, s. 1; 1977, c. 375, s. 5; 1991, c. 683, s. 2; 1998-228, s. 5; 2001-450, s. 2; 2001-487, s. 121; 2005-391, s. 4; 2006-59, ss. 6-12; 2006-199, s. 1.)



**Effect of Amendments.** — Session Laws 2006-59, ss. 6-12, effective October 1, 2006, and except as otherwise set forth in this act, applicable to notarial acts performed on or after that date, deleted former subdivision (a)(3) which read: “Execute jurats”; rewrote subdivision (b)(2) and added the last sentence in subdivision (b)(4); substituted “shall not perform” for “is disqualified from performing” in subsection (c); in subdivision (c)(1), added “However” “notarial” and “attesting to the notarial act” in the second sentence and made a minor stylistic change; added subdivision (c)(2a); deleted former subdivisions (c)(3) and (c)(4) and rewrote subdivision (c)(5); substituted “Persons”

for “Commissioned officers on active duty in the United States armed forces who are authorized to perform notarial acts and other persons” in subsection (g); substituted “subsection (i)” for “subsection (g)” in the first sentence of subsection (l); in subsection (m), deleted “nonattorney” preceding “notary” and added “who is not also a licensed attorney” thereafter; and substituted “section” for “section or G.S. 10B-35(b)” in subdivision (o)(1).

Session Laws 2006-199, s. 1, effective October 1, 2006, substituted “subsection (i)” for “subsection (g)” in the first sentence of subsection (l).

## § 10B-23. Improper records.

(a) A notary shall not notarize a signature on a record without a notarial certificate indicating what type of notarial act was performed. However, a notary may administer an oath or affirmation without completing a jurat.

(b) A notary shall neither certify, notarize, nor authenticate a photograph. A notary may notarize an affidavit regarding and attached to a photograph. (2005-391, s. 4; 2006-59, s. 13.)

**Effect of Amendments.** — Session Laws 2006-59, s. 13, effective October 1, 2006, and except as otherwise set forth in this act, appli-

cable to notarial acts performed on or after that date, added the last sentence in subsection (a).

## Part 4. Fees.

### § 10B-31. Fees for notarial acts.

The maximum fees that may be charged by a notary for notarial acts are as follows:

- (1) For acknowledgments, jurats, verifications or proofs, five dollars (\$5.00) per principal signature.
- (2) For oaths or affirmations without a signature, five dollars (\$5.00) per person, except for an oath or affirmation administered to a credible witness to vouch for the identity of a principal or subscribing witness. (Code, s. 3749; 1889, c. 446; 1895, c. 296; 1903, c. 734; Rev., s. 2800; C.S., s. 3178; 1973, c. 680, s. 1; 1977, c. 429, ss. 1, 2; 1981, c. 872; 1991, c. 683, s. 2; 1998-228, s. 6; 2005-328, s. 1.; 2005-391, s. 4; 2006-59, s. 14.)

**Effect of Amendments.** — Session Laws 2006-59, s. 14, effective October 1, 2006, and except as otherwise set forth in this act, applicable to notarial acts performed on or after that

date, substituted “the identity of a principal or subscribing witness” for “a principal’s identity” in subdivision (2).

## Part 5. Signature and Seal.

### § 10B-35. Official signature.

When notarizing a paper record, a notary shall sign by hand in ink on the notarial certificate. The notary shall comply with the requirements of G.S. 10B-20(b)(1) and (b)(2). The notary shall affix the official signature only after

the notarial act is performed. The notary shall not sign a paper record using the facsimile stamp or an electronic or other printing method. (2005-391, s. 4; 2006-59, s. 15.)

**Effect of Amendments.** — Session Laws 2006-59, s. 15, effective October 1, 2006, and except as otherwise set forth in this act, appli-

cable to notarial acts performed on or after that date, rewrote the section.

## § 10B-36. Official seal.

(a) A notary shall keep an official seal or stamp that is the exclusive property of the notary. The notary shall keep the seal in a secure location. A notary shall not allow another person to use or possess the seal, and shall not surrender the seal to the notary's employer upon termination of employment.

(b) The seal shall be affixed only after the notarial act is performed. The notary shall place the image or impression of the seal near the notary's signature on every paper record notarized. The seal and the notary's signature shall appear on the same page of a record as the text of the notarial certificate.

(c) A notary shall do the following within 10 days of discovering that the notary's seal has been lost or stolen:

(1) Inform the appropriate law enforcement agency in the case of theft or vandalism.

(2) Notify the appropriate register of deeds and the Secretary in writing and signed in the official name in which he or she was commissioned.

(d) As soon as is reasonably practicable after resignation, revocation, or expiration of a notary commission, or death of the notary, the seal shall be delivered to the Secretary for disposal. (1973, c. 680, s. 1; 1991, c. 683, s. 2; 1998-228, s. 7; 2005-391, s. 4; 2006-59, s. 16.)

**Effect of Amendments.** — Session Laws 2006-59, s. 16, effective October 1, 2006, and except as otherwise set forth in this act, applicable to notarial acts performed on or after that date, in subsection (a), deleted "(herein 'seal') following 'seal or stamp' in the first sentence, and substituted 'location' for 'location that is accessible only to the notary' in the second

sentence; in subsection (b), inserted "notary's" preceding "signature shall appear on the same" and added "of a record as the text of the notarial certificate" at the end of the last sentence; and substituted "lost or stolen" for "stolen, lost, damaged, or otherwise rendered incapable of affixing a legible image" in subsection (c).

## § 10B-37. Seal image.

(a) A notary shall affix the notary's official seal near the notary's official signature on the notarial certificate of a record.

(b) A notary's official seal shall include all of the following elements:

(1) The notary's name exactly as commissioned.

(2) The words "Notary Public".

(3) The county of commissioning, including the word "County" or the abbreviation "Co.".

(4) The words "North Carolina" or the abbreviation "NC".

(c) The notary seal may be either circular or rectangular in shape. Upon receiving a commission or a recommission on or after October 1, 2006, a notary shall not use a circular seal that is less than 1 ½ inches, nor more than 2 inches in diameter. The rectangular seal shall not be over 1 inch high and 2 ½ inches long. The perimeter of the seal shall contain a border that is visible when impressed.

(c1) Alterations to any information contained within the seal as embossed or stamped on the record are prohibited.



(d) A notarial seal, as it appears on a record, may contain the permanently imprinted, handwritten, or typed date the notary's commission expires.

(e) Any reference in the General Statutes to the seal of a notary shall include the stamp of a notary, and any reference to the stamp of a notary shall include the seal of the notary.

(f) The failure of a notarial seal to comply with the requirements of this section shall not affect the sufficiency, validity, or enforceability of the notarial certificate, but shall constitute a violation of the notary's duties. (2005-391, s. 4; 2006-59, s. 17.)

**Effect of Amendments.** — Session Laws 2006-59, s. 17, effective October 1, 2006, and except as otherwise set forth in this act, applicable to notarial acts performed on or after that date, rewrote the section.

## Part 6. Certificate Forms.

### § 10B-40. Notarial certificates in general.

(a) A notary shall not make or give a notarial certificate unless the notary has either personal knowledge or satisfactory evidence of the identity of the principal or, if applicable, the subscribing witness.

(a1) By making or giving a notarial certificate, whether or not stated in the certificate, a notary certifies as follows:

- (1) As to an acknowledgment, all those things described in G.S. 10B-3(1).
- (2) As to an affirmation, all those things described in G.S. 10B-3(2).
- (3) As to an oath, all those things described in G.S. 10B-3(14).
- (4) As to a verification or proof, all those things described in G.S. 10B-3(28).

(a2) In addition to the certifications under subsection (a1) of this section, by making or giving a notarial certificate, whether or not stated in the certificate, a notary certifies to all of the following:

- (1) At the time the notarial act was performed and the notarial certificate was signed by the notary, the notary was lawfully commissioned, the notary's commission had neither expired nor been suspended, the notarial act was performed within the geographic limits of the notary's commission, and the notarial act was performed in accordance with the provision of this Chapter.
- (2) If the notarial certificate is for an acknowledgment or the administration of an oath or affirmation, the person whose signature was notarized did not appear in the judgment of the notary to be incompetent, lacking in understanding of the nature and consequences of the transaction requiring the notarial act, or acting involuntarily, under duress, or undue influence.
- (3) The notary was not prohibited from acting under G.S. 10-20(c).

(a3) The inclusion of additional information in a notarial certificate, including the representative or fiduciary capacity in which a person signed or the means a notary used to identify a principal, shall not invalidate an otherwise sufficient notarial certificate.

(b) A notarial certificate for the acknowledgment taken by a notary of a principal who is an individual acting in his or her own right or who is an individual acting in a representative or fiduciary capacity is sufficient and shall be accepted in this State if it is substantially in the form set forth in G.S. 10B-41, if it is substantially in a form otherwise prescribed by the laws of this State, or if it includes all of the following:

- (1) Identifies the state and county in which the acknowledgment occurred.
- (2) Names the principal who appeared in person before the notary.



- (3) Repealed by Session Laws 2006-59, s. 18, effective October 1, 2006, and except as otherwise set forth in the act, applicable to notarial acts performed on or after October 1, 2006.
- (4) Indicates that the principal appeared in person before the notary and the principal acknowledged that he or she signed the record.
- (5) States the date of the acknowledgment.
- (6) Contains the signature and seal or stamp of the notary who took the acknowledgment.
- (7) States the notary's commission expiration date.

(c) A notarial certificate for the verification or proof of the signature of a principal by a subscribing witness taken by a notary is sufficient and shall be accepted in this State if it is substantially in the form set forth in G.S. 10B-42, if it is substantially in a form otherwise prescribed by the laws of this State, or if it includes all of the following:

- (1) Identifies the state and county in which the verification or proof occurred.
- (2) Names the subscribing witness who appeared in person before the notary.
- (3) Repealed by Session Laws 2006-59, s. 18, effective October 1, 2006.
- (4) Names the principal whose signature on the record is to be verified or proven.
- (5) Indicates that the subscribing witness certified to the notary under oath or by affirmation that the subscribing witness is not a party to or beneficiary of the transaction, signed the record as a subscribing witness, and either (i) witnessed the principal sign the record, or (ii) witnessed the principal acknowledge the principal's signature on the record.
- (6) States the date of the verification or proof.
- (7) Contains the signature and seal or stamp of the notary who took the verification or proof.
- (8) States the notary's commission expiration date.

(c1) A notarial certificate for the verification or proof of the signature of a principal or a subscribing witness by a nonsubscribing witness taken by a notary is sufficient and shall be accepted in this State if it is substantially in the form set forth in G.S. 10B-42.1, if it is substantially in a form otherwise prescribed by the laws of this State, or if it includes all of the following:

- (1) Identifies the state and county in which the verification or proof occurred.
- (2) Names the nonsubscribing witness who appeared in person before the notary.
- (3) Names the principal or subscribing witness whose signature on the record is to be verified or proven.
- (4) Indicates that the nonsubscribing witness certified to the notary under oath or by affirmation that the nonsubscribing witness is not a party to or beneficiary of the transaction and that the nonsubscribing witness recognizes the signature of either the principal or the subscribing witness and that the signature is genuine.
- (5) States the date of the verification or proof.
- (6) Contains the signature and seal or stamp of the notary who took the verification or proof.
- (7) States the notary's commission expiration date.

(d) A notarial certificate for an oath or affirmation taken by a notary is sufficient and shall be accepted in this State if it is substantially in the form set forth in G.S. 10B-43, if it is substantially in a form otherwise prescribed by the laws of this State, or if it includes all of the following:

- (1) Repealed by Session Laws 2006-59, s. 18, effective October 1, 2006.

- (2) Names the principal who appeared in person before the notary unless the name of the principal otherwise is clear from the record itself.
- (3) Repealed by Session Laws 2006-59, s. 18, effective October 1, 2006.
- (4) Indicates that the principal who appeared in person before the notary signed the record in question and certified to the notary under oath or by affirmation as to the truth of the matters stated in the record.
- (5) States the date of the oath or affirmation.
- (6) Contains the signature and seal or stamp of the notary who took the oath or affirmation.
- (7) States the notary's commission expiration date.

(e) Any notarial certificate made in another jurisdiction shall be sufficient in this State if it is made in accordance with federal law or the laws of the jurisdiction where the notarial certificate is made.

(f) On records to be filed, registered, recorded, or delivered in another state or jurisdiction of the United States, a North Carolina notary may complete any notarial certificate that may be required in that other state or jurisdiction.

(g) Nothing in this Chapter shall be deemed to authorize the use of a notarial certificate authorized by this Part in place of or as an alternative to a notarial certificate required by any other provision of the General Statutes outside of Chapter 47 of the General Statutes that prescribes the specific form or content for a notarial certificate including G.S. 31-11.6, Chapter 32A of the General Statutes, and G.S. 90-321. However, any statute that permits or requires the use of a notarial certificate contained within Chapter 47 of the General Statutes may also be satisfied by the use of a notarial certificate permitted by this Part. Any form of acknowledgment or probate authorized under Chapter 47 of the General Statutes shall be conclusively deemed in compliance with the requirements of this section.

(h) If an individual signs a record and purports to be acting in a representative or fiduciary capacity, that individual is also deemed to represent to the notary that he or she is signing the record with proper authority to do so and also is signing the record on behalf of the person or entity represented and identified therein or in the fiduciary capacity indicated therein. In performing a notarial act in relation to an individual described under this subsection, a notary is under no duty to verify whether the individual acted in a representative or fiduciary capacity or, if so, whether the individual was duly authorized so to do. A notarial certificate may include any of the following:

- (1) A statement that an individual signed a record in a particular representative or fiduciary capacity.
- (2) A statement that the individual who signed the record in a representative or fiduciary capacity had due authority so to do.
- (3) A statement identifying the represented person or entity or the fiduciary capacity. (2005-391, s. 4; 2006-59, s. 18.)

**Effect of Amendments.** — Session Laws 2006-59, s. 18, effective October 1, 2006, and except as otherwise set forth in this act, applicable to notarial acts performed on or after that date, rewrote the section.

## § 10B-41. Notarial certificate for an acknowledgment.

(a) When properly completed by a notary, a notarial certificate that substantially complies with the following form may be used and shall be sufficient under the law of this State to satisfy the requirements for a notarial certificate for the acknowledgment of a principal who is an individual acting in his or her own right or who is an individual acting in a representative or fiduciary capacity. The authorization of the form in this section does not preclude the use of other forms.



\_\_\_\_\_ County, North Carolina

I certify that the following person(s) personally appeared before me this day, each acknowledging to me that he or she signed the foregoing document: name(s) of principal(s).

Date: \_\_\_\_\_

Official Signature of Notary

Notary's printed or typed name, Notary Public

(Official Seal)

My commission expires: \_\_\_\_\_

(b) Repealed by Session Laws 2006-59, s. 19, effective October 1, 2006, and except as otherwise set forth in the act, applicable to notarial acts performed on or after October 1, 2006.

(c) The notary's printed or typed name as shown in the form provided in subsection (a) of this section is not required if the legible appearance of the notary's name may be ascertained from the notary's typed or printed name near the notary's signature or from elsewhere in the notarial certificate or from the notary's seal if the name is legible. (2005-391, s. 4; 2006-59, s. 19.)

**Effect of Amendments.** — Session Laws 2006-59, s. 19, effective October 1, 2006, and except as otherwise set forth in this act, appli-

cable to notarial acts performed on or after that date, rewrote the section.

## § 10B-42. Notarial certificate for a verification or of subscribing witness.

(a) When properly completed by a notary, a notarial certificate in substantially the following form may be used and shall be sufficient under the law of this State to satisfy the requirements for a notarial certificate for the verification or proof of the signature of a principal by a subscribing witness. The authorization of the form in this section does not preclude the use of other forms.

\_\_\_\_\_ County, North Carolina

I certify that (name of subscribing witness) personally appeared before me this day and certified to me under oath or by affirmation that he or she is not a grantee or beneficiary of the transaction, signed the foregoing document as a subscribing witness, and either (i) witnessed (name of principal) sign the foregoing document or (ii) witnessed (name of principal) acknowledge his or her signature on the already-signed document.

Date: \_\_\_\_\_

Official Signature of Notary

Notary's printed or typed name, Notary Public

(Official Seal)

My commission expires: \_\_\_\_\_

(b) Repealed by Session Laws 2006-59, s. 20, effective October 1, 2006, except as otherwise set forth in the act, and applicable to notarial acts performed on or after October 1, 2006.

(c) The notary's printed or typed name as shown in the form provided in subsection (a) of this section is not required if the legible appearance of the notary's name may be ascertained from the notary's typed or printed name near the notary's signature or from elsewhere in the notarial certificate or from the notary's seal if the name is legible. (2005-391, s. 4; 2006-59, s. 20.)

**Effect of Amendments.** — Session Laws 2006-59, s. 20, effective October 1, 2006, and except as otherwise set forth in this act, appli-

cable to notarial acts performed on or after that date, rewrote the section.



**§ 10B-42.1. Notarial certificate for a verification of nonsubscribing witness.**

(a) When properly completed by a notary, a notarial certificate in substantially the following form may be used and shall be sufficient under the law of this State to satisfy the requirements for a notarial certificate for the verification or proof of the signature of a principal or subscribing witness by a nonsubscribing witness. The authorization of the form in this section does not preclude the use of other forms.

\_\_\_\_\_ County, North Carolina

I certify (name of nonsubscribing witness) personally appeared before me this day and certified to me under oath or by affirmation that he or she is not a grantee or beneficiary of the transaction, that (name of nonsubscribing witness) recognizes the signature of (name of the principal or the subscribing witness) and that the signature is genuine.

Date: \_\_\_\_\_

Official Signature of Notary  
Notary's printed or typed name, Notary  
Public

(Official Seal)

My commission expires: \_\_\_\_\_

(b) The notary's printed or typed name as shown in the form provided in subsection (a) of this section is not required if the legible appearance of the notary's name may be ascertained from the notary's typed or printed name near the notary's signature or from elsewhere in the notarial certificate or from the notary's seal if the name is legible. (2006-59, s. 21.)

**Editor's Note.** — Session Laws 2006-59, s. 33, made this section effective October 1, 2006, and except as otherwise set forth in the act, applicable to notarial acts performed on or after that date.

**§ 10B-43. Notarial certificate for an oath or affirmation.**

(a) When properly completed by a notary, a notarial certificate that substantially complies with either of the following forms may be used and shall be sufficient under the law of this State to satisfy the requirements for a notarial certificate for an oath or affirmation. The authorization of the forms in this section does not preclude the use of other forms.

\_\_\_\_\_ County, North Carolina

Signed and sworn to before me this day by (name of principal).

Date: \_\_\_\_\_

Official Signature of Notary  
Notary's printed or typed name, Notary  
Public

(Official Seal)

My commission expires: \_\_\_\_\_

-OR-

\_\_\_\_\_ County, North Carolina

Sworn to and subscribed before me this day by (name of principal).

Date: \_\_\_\_\_

Official Signature of Notary  
Notary's printed or typed name, Notary  
Public

(Official Seal)

My commission expires: \_\_\_\_\_

(b) Repealed by Session Laws 2006-59, s. 22, effective October 1, 2006, except as otherwise set forth in the act, and applicable to notarial acts performed on or after October 1, 2006.

(c) The notary's printed or typed name as shown in the form provided in subsection (a) of this section is not required if the legible appearance of the notary's name may be ascertained from the notary's typed or printed name near the notary's signature or from elsewhere in the notarial certificate or from the notary's seal if the name is legible.

(d) In either of the forms provided under subsection (a) of this section all of the following shall apply:

- (1) The name of the principal may be omitted if the name of the principal is located near the jurat, and the principal who so appeared before the notary is clear from the record itself.
- (2) The words "affirmed" or "sworn to or affirmed" may be substituted for the words "sworn to". (2005-391, s. 4; 2006-59, s. 22.)

**Effect of Amendments.** — Session Laws 2006-59, s. 22, effective October 1, 2006, and except as otherwise set forth in the act, appli-

cable to notarial acts performed on or after that date, rewrote the section.

## Part 8. Enforcement, Sanctions, and Remedies.

### § 10B-60. Enforcement and penalties.

(a) The Secretary may issue a warning to a notary or restrict, suspend, or revoke a notarial commission for a violation of this Chapter and on any ground for which an application for a commission may be denied under this Chapter. Any period of restriction, suspension, or revocation shall not extend the expiration date of a commission.

(b) Except as otherwise permitted by law, a person who commits any of the following acts is guilty of a Class 1 misdemeanor:

- (1) Holding one's self out to the public as a notary if the person does not have a commission.
- (2) Performing a notarial act if the person's commission has expired or been suspended or restricted.
- (3) Performing a notarial act before the person had taken the oath of office.

(c) A notary shall be guilty of a Class 1 misdemeanor if the notary does any of the following:

- (1) Takes an acknowledgment or administers an oath or affirmation without the principal appearing in person before the notary.
- (2) Takes a verification or proof without the subscribing witness appearing in person before the notary.
- (3) Takes an acknowledgment or administers an oath or affirmation without personal knowledge or satisfactory evidence of the identity of the principal.
- (4) Takes a verification or proof without personal knowledge or satisfactory evidence of the identity of the subscribing witness.

(d) A notary shall be guilty of a Class I felony if the notary does any of the following:

- (1) Takes an acknowledgment or a verification or a proof, or administers an oath or affirmation if the notary knows it is false or fraudulent.
- (2) Takes an acknowledgment or administers an oath or affirmation without the principal appearing in person before the notary if the notary does so with the intent to commit fraud.

(3) Takes a verification or proof without the subscribing witness appearing in person before the notary if the notary does so with the intent to commit fraud.

(e) It is a Class I felony for any person to perform notarial acts in this State with the knowledge that the person is not commissioned under this Chapter.

(f) Any person who without authority obtains, uses, conceals, defaces, or destroys the seal or notarial records of a notary is guilty of a Class I felony.

(g) For purposes of enforcing this Chapter and Article 34 of Chapter 66 of the General Statutes, the law enforcement agents of the Department of the Secretary of State have statewide jurisdiction and have all of the powers and authority of law enforcement officers. The agents have the authority to assist local law enforcement agencies in their investigations and to initiate and carry out, on their own or in coordination with local law enforcement agencies, investigations of violations.

(h) Resignation or expiration of a notarial commission does not terminate or preclude an investigation into a notary's conduct by the Secretary, who may pursue the investigation to a conclusion, whereupon it may be a matter of public record whether or not the finding would have been grounds for disciplinary action.

(i) The Secretary may seek injunctive relief against any person who violates the provisions of this Chapter. Nothing in this Chapter diminishes the authority of the North Carolina State Bar.

(j) Any person who knowingly solicits, coerces, or in any material way influences a notary to commit official misconduct, is guilty as an aider and abettor and is subject to the same level of punishment as the notary.

(k) The sanctions and remedies of this Chapter supplement other sanctions and remedies provided by law, including, but not limited to, forgery and aiding and abetting. (1991, c. 683, s. 2; 1993, c. 539, ss. 6-8, 1121; 1994 Ex. Sess., c. 24, s. 14(c); 1995, c. 226, s. 4; 2001-450, s. 3; 2005-391, s. 4; 2006-59, s. 23.)

**Effect of Amendments.** — Session Laws 2006-59, s. 23, effective October 1, 2006, and except as otherwise set forth in the act, applicable to notarial acts performed on or after that

date, substituted "issue a warning to a notary or" for "warn" in the first sentence of subsection (a); added "or restricted" at the end of subdivision (b)(2); and rewrote subsections (c) and (d).

## Part 9. Validation of Notarial Acts.

### § 10B-67. Erroneous commission expiration date cured.

An erroneous statement of the date that the notary's commission expires shall not affect the sufficiency, validity, or enforceability of the notarial certificate or the related record if the notary is, in fact, lawfully commissioned at the time of the notarial act. (2006-59, s. 24.)

**Editor's Note.** — Session Laws 2006-59, s. 33, made this section effective October 1, 2006, and except as otherwise set forth in the act,

applicable to notarial acts performed on or after that date.

### § 10B-68. Technical defects cured.

(a) Technical defects, errors, or omissions in a notarial certificate shall not affect the sufficiency, validity, or enforceability of the notarial certificate or the related instrument or document. This subsection applies to notarial certificates made on or after December 1, 2005.

(b) Defects in the commissioning or recommissioning of a notary that are approved by the Department are cured. This subsection applies to commissions and recommissions issued on or after December 1, 2005.



(c) As used in this section, a technical defect includes those cured under G.S. 10B-37(f) and G.S. 10B-67. Other technical defects include the absence of the legible appearance of the notary's name exactly as shown on the notary's commission as required in G.S. 10B-20(b). This subsection applies to notarial certificates made on or after December 1, 2005. (2006-59, s. 24; 2006-199, s. 2.)

**Editor's Note.** — Session Laws 2006-59, s. 33, made this section effective October 1, 2006, and except as otherwise set forth in the act, applicable to notarial acts performed on or after that date.

Session Laws 2006-199, s. 5, provides that G.S. 10B-68(a) and (b), as enacted in Section 24 of S.L. 2006-59, and as amended in Section 2 of this act, become effective July 1, 2006.

2006-199, s. 2, effective July 1, 2006, added the second sentence of subsection (a); added subsection (b); redesignated former subsection (b) as present subsection (c); and, in subsection (c), deleted “and defects in the commissioning or recommissioning of the notary that were approved by the Department under this Chapter” at the end of the second sentence and added the third sentence.

**Effect of Amendments.** — Session Laws

§ 10B-69. Official forms cured.

(a) The notarial certificate contained in a form issued by a State agency prior to October 1, 2006, is deemed to be a valid certificate provided the certificate complied with the law at the time the form was issued.

(b) The notarization using a certificate under subsection (a) of this section shall be deemed valid if executed in compliance with the law at the time the form was issued. (2006-59, s. 24.)

**Editor's Note.** — Session Laws 2006-59, s. 33, made this section effective October 1, 2006, and except as otherwise set forth in the act,

applicable to notarial acts performed on or after that date.

§§ 10B-70 through 10B-98: Reserved for future codification purposes.

§ 10B-99. Presumption of regularity.

(a) In the absence of evidence of fraud on the part of the notary, or evidence of a knowing and deliberate violation of this Article by the notary, the courts shall grant a presumption of regularity to notarial acts so that those acts may be upheld, provided there has been substantial compliance with the law. Nothing in this Chapter modifies or repeals the common law doctrine of substantial compliance in effect on November 30, 2005.

(b) A notarial act performed before October 1, 2006, shall be deemed valid if it complies with the law as it existed on or before December 1, 2005. (2006-59, s. 24; 2006-199, s. 4.)

**Editor's Note.** — Session Laws 2006-59, s. 33, as amended by Session Laws 2006-199, s. 4, made this section effective July 3, 2006, and

except as otherwise set forth in the act, applicable to notarial acts performed on or after that date.

ARTICLE 2.

*Electronic Notary Act.*

Part 2. Registration.

§ 10B-106. Registration with the Secretary of State.

(a) Before performing notarial acts electronically, a notary shall register the capability to notarize electronically with the Secretary.

(b) The term of registration as an electronic notary shall coincide with the term of the notary's commission under Article 1 of this Chapter.

(c) An electronic notary shall reregister the capability to notarize electronically at the same time the notary applies for recommissioning under the requirements of Article 1 of this Chapter.

(d) An electronic form shall be used by an electronic notary in registering with the Secretary and it shall include, at least all of the following:

- (1) The applicant's full legal name and the name to be used for commissioning, excluding nicknames.
- (2) The state and county of commissioning of the registrant.
- (3) The expiration date of the registrant's notary commission.
- (4) Proof of successful completion of the course of instruction on electronic notarization as required by this Article.
- (5) A description of the technology the registrant will use to create an electronic signature in performing official acts.
- (6) If the device used to create the registrant's electronic signature was issued or registered through a licensed certification authority, the name of that authority, the source of the license, the starting and expiration dates of the device's term of registration, and any revocations, annulments, or other premature terminations of any registered device of the registrant that was due to misuse or compromise of the device, with the date, cause, and nature of each termination explained in detail.
- (7) The e-mail address of the registrant.

The information provided in a registration that relates to subdivision (7) of this section shall be considered confidential information and shall not be subject to disclosure under Chapter 132 of the General Statutes, except as provided by rule.

(e) The electronic registration form for an electronic notary shall be transmitted electronically to the Secretary and shall include any decrypting instructions, codes, keys, or software that allow the registration to be read.

(f) Within 10 business days after the change of any registration information required of an electronic notary, the notary shall electronically transmit to the Secretary a notice of the change of information signed with the notary's official electronic signature. (2005-391, s. 4; 2006-59, s. 25; 2006-259, ss. 1, 3.)

**Editor's Note. —**

Session Laws 2006-259, s. 1, which had substituted "subdivision (7) of this subsection" for "subsection (7)," was repealed by Session Laws 2006-259, s. 3, which provided in part that "If House Bill 1432, 2005 Regular Session (2006-59), becomes law, Section 1 of this act is re-

pealed." House Bill 1432 (2006-59) did pass.

**Effect of Amendments. —** Session Laws 2006-59, s. 25, effective October 1, 2006, and except as otherwise set forth in this act, applicable to notarial acts performed on or after that date, rewrote the second paragraph of subsection (d).

## Chapter 12.

### Statutory Construction.

#### § 12-3.1. Fees and charges by agencies.

**Editor's Note. —**

Session Laws 2006-66, s. 1.2, provides: "This act shall be known as 'The Current Operations and Capital Improvements Appropriations Act of 2006'."

Session Laws 2006-66, s. 6.3, provides: "Notwithstanding G.S. 12-3.1, an agency is not required to consult with the Joint Legislative Commission on Governmental Operations prior to establishing or increasing a fee as authorized or anticipated in the Current Operations and Capital Improvements Appropriations Act of 2006, or in the Senate and House of Representatives Appropriations Committee Reports on

the Continuation, Expansion and Capital Budgets, that were distributed in the Senate and House of Representatives Appropriations and Base Budget Committees and used to explain this act."

Session Laws 2006-66, s. 28.3, provides: "Except for statutory changes or other provisions that clearly indicate an intention to have effects beyond the 2006 2007 fiscal year, the textual provisions of this act apply only to funds appropriated for, and activities occurring during, the 2006 2007 fiscal year."

Session Laws 2006-66, s. 28.6 is a severability clause.



## Chapter 14. Criminal Law.

### SUBCHAPTER III. OFFENSES AGAINST THE PERSON.

#### Article 7A.

#### Rape and Other Sex Offenses.

Sec.

14-27.1. Definitions.

#### Article 8.

#### Assaults.

14-32.1. Assaults on handicapped persons; punishments.

#### Article 10.

#### Kidnapping and Abduction.

14-39. Kidnapping.

14-43.2. [Repealed.]

#### Article 10A.

#### Human Trafficking.

14-43.10. Definitions.

14-43.11. Human trafficking.

14-43.12. Involuntary servitude.

14-43.13. Sexual servitude.

### SUBCHAPTER V. OFFENSES AGAINST PROPERTY.

#### Article 16.

#### Larceny.

14-72. Larceny of property; receiving stolen goods or possessing stolen goods.

#### Article 19.

#### False Pretenses and Cheats.

14-112.2. Exploitation of an elder adult or disabled adult.

### SUBCHAPTER VII. OFFENSES AGAINST PUBLIC MORAL- ITY AND DECENCY.

#### Article 27A.

#### Sex Offender and Public Protection Registration Programs.

Part 1. Registration Programs, Purpose and Definitions Generally.

14-208.6. Definitions.

14-208.6A. Lifetime registration requirements for criminal offenders.

14-208.6B. Registration requirements for juveniles transferred to and convicted in superior court.

Part 2. Sex Offender and Public Protection Registration Program.

Sec.

14-208.7. Registration.

14-208.8A. (Effective June 1, 2007) Notification requirement for out-of-county employment if temporary residence established.

14-208.9. Change of address; change of academic status or educational employment status.

14-208.9A. Verification of registration information.

14-208.11. Failure to register; falsification of verification notice; failure to return verification form; order for arrest.

14-208.11A. Duty to report noncompliance of a sex offender; penalty for failure to report in certain circumstances.

14-208.12A. Request for termination of registration requirement.

14-208.16. Residential restrictions.

14-208.17. Sexual predator prohibited from working or volunteering for child-involved activities; limitation on residential use.

14-208.18, 14-208.19. [Reserved.]

Part 4. Registration of Certain Juveniles Adjudicated for Committing Certain Offenses.

14-208.28. Verification of registration information.

Part 5. Sex Offender Monitoring.

14-208.40. Establishment of program; creation of guidelines; duties.

14-208.41. Enrollment in satellite-based monitoring programs mandatory; length of enrollment.

14-208.42. Lifetime registration offenders required to submit to satellite-based monitoring for life and to continue on unsupervised probation upon completion of sentence.

14-208.43. Request for termination of satellite-based monitoring requirement.

14-208.44. Failure to enroll; tampering with device.

14-208.45. Fees.

### SUBCHAPTER VIII. OFFENSES AGAINST PUBLIC JUSTICE.

#### Article 30.

#### Obstructing Justice.

14-226. Intimidating or interfering with witnesses.

Sec.

14-226.2. Harassment of participant in neighborhood crime watch program.

### Article 31.

#### Misconduct in Public Office.

14-234. Public officers or employees benefiting from public contracts; exceptions.

### SUBCHAPTER IX. OFFENSES AGAINST THE PUBLIC PEACE.

### Article 35.

#### Offenses Against the Public Peace.

14-269. Carrying concealed weapons.

14-269.2. Weapons on campus or other educational property.

### SUBCHAPTER X. OFFENSES AGAINST THE PUBLIC SAFETY.

### Article 36A.

#### Riots and Civil Disorders.

14-288.4. Disorderly conduct.

### SUBCHAPTER XI. GENERAL POLICE REGULATIONS.

### Article 37.

#### Lotteries, Gaming, Bingo and Raffles.

Part 1. Lotteries and Gaming.

14-306.1. (Repealed effective July 1, 2007) Types of machines and devices prohibited by law; penalties.

14-306.1A. (Effective July 1, 2007) Types of

Sec.

machines and devices prohibited by law; penalties.

14-306.2. (Effective July 1, 2007) Violation of G.S. 14-306.1A a violation of the ABC laws.

14-309. (Effective July 1, 2007) Violation made criminal.

Part 2. Bingo and Raffles.

14-309.15. Raffles.

### Article 47.

#### Cruelty to Animals.

14-362.2. Dog fighting and baiting.

### Article 52A.

#### Sale of Weapons in Certain Counties.

14-404. Issuance or refusal of permit; appeal from refusal; grounds for refusal; sheriff's fee.

14-407.1. Sale of blank cartridge pistols.

### Article 53A.

#### Other Firearms.

14-409.11. "Antique firearm" defined.

### Article 54A.

#### The Felony Firearms Act.

14-415.1. Possession of firearms, etc., by felon prohibited.

### Article 54B.

#### Concealed Handgun Permit.

14-415.13. Application for a permit; fingerprints.

## SUBCHAPTER I. GENERAL PROVISIONS.

### ARTICLE 1.

#### *Felonies and Misdemeanors.*

## § 14-2.4. Punishment for conspiracy to commit a felony.

### CASE NOTES

#### Proof of Conspiracy. —

Trial court did not err in denying defendants' motions to dismiss conspiracy charge because substantial evidence existed, in that: (1) a co-defendant testified that defendants had agreed to distribute marijuana, were engaged in distributing marijuana, and stored marijuana in the house where defendants lived and sold marijuana from an apartment; (2) defendants each had access to the marijuana found in a garage; (3) one defendant was at the apartment when a law enforcement agent made a con-

trolled delivery of a package containing marijuana; (4) marijuana, scales, packaging materials, and weapons were found at both the apartment and in the bedrooms and public areas of the house. *State v. Harrington*, 171 N.C. App. 17, 614 S.E.2d 337, 2005 N.C. App. LEXIS 1189 (2005), cert. denied, sub nom. *State v. Rattis*, 360 N.C. 70, 623 S.E.2d 36 (2005).

#### Conspiracy to Commit Murder. —

Defendant was properly charged and convicted of conspiracy to commit first-degree mur-

der under the felony murder rule because the instruction that was given requiring the jury to find an agreement and specific intent to kill eliminated the possibility that an unintentional felony murder formed the basis for the specific intent underlying the conspiracy of which the jury convicted defendant. *State v. Curry*, 171 N.C. App. 568, 615 S.E.2d 327, 2005 N.C. App. LEXIS 1312 (2005).

Motion to dismiss was properly denied where the evidence showed that defendant drove through an apartment complex in a borrowed car with victim's brother, exited the vehicle in a certain area and returned to the vehicle after gunshots, and the brother fabricated a story to police to avoid identification, there was sufficient evidence to support a finding of conspiracy to commit murder. *State v. Brewton*, 173 N.C. App. 323, 618 S.E.2d 850, 2005 N.C. App. LEXIS 2027 (2005).

**Jury Instructions.** — Finding of "an agreement to kill" is equivalent to a finding of an agreement to commit an intentional murder, even in the absence of an instruction requiring the latter finding, and the finding of an agreement to kill is equivalent to the finding of an agreement to premeditate and deliberate. *State v. Brewton*, 173 N.C. App. 323, 618 S.E.2d 850, 2005 N.C. App. LEXIS 2027 (2005).

Trial court committed plain error in failing to instruct the jury on conspiracy to commit common law robbery as the jury was properly instructed on robbery with a dangerous weapon

and common law robbery, apparently based on the conflicting evidence regarding whether the gun used was real or fake; the same conflicting evidence directly pertained to defendant's charge of conspiracy to commit common law robbery as there was conflicting evidence as to whether the agreement was that the person who committed the robbery would use a real or a fake gun. *State v. Carter*, — N.C. App. —, 629 S.E.2d 332, 2006 N.C. App. LEXIS 1078 (2006).

**Sufficient Evidence to Go to Jury on Conspiracy to Commit Robbery with Dangerous Weapon.** — Defendant's motion to dismiss a conspiracy to commit robbery with a dangerous weapon charge was properly denied as there was conflicting evidence as to whether a gun given to a person who committed a robbery (the actor) was real or not and there was sufficient evidence that the gun was an operable weapon where: (1) defendant and two other men told the actor to rob a store in exchange for drugs, which she agreed to do, (2) the men provided the actor with a gun and she committed the robbery, (3) the actor spoke primarily with defendant regarding the robbery, (4) the actor stated that one of the men told her that the gun was fake, but that she was uncertain whether it was fake, and (5) the actor stated that defendant and the others had a real gun and a fake gun and that she believed she had been given the fake one. *State v. Carter*, — N.C. App. —, 629 S.E.2d 332, 2006 N.C. App. LEXIS 1078 (2006).

## § 14-2.5. Punishment for attempt to commit a felony or misdemeanor.

### CASE NOTES

**Sentence aggravation.** — Trial court erred in sentencing defendant as a level IV offender on his conviction of second-degree murder, as the trial court erred in finding that a prior New York conviction of N.Y. Penal Law § 120.05 was substantially similar to North Carolina's offense of simple assault set forth in G.S. 14-33(a), as the North Carolina offense required serious injury to the victim and the New York offense did not; furthermore, under G.S. 14-2.5,

an attempt to commit a misdemeanor or a felony is punishable under the next lower classification as the offense the offender attempted to commit, and defendant's prior New York conviction for attempted second-degree assault should have been treated as a class 3 misdemeanor, which would have not had any point value for prior record purposes. *State v. Hanton*, — N.C. App. —, 623 S.E.2d 600, 2006 N.C. App. LEXIS 45 (2006).

## § 14-4. Violation of local ordinances misdemeanor.

### CASE NOTES

**Applied** in *Shavitz v. City of High Point*, — N.C. App. —, 630 S.E.2d 4, 2006 N.C. App. LEXIS 1080 (2006).



## ARTICLE 2A.

*Habitual Felons.*

## § 14-7.1. Persons defined as habitual felons.

## CASE NOTES

**Enhanced Punishment Is Constitutional. —**

Defendant's constitutional challenges to his sentence as an habitual felon failed because (1) the North Carolina Habitual Felon Act was not violative of the Separation of Powers Clause; (2) there was no double jeopardy infirmity inherent in the Habitual Felon Act as applied in conjunction with the North Carolina Structured Sentencing Act; and (3) the state appellate court and the state supreme court have rejected constitutional challenges to the Habitual Felon Act based on allegations of cruel and unusual punishment. *State v. McIlwaine*, 169 N.C. App. 397, 610 S.E.2d 399, 2005 N.C. App. LEXIS 607 (2005).

**Sufficiency of Indictment. —** Where defendant did not dispute that his habitual felony indictment included each element specified in G.S. 14-7.3, the indictment was facially valid; defendant's claim that there was a variance between the indictment and the proof offered in support of the indictment should have been raised by a motion to dismiss and was waived by his guilty plea. *State v. McGee*, — N.C. App. —, 623 S.E.2d 782, 2006 N.C. App. LEXIS 180 (2006).

**Indictment Held Sufficient. —** Defendant contended that because the specific name of the controlled substance was not alleged in the indictment, the indictment was not sufficient to charge habitual felon; however, the habitual felon indictment alleging a prior conviction for felony possession with intent to manufacture, sell, or deliver a Schedule I controlled substance, in addition to two other felony convictions, was sufficient notice under North Carolina and case law. Additionally, because there was no defect in the indictment, the trial court had jurisdiction to sentence defendant as an habitual felon under G.S. 14-7.1 and G.S. 14-7.3. *State v. McIlwaine*, 169 N.C. App. 397, 610 S.E.2d 399, 2005 N.C. App. LEXIS 607 (2005).

**Conviction on Predicate Felonies. —** Defendant's argument, that he was not convicted for purposes of G.S. 14-7.1 until he was sentenced for the first predicate felony, and, therefore, he committed the second felony before he was "convicted" of the first felony, did not challenge the sufficiency of the indictment on its

face, and thus defendant's guilty plea waived this argument; in any event, "conviction" referred to the jury's or factfinder's guilty verdict. *State v. McGee*, — N.C. App. —, 623 S.E.2d 782, 2006 N.C. App. LEXIS 180 (2006).

**Sentence Enhancement. —**

State's use of defendant's prior misdemeanor convictions to enhance a sentence already enhanced under the Habitual Felon Act, G.S. 14-7.1 et seq., did not constitute cruel and unusual punishment. *State v. Hall*, 174 N.C. App. 353, 620 S.E.2d 723, 2005 N.C. App. LEXIS 2397 (2005).

**Use of Prior Convictions. —**

Defendant was properly sentenced as a habitual offender where the record showed that defendant had been convicted of three previous felony offenses, including possession of cocaine. *State v. Nettles*, 170 N.C. App. 100, 612 S.E.2d 172, 2005 N.C. App. LEXIS 950 (2005).

**Defendant Has Burden of Proving Prior Felony Was Set Aside. —** Though defendant may have had a valid defense to a habitual felony proceeding if he could establish that a juvenile felony conviction was unconditionally discharged under the provisions of 18 U.S.C.S. § 5021(a), defendant did not submit any evidence of such a discharge and thereby failed to carry his burden of proof under G.S. 14-7.1 to show that a prior felony was set aside. *State v. Brewington*, 170 N.C. App. 264, 612 S.E.2d 648, 2005 N.C. App. LEXIS 1011 (2005), cert. denied, 360 N.C. 67, 621 S.E.2d 881 (2005).

**Selective Prosecution Not Shown. —** Without substantial evidence of intentional discrimination, and absent a showing that the prosecutorial system was motivated by discriminatory purpose and had discriminatory effect, a District Attorney did not abuse his prosecutorial discretion in deciding to seek indictments against all individuals eligible for prosecution as habitual felons; defendant's claim that he was subject to selective prosecution was without merit. *State v. Blyther*, — N.C. App. —, 623 S.E.2d 43, 2005 N.C. App. LEXIS 2740 (2005).

**Cited in** *State v. McBride*, 173 N.C. App. 101, 618 S.E.2d 754, 2005 N.C. App. LEXIS 1897 (2005).

## § 14-7.3. Charge of habitual felon.

### CASE NOTES

**New Indictment Required.** — State did not satisfy the requirements of G.S. 14-7.3, and the trial court lacked the authority to sentence defendant as an habitual felon for a later offense, where the State had not obtained a new habitual felon indictment, and defendant did not agree to waive the same and admit his status pursuant to a bill of information; while the State previously charged defendant with being an habitual felon, defendant was already convicted of the substantive felonies associated with those bills of information, and a new indictment was required. *State v. Bradley*, — N.C. App. —, 623 S.E.2d 85, 2005 N.C. App. LEXIS 2745 (2005).

**Indictment Held Sufficient.** —

Defendant contended that because the specific name of the controlled substance was not alleged in the indictment, the indictment was not sufficient to charge habitual felon; however, the habitual felon indictment alleging a prior conviction for felony possession with intent to manufacture, sell, or deliver a Schedule I controlled substance, in addition to two other felony convictions, was sufficient notice under North Carolina and case law. Additionally, be-

cause there was no defect in the indictment, the trial court had jurisdiction to sentence defendant as an habitual felon under G.S. 14-7.1 and G.S. 14-7.3. *State v. McIlwaine*, 169 N.C. App. 397, 610 S.E.2d 399, 2005 N.C. App. LEXIS 607 (2005).

Where defendant did not dispute that his habitual felony indictment included each element specified in G.S. 14-7.3, the indictment was facially valid; defendant's claim that there was a variance between the indictment and the proof offered in support of the indictment should have been raised by a motion to dismiss and was waived by his guilty plea. *State v. McGee*, — N.C. App. —, 623 S.E.2d 782, 2006 N.C. App. LEXIS 180 (2006).

**Collateral Attack.** —

Defendant's collateral attack questioning the validity of his original conviction for the habitual felon sentence was impermissible under G.S. 14-7.3. *State v. Flemming*, 171 N.C. App. 413, 615 S.E.2d 310, 2005 N.C. App. LEXIS 1260 (2005).

**Cited in** *State v. McBride*, 173 N.C. App. 101, 618 S.E.2d 754, 2005 N.C. App. LEXIS 1897 (2005).

## § 14-7.4. Evidence of prior convictions of felony offenses.

### CASE NOTES

**Proof of Prior Convictions.** —

Where defendant, in pleading nolo contendere, stipulated to three of defendant's eight prior convictions, but the State failed to prove any of the remaining convictions as required by G.S. 15A-1340.14(f) and G.S. 14-7.4, the trial court erred under G.S. 15A-1340.13(b) and G.S. 15A-1340.14(a) in sentencing defendant as a prior record level III offender based on prior convictions that were not proven at trial; the sentence, despite being agreed to by defendant, had to be authorized by G.S. 15A-1340.17. *State v. Quick*, 170 N.C. App. 166, 611 S.E.2d 864, 2005 N.C. App. LEXIS 897 (2005).

Defendant's collateral attack questioning the validity of his original conviction for the habitual felon sentence was impermissible under G.S. 14-7.3. *State v. Flemming*, 171 N.C. App.

413, 615 S.E.2d 310, 2005 N.C. App. LEXIS 1260 (2005).

Admission of exhibits containing both the dates of defendant's prior offenses and resulting convictions for three felonies were properly admitted into evidence and supported defendant's conviction as an habitual offender. *State v. McBride*, 173 N.C. App. 101, 618 S.E.2d 754, 2005 N.C. App. LEXIS 1897 (2005).

**A faxed certified copy of a criminal record was admissible under this section to prove defendant's status as an habitual felon; etc.** —

Facsimile copy of judgment and probation order were sufficient as proof of defendant's third felony under G.S. 14-7.4. *State v. Brewington*, 170 N.C. App. 264, 612 S.E.2d 648, 2005 N.C. App. LEXIS 1011 (2005), cert. denied, 360 N.C. 67, 621 S.E.2d 881 (2005).

## § 14-7.5. Verdict and judgment.

### CASE NOTES

**Cited in** *State v. McBride*, 173 N.C. App. 101, 618 S.E.2d 754, 2005 N.C. App. LEXIS 1897 (2005).

## § 14-7.6. Sentencing of habitual felons.

### CASE NOTES

#### **Being an habitual felon is not a crime, but is a status, etc. —**

Defendant was sentenced only once as required by the habitual felon statute, G.S. 14-7.6; he was not convicted of being an habitual felon, since the status being an habitual felon was not a separate offense, rather his status as an habitual felon enhanced his conviction of the crime attempting to obtain property by false pretenses. *State v. Ledwell*, 171 N.C. App. 314, 614 S.E.2d 562, 2005 N.C. App. LEXIS 1212 (2005).

#### **Use of Prior Convictions. —**

State's use of defendant's prior misdemeanor convictions to enhance a sentence already enhanced under the Habitual Felon Act, G.S. 14-7.1 et seq., did not constitute cruel and unusual punishment. *State v. Hall*, 174 N.C. App. 353, 620 S.E.2d 723, 2005 N.C. App. LEXIS 2397 (2005).

Trial court's use of defendant's prior driving while impaired convictions in determining defendant's sentence as a Level II offender did not violate G.S. 15A-1340.16(d) as defendant's prior convictions were not used as aggravating factors; instead, the trial court added points to defendant's prior record pursuant to G.S. 15A-1340.14, which in contrast to using the same prior convictions to establish a person's status as an habitual felon, was not expressly prohibited. Further, the use of the same prior convictions introduced by the State as evidence of malice during trial to increase defendant's prior record level at sentencing did not violate the

plain language of G.S. 15A-1340.01. *State v. Bauberger*, — N.C. App. —, 626 S.E.2d 700, 2006 N.C. App. LEXIS 523 (2006).

**Sentence Was Proportionate and Not Cruel and Unusual. —** Defendant had a lengthy criminal record and was sentenced accordingly for G.S. 14-100 false pretenses, which sentence was enhanced by his status of being an habitual offender under G.S. 14-7.6; the sentence of 142 months to 180 months was within the range for a Class C level V felon, was not disproportionate to the defendant's 25-year history of criminal convictions, and was not cruel and unusual under U.S. Const. amends. VIII, XIV. *State v. Ledwell*, 171 N.C. App. 314, 614 S.E.2d 562, 2005 N.C. App. LEXIS 1212 (2005).

**Trial court erred in entering judgment and commitment for defendant under the habitual offender case number** since the error was clerical; however, the court was entitled to fix the error and reversal was not necessary. *State v. McBride*, 173 N.C. App. 101, 618 S.E.2d 754, 2005 N.C. App. LEXIS 1897 (2005).

**Sentence Held Proper. —** Sentence imposed on defendant of 84 months to 110 months imprisonment, where defendant had a prior record level of III, was not grossly disproportionate under the Eighth Amendment; defendant's sentence was as a Class C felony under G.S. 14-7.6 and his sentence was in the mitigated sentencing range of G.S. 15A-1340.17. *State v. Flemming*, 171 N.C. App. 413, 615 S.E.2d 310, 2005 N.C. App. LEXIS 1260 (2005).

## SUBCHAPTER III. OFFENSES AGAINST THE PERSON.

### ARTICLE 6.

#### *Homicide.*

## § 14-17. Murder in the first and second degree defined; punishment.

### CASE NOTES

- I. General Consideration.
- II. Murder in the First Degree Generally.
- IV. Murder in Perpetration of a Felony.
- VI. Defenses and Denials.
  - F. Self-Defense.
- VII. Evidence.
  - A. In General.



- VIII. Instructions.
  - A. In General.
- IX. Charge and Indictment.
- XII. Capital Punishment.
- XIII. Appeal.

## I. GENERAL CONSIDERATION.

**Death Need Not Be Intended for Conviction.** — While defendant may not have intended to join the codefendant in shooting and killing the victim, defendant's intent was irrelevant under an acting in concert theory of felony murder in violation of G.S. 14-17; as long as defendant joined the codefendant in committing a felony, defendant was responsible for all other crimes committed in a single transaction that were in furtherance of a common purpose or plan. *State v. Herring*, — N.C. App. —, 626 S.E.2d 742, 2006 N.C. App. LEXIS 521 (2006).

Defendant had no right to a reversal in his murder trial, despite his claim that the indictment was insufficient for staying only that he violated G.S. 14-17. The indictment the requirements of G.S. 15-144. *State v. Elliott*, 360 N.C. 400, 628 S.E.2d 735, 2006 N.C. LEXIS 46 (2006).

**Entitlement to Parole Ineligibility Instruction.** — Where a state prisoner, who was convicted of first-degree murder, first-degree rape, kidnapping, armed robbery, and the burning of personal property, in violation of G.S. 14-17, 14-27.2(a)(2), 14-39, 14-87, and 14-66, argued that the sentencing court erred by failing to provide a parole ineligibility instruction, the prisoner, who was sentenced to death for the murder conviction, was not entitled to federal habeas corpus relief because the prisoner would have been eligible for parole under former G.S. 15A-1371(a1) if the jury had recommended life imprisonment; thus, because the prisoner was eligible for parole as a matter of law, the prisoner was not entitled to a parole ineligibility instruction. *Campbell v. Polk*, 447 F.3d 270, 2006 U.S. App. LEXIS 11591 (4th Cir. 2006).

**Mitigating Circumstances.** — Where a state prisoner, who was sentenced to death for committing first-degree murder, in violation of G.S. 14-17, argued that his attorneys were ineffective because they failed to adequately present mitigating evidence concerning his life history and his mental health, the prisoner was not entitled to federal habeas corpus relief because (1) the prisoner's sisters testified at sentencing about the prisoner's dysfunctional childhood; (2) the prisoner instructed the attorneys not to introduce further evidence of his background; and (3) a doctor testified at sentencing that the prisoner's mental disorders impaired his ability to control his behavior; furthermore, the prisoner could not demonstrate prejudice because the additional evi-

dence identified by the prisoner was largely cumulative and the jury found that four severe aggravating circumstances under G.S. 15A-2000 outweighed any mitigating circumstances. *Campbell v. Polk*, 447 F.3d 270, 2006 U.S. App. LEXIS 11591 (4th Cir. 2006).

**Applied** in *State v. Andrews*, 170 N.C. App. 68, 612 S.E.2d 178, 2005 N.C. App. LEXIS 891 (2005).

**Cited** in *Buckner v. Polk*, 453 F.3d 195, 2006 U.S. App. LEXIS 16062 (4th Cir. 2006).

## II. MURDER IN THE FIRST DEGREE GENERALLY.

**A specific intent to kill is an essential element of first degree murder.**

Trial court properly denied motion to dismiss the charge of attempted murder of an infant child as the State presented sufficient evidence of defendant's specific intent to kill the child by showing that defendant carjacked a woman and her infant child, drove the woman and her infant child to a deserted area, raped the woman, beat the woman to death, and drove away while leaving the child behind in his diapers on a hot day in grass a foot tall at the deserted area. Additionally, a pediatric critical care expert testified that the infant's injuries, especially sunburns, were life-threatening and that if the infant had not been found by a passerby before nightfall he could have died as a result of exposure and dehydration. *State v. Edwards*, — N.C. App. —, 621 S.E.2d 333, 2005 N.C. App. LEXIS 2487 (2005).

**Specific intent to kill shown.** — Trial court properly denied defendant's motion to dismiss charge of attempted first degree murder in violation of G.S. 14-17, as defendant's acts of kidnapping his infant daughter and leaving her in a shed in freezing weather for two days, coupled with his stated interest in avoiding having to pay child support, showed a specific intent to kill the child. *State v. Pittman*, — N.C. App. —, 622 S.E.2d 135, 2005 N.C. App. LEXIS 2583 (2005).

**Premeditation and Deliberation Generally.** —

Defendant's convictions for attempted first-degree murder and assault with a deadly weapon with intent to kill inflicting serious injury did not violate his right to be free of double jeopardy; in order to obtain a conviction for attempted first-murder, the state had to prove premeditation and deliberation, whereas it did not have to prove those elements to obtain a conviction for assault with a deadly weapon,

which was a different offense requiring both proof of the use of a deadly weapon and proof of serious injury. *State v. Bethea*, 173 N.C. App. 43, 617 S.E.2d 687, 2005 N.C. App. LEXIS 1907 (2005).

**Comments by Prosecutor.** — Defendant's first degree murder conviction for stabbing his wife to death was affirmed because the prosecutor's statements as to the evidence were not grossly improper and the trial court's failure to intervene *ex mero motu* was not error. *State v. Nguyen*, — N.C. App. —, 632 S.E.2d 197, 2006 N.C. App. LEXIS 1571 (2006).

**Same — Nature and Number of Wounds.**

Sufficient evidence of premeditation supported defendant's conviction of first-degree murder under G.S. 14-17, where defendant stabbed the victim multiple times in a bar after the victim called defendant names and punched defendant; the evidence of premeditation, which taken together was adequate for a jury to convict, included that defendant slashed the victim multiple times and that defendant left the scene. *State v. Dennison*, 171 N.C. App. 504, 615 S.E.2d 404, 2005 N.C. App. LEXIS 1271 (2005), cert. denied, appeal dismissed, 360 N.C. 69, 622 S.E.2d 113 (2005).

**Evidence Held Sufficient.** —

Evidence was sufficient to support an attempted first-degree murder conviction because the evidence established that the prisoner broke into the victims' home, brandished a gun, threatened to kill both victims, and then shot both victims. *Fredrick v. Beck*, — F. Supp. 2d —, 2005 U.S. Dist. LEXIS 28000 (W.D.N.C. Oct. 28, 2005).

#### IV. MURDER IN PERPETRATION OF A FELONY.

**Death Need Not Be Intended.** —

Trial court did not err in instructing the jury both on premeditation and deliberation, and felony murder, as defendant could be convicted of felony murder even though it was the co-felon he shot and killed during the robbery of the seafood merchant; the State only had to show that the killing occurred by defendant's hands during the perpetration of a felony, and not that the intended victim was killed. *State v. Torres*, 171 N.C. App. 419, 615 S.E.2d 36, 2005 N.C. App. LEXIS 1200 (2005).

**Deadly Weapons.** —

State did not have to prove that defendant knew the codefendant possessed a gun in order to for defendant to be convicted of felony murder under G.S. 14-17 based on trafficking in cocaine with a deadly weapon in violation of G.S. 90-95 under a concert of action theory; defendant's knowledge that the codefendant had a gun was irrelevant as long as the codefendant killed the victim while possession or

attempting to possess the drugs, which the State substantially established was the common purpose of defendant and the codefendant. *State v. Herring*, — N.C. App. —, 626 S.E.2d 742, 2006 N.C. App. LEXIS 521 (2006).

**Evidence of Murder in Perpetration of Felony Held Sufficient.** —

State presented sufficient evidence that the codefendant had constructive possession of the cocaine around the time of the shooting to find that defendant, by virtue of concert of action, committed trafficking in cocaine by possession of more than 400 grams of cocaine while also possessing a deadly weapon in violation of G.S. 90-95; when the codefendant shot the victim, the codefendant obtained dominion and control over the victim and the area around him, including the cocaine, and the codefendant's shooting of the victim within moments of the codefendant stepping into the apartment with the gun to complete the gun transaction was sufficient to convict defendant of felony murder under G.S. 14-17. *State v. Herring*, — N.C. App. —, 626 S.E.2d 742, 2006 N.C. App. LEXIS 521 (2006).

#### VI. DEFENSES AND DENIALS.

##### F. Self-Defense.

**Evidence of Victim's Character.** —

In defendant's murder trial, defendant was not required to make an offer of proof regarding testimony that her victim had told her former employee that he was going to "shoot up his house" that was excluded when the trial court granted the state's motion to strike the testimony. *State v. Everett*, — N.C. App. —, 630 S.E.2d 703, 2006 N.C. App. LEXIS 1302 (2006).

In defendant's trial ending in her conviction for second-degree murder, evidence of her prior conduct in shooting a dog was irrelevant under G.S. § 8C-1-401; the evidence was not necessary to show that defendant was knowledgeable about firearms or had used a gun in the past because defendant had admitted that she shot her victim and whether or not she knew how to use a pistol was not contested, and the evidence was irrelevant to her claim of self-defense. *State v. Everett*, — N.C. App. —, 630 S.E.2d 703, 2006 N.C. App. LEXIS 1302 (2006).

Testimony from a witness who saw defendant's victim breaking car windows at an automobile dealership should have been admitted during her murder trial, which ended in her conviction for second-degree murder, as an essential element of her assertion of self-defense under G.S. 8C-1-405(b). *State v. Everett*, — N.C. App. —, 630 S.E.2d 703, 2006 N.C. App. LEXIS 1302 (2006).

Erroneous exclusion of testimony from a car dealership employee who saw defendant's victim breaking car windows at the dealership, which should have been admitted during defen-



dant's murder trial as evidence of the victim's violent character, was prejudicial under G.S. 15A-1443(a) even though defendant testified to the same incident on direct and redirect examination. *State v. Everett*, — N.C. App. —, 630 S.E.2d 703, 2006 N.C. App. LEXIS 1302 (2006).

**Instruction on Self-Defense Required.** —

Defendant was awarded a new trial on charges of second degree murder because there was testimony from the prosecution's witnesses that defendant returned fire only after a person in the car shot at defendant. According to such evidence, defendant was not the initial aggressor and his right to stand his ground was at least a substantial feature of his defense of self-defense; because this instructional error had a probable impact on the jury's finding of guilt, the error was prejudicial, the trial court's failure to give the instruction was thus plain error. *State v. Davis*, — N.C. App. —, 627 S.E.2d 474, 2006 N.C. App. LEXIS 696 (2006).

## VII. EVIDENCE.

### A. In General.

**Mere Strong Suspicion of Guilt Insufficient to Withstand Motion to Dismiss.** —

While evidence presented by the State raised a strong suspicion of guilt it did not permit a reasonable inference that defendants were responsible for victim's death, but merely that they had the opportunity to commit the crime, and the trial court did not err in granting defendants' motion to dismiss. *State v. Myers*, — N.C. App. —, 621 S.E.2d 329, 2005 N.C. App. LEXIS 2485 (2005).

**Premeditation and Deliberation Shown.** —

Although the trial court erred in admitting the hearsay statements of the witness, the error was harmless under G.S. 15A-1443(b) given the presence of overwhelming evidence of premeditation required for the conviction of first-degree murder; this evidence included the fact that defendant brought the murder weapon to the residence where the murder occurred, that defendant stabbed or lacerated the victim 51 times, and that the responding police officer saw that defendant's clothes were heavily blood stained. *State v. Champion*, 171 N.C. App. 716, 615 S.E.2d 366, 2005 N.C. App. LEXIS 1364 (2005).

**Evidence of Prior Abuse of Victim.** —

North Carolina, to prove the disputed issue of defendant's intent to kill after defendant's forensic psychologist testified that defendant was unable to form the specific intent to kill, elicited testimony on defendant's prior misconduct toward his wife; thus, the psychologist's testimony regarding the statements of defendant's prior bad acts was properly admitted under G.S. 8C-1-404(b). *State v. Nguyen*, — N.C. App.

—, 632 S.E.2d 197, 2006 N.C. App. LEXIS 1571 (2006).

**Evidence of Conspiracy.** — Motion to dismiss was properly denied where the evidence showed that defendant drove through an apartment complex in a borrowed car with victim's brother, exited the vehicle in a certain area and returned to the vehicle after gunshots, and the brother fabricated a story to police to avoid identification, there was sufficient evidence to support a finding of conspiracy to commit murder. *State v. Brewton*, 173 N.C. App. 323, 618 S.E.2d 850, 2005 N.C. App. LEXIS 2027 (2005).

**Admissible Evidence.** —

Evidence as to defendant's prior convictions for driving while impaired and driving while license revoked was properly admitted, under G.S. 8C-1, N.C. R. Evid. 404(b), as the evidence was relevant to show malice to support defendant's charge for second degree murder following an auto accident in which defendant was driving while impaired. Further, there was no plain error in the trial court admitting evidence of defendant's empty prescription pill bottle, testimony by an officer identifying the pills from the label, and testimony by a pharmacist about the interaction between the pills and alcohol, as the evidence was relevant to the charges against defendant. *State v. Edwards*, 170 N.C. App. 381, 612 S.E.2d 394, 2005 N.C. App. LEXIS 992 (2005).

Defendant's first degree murder conviction for stabbing his wife to death was affirmed because defendant's written waiver of his Miranda rights and written confession were made understandingly, knowingly, and voluntarily through a police officer that served as defendant's interpreter. *State v. Nguyen*, — N.C. App. —, 632 S.E.2d 197, 2006 N.C. App. LEXIS 1571 (2006).

**Evidence Held Sufficient to Support Conviction.** —

Evidence, including a history of violence and hostility between the parties, testimony from defendant's girlfriend that she thought defendant was going to shoot the victim, and defendant's DNA on a beer can, was sufficient to support defendant's conviction for first-degree murder. *State v. Hocutt*, — N.C. App. —, 628 S.E.2d 832, 2006 N.C. App. LEXIS 966 (2006).

Sufficient evidence supported a murder conviction where testimony revealed that defendant attacked the victim after the victim had been knocked to the ground by another, that defendant then beat the victim with a rubber mallet, that defendant then stole the shoes off the victim's feet and fled the scene, and that during his flight, defendant stated to others "I killed him, I killed him." *State v. Yarrell*, 172 N.C. App. 135, 616 S.E.2d 258, 2005 N.C. App. LEXIS 1428 (2005).

**Error in admission of victim's statements without cross-examination was**



**harmless.** — Defendant's conviction for first-degree murder was upheld on appeal, despite that the trial court erring by admitting the statements of two unavailable robbery victims with regard to their statements to police after the crime, which identified and implicated defendant and three others, without affording defendant the right to confrontation, because the evidence of defendant's guilt was overwhelming, which rendered the trial court's error harmless. *State v. Allen*, 171 N.C. App. 71, 614 S.E.2d 361, 2005 N.C. App. LEXIS 1186 (2005), cert. dismissed, 360 N.C. 66, 621 S.E.2d 875 (2005), cert. denied, appeal dismissed, 360 N.C. 66, 621 S.E.2d 878 (2005).

## VIII. INSTRUCTIONS.

### A. In General.

#### Ability to Form Specific Intent. —

Defendant's first degree murder conviction for stabbing his wife to death was affirmed because the trial court did not error in giving a jury instruction which limited the purpose of evidence that was introduced regarding defendant's prior bad acts to the determination of defendant's intent. *State v. Nguyen*, — N.C. App. —, 632 S.E.2d 197, 2006 N.C. App. LEXIS 1571 (2006).

**Instruction as to Aiding and Abetting.** — Defendant's conviction for first-degree murder, under a theory of aiding and abetting, was affirmed because the trial court's clarifying instructions properly set out the elements of the crime and did not lessen the state's burden of proof. *State v. Glynn*, — N.C. App. —, 632 S.E.2d 551, 2006 N.C. App. LEXIS 1676 (2006).

**Finding of "an agreement to kill"** is equivalent to finding an agreement to commit an intentional murder, even in the absence of an instruction requiring the latter finding, and the finding of an agreement to kill is equivalent to the finding of an agreement to premeditate and deliberate. *State v. Brewton*, 173 N.C. App. 323, 618 S.E.2d 850, 2005 N.C. App. LEXIS 2027 (2005).

**Instruction on action in concert** was erroneously given regarding defendant's first-degree murder charge, as the State failed to present any evidence that defendant acted with another; moreover, the error was not harmless, as contended by the State, because the trial court also erroneously informed the jury in its instructions that it could convict defendant of first-degree murder on the basis of acting in concert under both felony murder and premeditation and deliberation theories. *State v. Windley*, 173 N.C. App. 187, 617 S.E.2d 682, 2005 N.C. App. LEXIS 1927 (2005).

#### Voluntary Intoxication. —

Defendant's conviction of first-degree murder under G.S. 14-17, was affirmed; the trial court properly denied defendant's requested jury in-

structions on voluntary intoxication and second-degree murder, as defendant showed no signs of intoxication when he committed the crime, and the evidence of premeditation was very strong, and the trial court did not abuse its authority to question witnesses under G.S. 8C-1, N.C. R. Crim. P. 614(b), as the trial court only questioned jurors to focus the witness, or to clarify the testimony. *State v. Rios*, 169 N.C. App. 270, 610 S.E.2d 764, 2005 N.C. App. LEXIS 685 (2005), appeal dismissed, cert. denied, — N.C. —, 623 S.E.2d 37 (2005).

## IX. CHARGE AND INDICTMENT.

### Short-Form Indictment Held Sufficient.

Defendant's conviction for first degree murder, pursuant to a theory of aiding and abetting under G.S. § 14-5.2, was affirmed because: (1) the short form indictment properly apprised defendant of the charges against him under G.S. 15-144; and (2) there was no variance with the evidence as the state's evidence presented supported the indictment for first degree murder. *State v. Glynn*, — N.C. App. —, 632 S.E.2d 551, 2006 N.C. App. LEXIS 1676 (2006).

## XII. CAPITAL PUNISHMENT.

### Sentence Not Disproportionate. —

Several factors supported the determination that imposition of the death penalty was neither excessive nor disproportionate where the evidence indicated that defendant began planning to kill the victim as soon as their telephone conversation ended the day before the murder; that defendant urged the victim to walk into the field for the ostensible purpose of setting up targets, then shot him without provocation; that the victim asked defendant not to shoot him again; that defendant fired three spaced shots into the victim; that the third shot was fired into the victim's head as the victim lay helpless watching defendant; that defendant took the victim's keys from his body after shooting him; and that defendant felt no remorse. *State v. Hurst*, 360 N.C. 181, 624 S.E.2d 309, 2006 N.C. LEXIS 7 (2006).

## XIII. APPEAL.

**Ineffective Assistance of Counsel Claims.** — Where a state prisoner, who was convicted of first-degree murder, in violation of G.S. 14-17, argued that his attorneys were ineffective because they failed to assert a diminished capacity defense, the prisoner was not entitled to federal habeas corpus relief because (1) the prisoner directed the attorneys to pursue the theory that another individual committed the murder; (2) the attorneys' strategic decision to argue that the prisoner did not commit the murder was objectively reasonable; (3) the fact that the attorneys met with the

prisoner only five times before trial did not establish their ineffectiveness; and (4) the state court reasonably held that asserting a diminished capacity defense would not have led to a different outcome. *Campbell v. Polk*, 447 F.3d 270, 2006 U.S. App. LEXIS 11591 (4th Cir. 2006).

Defendant's first degree murder conviction for stabbing his wife to death was affirmed

because defendant failed to show ineffective assistance of counsel as he did not meet his burden of showing a reasonable probability that, but for defense counsel's failure to raise an issue at trial, the result of his proceedings would have been different. *State v. Nguyen*, — N.C. App. —, 632 S.E.2d 197, 2006 N.C. App. LEXIS 1571 (2006).

## § 14-18. Punishment for manslaughter.

### CASE NOTES

- I. General Consideration.
- II. Manslaughter.
  - B. Voluntary.
- VIII. Sufficiency of Evidence.

#### I. GENERAL CONSIDERATION.

**Trial court erred in failing to submit aggravating factors to the jury** before imposing an aggravated sentence on defendant for his two manslaughter convictions; as defendant was entitled to a jury trial on the charge, any aggravating factor had to be submitted to the jury before an aggravated sentence could be imposed. *State v. Speight*, 359 N.C. 602, 614 S.E.2d 262, 2005 N.C. LEXIS 645 (2005).

**Cited in** *In re K.T.L.*, — N.C. App. —, 629 S.E.2d 152, 2006 N.C. App. LEXIS 965 (2006).

#### II. MANSLAUGHTER.

##### B. Voluntary.

**Defendant's convictions on both assault with a deadly weapon inflicting serious injury and attempted voluntary manslaughter for shooting a person were mutually exclusive offenses** and the trial court's consolidation of the offenses into a single judgment was error that mandated a new trial; for

the jury to convict on both offenses, it had to find either that defendant did not have the intent to kill, which would support the assault offense, or that he had the intent to kill, but that such intent was negated by sudden provocation, which would support the attempted manslaughter charge. *State v. Hames*, 170 N.C. App. 312, 612 S.E.2d 408, 2005 N.C. App. LEXIS 1007 (2005), cert. denied, stay denied, 360 N.C. 70, 622 S.E.2d 496 (2005).

#### VIII. SUFFICIENCY OF EVIDENCE.

**Evidence Sufficient to Sustain Conviction.** —

Admissible testimony and opinions of woman who, with victim who died from smoking methamphetamine and defendant, smoked an eight-ball of meth was sufficient evidence to convict defendant of possession and its sale, by exchange for work, under G.S. 90-95 and involuntary manslaughter under G.S. 14-18. *State v. Yelton*, — N.C. App. —, 623 S.E.2d 594, 2006 N.C. App. LEXIS 44 (2006).

### ARTICLE 7A.

#### *Rape and Other Sex Offenses.*

## § 14-27.1. Definitions.

As used in this Article, unless the context requires otherwise:

- (1) "Mentally disabled" means (i) a victim who suffers from mental retardation, or (ii) a victim who suffers from a mental disorder, either of which temporarily or permanently renders the victim substantially incapable of appraising the nature of his or her conduct, or of resisting the act of vaginal intercourse or a sexual act, or of communicating unwillingness to submit to the act of vaginal intercourse or a sexual act.
- (2) "Mentally incapacitated" means a victim who due to any act committed upon the victim is rendered substantially incapable of either apprais-



ing the nature of his or her conduct, or resisting the act of vaginal intercourse or a sexual act.

- (3) "Physically helpless" means (i) a victim who is unconscious; or (ii) a victim who is physically unable to resist an act of vaginal intercourse or a sexual act or communicate unwillingness to submit to an act of vaginal intercourse or a sexual act.
- (4) "Sexual act" means cunnilingus, fellatio, analingus, or anal intercourse, but does not include vaginal intercourse. Sexual act also means the penetration, however slight, by any object into the genital or anal opening of another person's body: provided, that it shall be an affirmative defense that the penetration was for accepted medical purposes.
- (5) "Sexual contact" means (i) touching the sexual organ, anus, breast, groin, or buttocks of any person, (ii) a person touching another person with their own sexual organ, anus, breast, groin, or buttocks, or (iii) a person ejaculating, emitting, or placing semen, urine, or feces upon any part of another person.
- (6) "Touching" as used in subdivision (5) of this section, means physical contact with another person, whether accomplished directly, through the clothing of the person committing the offense, or through the clothing of the victim. (1979, c. 682, s. 1; 2002-159, s. 2(a); 2003-252, s. 1; 2006-247, s. 12(a).)

**Editor's Note.** — Session Laws 2006-247, s. 1(a), provides: "This act shall be known as 'An Act To Protect North Carolina's Children/Sex Offender Law Changes.'"

Session Laws 2006-247, s. 21 is a severability clause.

Session Laws 2006-247, s. 22, provides, in part: "Prosecutions for offenses committed before the effective date of this act are not abated

or affected by this act, and the statutes that would be applicable but for this act remain applicable to those prosecutions."

**Effect of Amendments.** — Session Laws 2006-247, s. 12(a), effective December 1, 2006, and applicable to offenses committed on or after that date, added clause (iii) of subdivision (5) and made minor stylistic changes.

## CASE NOTES

### Proof of Penetration. —

Where the evidence showed that defendant ordered the victim to drop her pants and underwear at gunpoint and asked her to spread open her labia so he could inspect her vagina and defendant then used the barrel of his gun to separate her labia and the victim testified that she felt the gun up against her private area right where her tampon would be entered, such evidence was sufficient to support a finding that a penetration occurred under G.S. 14-27.1(4) to support defendant's conviction for first degree sexual offense, despite defendant changing his mind about pursuing any further contact with the victim upon discovering the tampon. *State v. Bellamy*, 172 N.C. App. 649, 617 S.E.2d 81, 2005 N.C. App. LEXIS 1793 (2005).

**Touching the victim's breast and genitals demonstrated intent to commit a sexual act** against the victim without her consent sufficient to support the charge of attempted second degree sex offense. *State v. Buff*, 170 N.C. App. 374, 612 S.E.2d 366, 2005 N.C. App. LEXIS 998 (2005).

**A "Sexual Act" Includes Anal Intercourse.** — Defendant's conviction for sexual assault was affirmed because there was substantial evidence that defendant engaged in a sexual act of anal penetration with the victim, against the victim's will, and by employing a knife as a dangerous or deadly weapon. While the elderly victim gave conflicting testimony as to whether defendant penetrated her anally, a report from a rape kit concluded that semen was present on the swab from the victim's rectum; furthermore, an emergency room doctor testified that it was possible for a person to be penetrated anally without showing signs of trauma and a victim might not recall anal penetration due to the fear experienced during such an assault. *State v. Cartwright*, — N.C. App. —, 629 S.E.2d 318, 2006 N.C. App. LEXIS 1076 (2006).

**Applied** in *State v. Brown*, — N.C. App. —, 631 S.E.2d 49, 2006 N.C. App. LEXIS 1311 (2006).

**Cited** in *Evans v. Evans*, 169 N.C. App. 358, 610 S.E.2d 264, 2005 N.C. App. LEXIS 609



(2005); *State v. Lawrence*, 170 N.C. App. 200, 612 S.E.2d 678, 2005 N.C. App. LEXIS 1016 (2005); *State v. Bates*, 172 N.C. App. 27, 616

S.E.2d 280, 2005 N.C. App. LEXIS 1585 (2005); *State v. Massey*, 174 N.C. App. 216, 621 S.E.2d 633, 2005 N.C. App. LEXIS 2400 (2005).

## § 14-27.2. First-degree rape.

### CASE NOTES

- I. General Consideration.
- IV. Victim under Age.
- XIII. Evidence.
- XIV. Instructions.

#### I. GENERAL CONSIDERATION.

**Unanimity of Verdict.** — Defendant's convictions for first-degree rape of a child under the age of 13, in violation of G.S. 14-27.2(a)(1), were affirmed because the trial court did not violate defendant's right to a unanimous verdict based upon generic testimony, or evidence of more incidents than there were criminal charges. *State v. Bullock*, — N.C. App. —, 631 S.E.2d 868, 2006 N.C. App. LEXIS 1572 (2006).

**Multiple Short-Form Indictments Did Not Create a Danger of Unanimous Verdicts.** — Appellate court erred in reversing defendant's convictions of first-degree statutory rape, G.S. 14-27.2, and taking indecent liberties with a minor, G.S. 14-202.1(a)(1), as defendant was properly charged by short-form indictments on all the charges as authorized by G.S. 15-144.2(a), because there was no danger of a nonunanimous verdict resulting from the multiple indictments in violation of N.C. Const. art. 1, § 24, and G.S. 15A-1237(b), as even if some jurors disagreed on the kinds of sexual misconduct committed, the jury as a whole would unanimously find that there occurred sexual conduct within the ambit of any immoral, improper, or indecent liberties as required by G.S. 14-202.1(a)(1), and because defendant was indicted on five counts of statutory rape, the victim testified to five specific incidents of statutory rape, and five verdicts of guilty were returned. *State v. Lawrence*, 360 N.C. 368, 627 S.E.2d 609, 2006 N.C. LEXIS 30 (2006).

**Instruction on Parole Ineligibility in Capital Case.** — Where a state prisoner, who was convicted of first-degree murder, first-degree rape, kidnapping, armed robbery, and the burning of personal property, in violation of G.S. 14-17, 14-27.2(a)(2), 14-39, 14-87, and 14-66, argued that the sentencing court erred by failing to provide a parole ineligibility instruction, the prisoner, who was sentenced to death for the murder conviction, was not entitled to federal habeas corpus relief because the prisoner would have been eligible for parole under former G.S. 15A-1371(a1) if the jury had rec-

ommended life imprisonment; thus, because the prisoner was eligible for parole as a matter of law, the prisoner was not entitled to a parole ineligibility instruction. *Campbell v. Polk*, 447 F.3d 270, 2006 U.S. App. LEXIS 11591 (4th Cir. 2006).

**Prosecutorial Comments in Closing Argument.** — Defendant's convictions for first-degree rape of a child under the age of 13, in violation of G.S. 14-27.2(a)(1), were affirmed because the trial court did not err by failing to intervene ex mero motu to limit certain remarks made by the state in its closing argument; in the remarks, the prosecutor referred to defendant as "vile," "amoral," "wicked," and "evil." *State v. Bullock*, — N.C. App. —, 631 S.E.2d 868, 2006 N.C. App. LEXIS 1572 (2006).

**Cited in** *State v. Watts*, 172 N.C. App. 58, 616 S.E.2d 290, 2005 N.C. App. LEXIS 1588 (2005).

#### IV. VICTIM UNDER AGE.

**Multiple Instances of Statutory Rape.** — Defendant's convictions on five counts of statutory rape and three counts of taking indecent liberties with a child had to be reversed, and he had to be retried on those charges, as the State's proof at trial of many more acts than were pled in those counts meant that the appellate court could not determine whether defendant was found guilty by the required unanimous jury on the counts pled or some other acts that were not pled; accordingly, defendant's right to conviction by a unanimous jury may have been compromised. *State v. Lawrence*, 170 N.C. App. 200, 612 S.E.2d 678, 2005 N.C. App. LEXIS 1016 (2005).

#### XIII. EVIDENCE.

**Evidence of Defendant's Prior Sexual Misconduct.** —

Defendant's convictions for first-degree rape of a child under the age of 13 were affirmed because evidence of defendant's prior sexual relations with his older half-daughter from about nine years earlier was properly admitted under G.S. 8C-1-404(b) to show a common

scheme or plan; further, DNA evidence showing that defendant was the father of the victim's child, and thus must have had sexual intercourse with her, was admissible to show a common scheme or plan under Rule 404(b). *State v. Bullock*, — N.C. App. —, 631 S.E.2d 868, 2006 N.C. App. LEXIS 1572 (2006).

**Evidence Held Sufficient to Support Separate Charges and Convictions. —**

Defendant's 11 convictions for first-degree rape of a child under the age of 13, in violation of G.S. 14-27.2(a)(1), were affirmed because the generic evidence in the form of the victim's testimony as to the acts that occurred approximately twice a week over a 10-month period was sufficient to support the convictions; thus, defendant's right to a unanimous verdict was not violated. *State v. Bullock*, — N.C. App. —, 631 S.E.2d 868, 2006 N.C. App. LEXIS 1572 (2006).

**Evidence Held Sufficient. —**

Defendant's adjudication for first-degree attempted rape was affirmed and the trial court did not err in denying defendant's motion to dismiss at the end of all the evidence, where: (1) defendant, who was 14 years old, told the victim, his 8-year-old step-sister, to come into his room; (2) when the victim entered the room, defendant pulled down her pants; (3) defendant then pulled down his own pants and touched the victim's vagina with his penis; (4) when he heard his step-mother coming, defendant ran to his closet while pulling up his pants; (4) the step-mother found the victim under the covers in defendant's bed not wearing pants or underwear; and (5) while the step-mother was in the room defendant hid in the closet. *In re D.W.*, 171 N.C. App. 496, 615 S.E.2d 90, 2005 N.C. App. LEXIS 1358 (2005).

Trial court properly denied defendant's motion to dismiss criminal charges against him; evidence that defendant forced the victim at knife-point from the front of her home to a bedroom and then sexually assaulted her con-

stituted sufficient evidence to satisfy the charge of kidnapping under G.S. 14-39(a), as well as the charge of rape under G.S. 14-27.2 and burglary under G.S. 14-51. *State v. Blizzard*, 169 N.C. App. 285, 610 S.E.2d 245, 2005 N.C. App. LEXIS 680 (2005).

Complainant's testimony that defendant's penis penetrated her vagina "more than once" provided support for the rape charge provided sufficient evidence to support defendant's conviction; thus, the denial of defendant's motion to dismiss was proper. *State v. Watson*, — N.C. App. —, 634 S.E.2d 231, 2006 N.C. App. LEXIS 1923 (2006).

#### XIV. INSTRUCTIONS.

**Instruction on "Use of Deadly Weapon".**

— Appellate court affirmed defendant's first-degree rape conviction, where defendant did not object to the jury instruction, because, even if the trial court erred by instructing the jury that a knife was a dangerous weapon as a matter of law, the trial court's instruction did not amount to plain error as, in light of the entire record, particularly the victim's testimony that she knew it was a knife that defendant took from his pocket, that she asked him not hurt her upon seeing the knife, and that she was scared, the jury likely would have found that the victim reasonably believed the knife to be a dangerous or deadly weapon. *State v. Cartwright*, — N.C. App. —, 629 S.E.2d 318, 2006 N.C. App. LEXIS 1076 (2006).

**Instruction Held Proper. —**

Defendant's convictions for first-degree rape of a child under the age of 13, in violation of G.S. 14-27.2(a)(1), were affirmed because the trial court properly instructed the jury on all 11 counts as its charge on the initial instruction on the elements of first-degree rape applied to all 11 counts. *State v. Bullock*, — N.C. App. —, 631 S.E.2d 868, 2006 N.C. App. LEXIS 1572 (2006).

## § 14-27.3. Second-degree rape.

### CASE NOTES

- I. General Consideration.
- III. Evidence.
- IV. Instructions.

#### I. GENERAL CONSIDERATION.

**Indictment Defective. —** Indictment of defendant for statutory rape was insufficient to support a judgment on the offense of attempted second degree rape, where the indictment failed to charge essential elements of the offense of attempted second degree rape. Because the indictment was fatally defective, defen-

dant's conviction for attempted second degree rape was a nullity. *State v. Frink*, — N.C. App. —, 627 S.E.2d 472, 2006 N.C. App. LEXIS 689 (2006).

#### III. EVIDENCE.

**Evidence Held Sufficient. —**

Forensic DNA testing showing a high probability that defendant was the father of the



victim's children and the victim's statement that defendant, her father, started molesting her when she was four years old provided sufficient evidence to support defendant's conviction for second-degree rape. *State v. Locklear*, 172 N.C. App. 249, 616 S.E.2d 334, 2005 N.C. App. LEXIS 1583 (2005).

Rape conviction was supported by testimony that defendant engaged in sexual intercourse with the victim when she was helpless due to her having consumed a large quantity of alcohol, the victim's her lack of experience with intoxicating beverages, and the victim's repeated loss of consciousness due to her alcohol consumption. *State v. Buff*, 170 N.C. App. 374, 612 S.E.2d 366, 2005 N.C. App. LEXIS 998 (2005).

#### IV. INSTRUCTIONS.

**Impermissible Instruction Regarding Elements of Force and Lack of Consent.** — In a second degree rape charge under G.S. 14-27.3 where the victim alleged that she said

no and that defendant engaged in sexual intercourse with her while she was asleep, and defendant alleged that the victim was awake and consented to intercourse, the State and defendant presented contradictory evidence on the elements of force and against the victim's will, but the trial court impermissibly instructed the jury that two elements — force and lack of consent — were established as a matter of law; the trial court's jury instruction created a reasonable likelihood that the jury did not deliberate upon the contradictory evidence, but rather understood the trial court's instruction to mean force and lack of consent had been established. Thus, there was a reasonable likelihood the jury concluded the victim was asleep by a standard less than beyond a reasonable doubt; therefore, pursuant to G.S. 15A-1443(b), the erroneous jury instruction was not harmless beyond a reasonable doubt, and defendant was entitled to a new trial. *State v. Smith*, 170 N.C. App. 461, 613 S.E.2d 304, 2005 N.C. App. LEXIS 1075 (2005).

## § 14-27.4. First-degree sexual offense.

### CASE NOTES

- I. General Consideration.
- II. Elements of Offense.
- III. Practice and Procedure.

#### I. GENERAL CONSIDERATION.

**Defendant's right to a unanimous jury verdict was jeopardized** by the trial court's failure to ensure that each juror had in mind the same instances of abuse when voting to convict defendant. *State v. Bates*, 172 N.C. App. 27, 616 S.E.2d 280, 2005 N.C. App. LEXIS 1585 (2005).

**Cited** in *State v. Massey*, 174 N.C. App. 216, 621 S.E.2d 633, 2005 N.C. App. LEXIS 2400 (2005).

#### II. ELEMENTS OF OFFENSE.

**Penetration.** — Where the evidence showed that defendant ordered the victim to drop her pants and underwear at gunpoint and asked her to spread open her labia so he could inspect her vagina and defendant then used the barrel of his gun to separate her labia and the victim testified that she felt the gun up against her private area right where her tampon would be entered, such evidence was sufficient to support a finding that a penetration occurred under G.S. § 14-27.1(4) to support defendant's conviction for first degree sexual offense, despite defendant changing his mind about pursuing any further contact with the victim upon discovering the tampon. *State v. Bellamy*, 172 N.C.

App. 649, 617 S.E.2d 81, 2005 N.C. App. LEXIS 1793 (2005).

#### III. PRACTICE AND PROCEDURE.

##### Fatal Variance. —

Defendant's convictions on six counts of first-degree sexual offense had to be vacated, as a fatal variance existed between the offense charged, which the State said in the indictment was by force and against the victim's will, and the fact that the State did not present any evidence that the alleged offenses were forcible and the trial court's instruction to the jury that the offense was based on the victim being under 13-years-old. *State v. Lawrence*, 170 N.C. App. 200, 612 S.E.2d 678, 2005 N.C. App. LEXIS 1016 (2005).

##### Evidence Held Sufficient. —

Defendant's conviction for sexual assault was affirmed because there was substantial evidence that defendant engaged in a sexual act of anal penetration with the victim, against the victim's will, and by employing a knife as a dangerous or deadly weapon. While the elderly victim gave conflicting testimony as to whether defendant penetrated her anally, a report from a rape kit concluded that semen was present on the swab from the victim's rectum; further-



more, an emergency room doctor testified that it was possible for a person to be penetrated anally without showing signs of trauma and a victim might not recall anal penetration due to

the fear experienced during such an assault. *State v. Cartwright*, — N.C. App. —, 629 S.E.2d 318, 2006 N.C. App. LEXIS 1076 (2006).

## § 14-27.5. Second-degree sexual offense.

### CASE NOTES

#### **Evidence held sufficient, etc. —**

Trial court properly denied defendant's motion to dismiss, pursuant to G.S. 15A-954, with respect to sexual offense charges against him which he allegedly committed against his 16-year-old daughter, as the evidence was sufficient to support the jury verdict, finding defendant guilty of second-degree sexual offense in violation of G.S. 14-27.5, where he physically and sexually attacked her; defendant's claim that there were inconsistencies in the testimony and a lack of physical evidence to bolster the victim's testimony lacked merit, as there was no physical evidence bolstering requirement, and inconsistencies were for the jury to

resolve. *State v. Dorton*, 172 N.C. App. 759, 617 S.E.2d 97, 2005 N.C. App. LEXIS 1794 (2005), cert. denied, 360 N.C. 69, 623 S.E.2d 775 (2005).

Evidence that defendant committed several overt acts, including touching the victim's breast and vaginal areas, demonstrated intent to commit a sexual act against the victim without her consent sufficient to support the charge of attempted second degree sex offense. *State v. Buff*, 170 N.C. App. 374, 612 S.E.2d 366, 2005 N.C. App. LEXIS 998 (2005).

**Applied** in *State v. Whiteley*, 172 N.C. App. 772, 616 S.E.2d 576, 2005 N.C. App. LEXIS 1795 (2005).

## § 14-27.7. Intercourse and sexual offenses with certain victims; consent no defense.

### CASE NOTES

**Indictment Sufficient.** — Indictment for sex offense in a parental role that matched the form required by G.S. 14-27.7 was sufficient to

inform defendant of the charges against him. *State v. Massey*, 174 N.C. App. 216, 621 S.E.2d 633, 2005 N.C. App. LEXIS 2400 (2005).

## § 14-27.7A. Statutory rape or sexual offense of person who is 13, 14, or 15 years old.

### CASE NOTES

**Indictment sufficient.** — Short-form indictment charging violation of G.S. 14-27.7A(a) was sufficient when it alleged that defendant unlawfully, willfully, and feloniously engaged in a sexual act with a person of the age of 13 years, that defendant was at least six years older than the victim, and that he was not lawfully married to the victim; the indictment complied with the requirements of G.S. 15-144.2(a) and was sufficient to put him on notice of the crime of which he was accused. *State v. Bradley*, — N.C. App. —, 634 S.E.2d 258, 2006 N.C. App. LEXIS 1968 (2006).

**Evidence Was Sufficient to Support Conviction.** —

Evidence was sufficient to support defendant's conviction for statutory rape, as it showed that he engaged in repeated acts of sexual intercourse with the victim when she

was under the age of consent and he was an adult who was dating her mother; indeed, the evidence showed that she gave birth to his baby when she was still a minor. *State v. Jones*, 172 N.C. App. 308, 616 S.E.2d 15, 2005 N.C. App. LEXIS 1580 (2005).

When taken in the light most favorable to the state, the victim's testimony that defendant "stuck his fingers in her vagina" while she was 13 years old provided sufficient evidence to support defendant's conviction for statutory sexual offense of a person 13 years old. *State v. Brown*, — N.C. App. —, 631 S.E.2d 49, 2006 N.C. App. LEXIS 1311 (2006).

**Defendant Not Entitled to Jury Instruction on Mistake of Fact.** — Defendant's request for a jury instruction on mistake of fact as to the victim's age was properly denied because statutory rape is a strict liability crime

to which mistake of fact is no defense. *State v. Browning*, — N.C. App. —, 629 S.E.2d 299, 2006 N.C. App. LEXIS 1079 (2006).

**Cited in** *State v. Watts*, 172 N.C. App. 58, 616 S.E.2d 290, 2005 N.C. App. LEXIS 1588 (2005).

## ARTICLE 8.

### *Assaults.*

## § 14-32. Felonious assault with deadly weapon with intent to kill or inflicting serious injury; punishments.

### CASE NOTES

- I. General Consideration.
- II. Other Crimes.
- V. Deadly Weapon.
- VI. Intent to Kill.
- IX. Instructions to Jury.
- XI. Sufficiency of Evidence.

#### I. GENERAL CONSIDERATION.

**Evidence was sufficient to support conviction** of assault with a deadly weapon inflicting serious injury where testimony revealed defendant went into the room where the victims were, defendant later reemerged from the room wearing one victim's jacket, the victim was undressed and lying in bed in an unlit bedroom, the victim was struck, was bleeding, and blacked out, and, as a result of the assault, the victim incurred a nasal fracture, sinus fracture, and closed head injury, and required surgery on her nose. *State v. Yarrell*, 172 N.C. App. 135, 616 S.E.2d 258, 2005 N.C. App. LEXIS 1428 (2005).

Conviction of assault with a deadly weapon inflicting serious injury was supported by sufficient evidence where testimony revealed that defendant hit the victim in the head, that the victim then fell to the ground, and that, as a result of the assault, the victim incurred a deep laceration over her left eye and required stitches, antibiotics, and a tetanus shot. *State v. Yarrell*, 172 N.C. App. 135, 616 S.E.2d 258, 2005 N.C. App. LEXIS 1428 (2005).

**A police officer was properly allowed to testify concerning the type of pistol used** in assault as the officer's testimony regarding the location of shell casings when a bullet was fired from two different weapons was based not upon any specialized expertise or training, but merely upon his own personal experience and observations in firing different kinds of weapons; defendant's due process rights were not violated by the destruction of the shell casings as the police had no duty to preserve the casings when defendant did not file a discovery request for the casings. *State v. Fisher*, 171 N.C. App. 201, 614 S.E.2d 428, 2005 N.C. App. LEXIS 1214 (2005).

**Great Monetary Loss as Aggravating Factor Was Proper.** — Defendant was not entitled to a new sentencing hearing on his assault with a deadly weapon inflicting serious injury conviction where the victim's medical bills after being shot in the amount of \$29,837.29 were "excessive" and surpassed those normally incurred from such an assault; defendant stipulated to the medical bills as he did not object to the State's recitation of the figure nor take exception to the amount of the medical expenses offered by the State in support of its argument for the existence of the non-statutory aggravating factor of great monetary loss. *State v. Pender*, — N.C. App. —, 622 S.E.2d 664, 2005 N.C. App. LEXIS 2710 (2005).

**Cited in** *State v. Everette*, 172 N.C. App. 237, 616 S.E.2d 237, 2005 N.C. App. LEXIS 1437 (2005).

#### II. OTHER CRIMES.

**Defendant cannot be convicted of both assault with a deadly weapon inflicting serious injury and attempted murder upon the same victim**, because they are mutually exclusive, and defendant who convicted of both was entitled to a new trial. *State v. Yang*, — N.C. App. —, 622 S.E.2d 632, 2005 N.C. App. LEXIS 2623 (2005).

#### **Prosecution Under G.S. 14-34.2 and This Section Not Double Jeopardy.** —

Trial court violated defendant's right to be free of double jeopardy when it sentenced him for both assault with a deadly weapon inflicting serious injury under G.S. 14-32(b) and misdemeanor assault inflicting serious injury under G.S. 14-33(c)(1) based on an incident in which defendant punched his girlfriend into a wall and stabbed her multiple times in the arm and leg; because defendant's convictions under G.S.



14-32(b) provided for greater punishment than G.S. 14-32.4 or 14-33(c), the trial court could not convict and sentence defendant under two statutes for the same conduct in each incident without violating the double jeopardy provisions of USCS Const. Amend. 5 and N.C. Const. art. I, § 19. *State v. McCoy*, 174 N.C. App. 105, 620 S.E.2d 863, 2005 N.C. App. LEXIS 2289 (2005).

## V. DEADLY WEAPON.

**Insufficient Evidence to Support Charge of Assault With Deadly Weapon.** — Trial court erred in denying defendant's motion to dismiss the charge of assault with a deadly weapon inflicting serious bodily injury because there was insufficient evidence to determine defendant's size and strength compared to that of the victim; mere observation by the jury of the victim and defendant's strength and size alone was not sufficient to support the deadly weapon element, as a result of which the State failed to prove the deadly weapon element of the offense. *State v. Lawson*, 173 N.C. App. 270, 619 S.E.2d 410, 2005 N.C. App. LEXIS 2036 (2005).

### Knife. —

Trial court did not err in denying defendant's motion to dismiss the charge of assault with a deadly weapon inflicting serious injury, a violation of G.S. 14-32(b), because although defendant claimed the state presented no substantive evidence that the knife was a dangerous or deadly weapon, which was an essential element of assault with a deadly weapon inflicting serious injury under G.S. 14-32(b), the state's evidence included the documents from the domestic violence hearing which were admitted as substantive evidence and tended to show that defendant stabbed his girlfriend five times with a knife causing wounds still visible some eight weeks after the assault. *State v. McCoy*, 174 N.C. App. 105, 620 S.E.2d 863, 2005 N.C. App. LEXIS 2289 (2005).

**Evidence of Premeditation and Deliberation Not Required.** — Defendant's convictions for attempted first-degree murder and assault with a deadly weapon with intent to kill inflicting serious injury did not violate his right to be free of double jeopardy; in order to obtain a conviction for attempted first-murder, the state had to prove premeditation and deliberation, whereas it did not have to prove those elements to obtain a conviction for assault with

a deadly weapon, which was a different offense requiring both proof of the use of a deadly weapon and proof of serious injury. *State v. Bethea*, 173 N.C. App. 43, 617 S.E.2d 687, 2005 N.C. App. LEXIS 1907 (2005).

## VI. INTENT TO KILL.

### Intent to Kill May Be Inferred from Circumstances. —

In a case involving an assault with a deadly weapon inflicting serious injury with intent to kill, a motion to dismiss based on insufficient evidence was properly denied because the jury could have inferred an intent to kill due to the victim's multiple stab wounds with a knife. *State v. Nicholson*, 169 N.C. App. 390, 610 S.E.2d 433, 2005 N.C. App. LEXIS 601 (2005).

## IX. INSTRUCTIONS TO JURY.

### Failure to Submit Lesser Offense Held Not Error. —

Trial court did not commit plain error when it failed to instruct the jury on the lesser included offense of assault with a deadly weapon inflicting serious injury as the evidence showed that defendant went into his home, retrieved a loaded gun, pointed the gun at the victim at close range, told the victim he was not leaving the alley that day, and then shot the victim in the back. It was irrelevant that defendant only shot the victim one time as the lack of multiple shots fired did not negate intent to kill. *State v. Cromartie*, — N.C. App. —, 627 S.E.2d 677, 2006 N.C. App. LEXIS 701 (2006).

## XI. SUFFICIENCY OF EVIDENCE.

**Defendant's convictions on both assault with a deadly weapon inflicting serious injury and attempted voluntary manslaughter for shooting a person were mutually exclusive offenses** and the trial court's consolidation of the offenses into a single judgment was error that mandated a new trial; for the jury to convict on both offenses, it had to find either that defendant did not have the intent to kill, which would support the assault offense, or that he had the intent to kill, but that such intent was negated by sudden provocation, which would support the attempted manslaughter charge. *State v. Hames*, 170 N.C. App. 312, 612 S.E.2d 408, 2005 N.C. App. LEXIS 1007 (2005), cert. denied, stay denied, 360 N.C. 70, 622 S.E.2d 496 (2005).

## § 14-32.1. Assaults on handicapped persons; punishments.

- (a) For purposes of this section, a "handicapped person" is a person who has:
- (1) A physical or mental disability, such as decreased use of arms or legs, blindness, deafness, mental retardation or mental illness; or



## (2) Infirmary

which would substantially impair that person's ability to defend himself.

(b) through (d) Repealed by Session Laws 1993 (Reg. Sess., 1994), c. 767, s. 31, effective October 1, 1994.

(e) Unless his conduct is covered under some other provision of law providing greater punishment, any person who commits any aggravated assault or assault and battery on a handicapped person is guilty of a Class F felony. A person commits an aggravated assault or assault and battery upon a handicapped person if, in the course of the assault or assault and battery, that person:

(1) Uses a deadly weapon or other means of force likely to inflict serious injury or serious damage to a handicapped person; or

(2) Inflicts serious injury or serious damage to a handicapped person; or

(3) Intends to kill a handicapped person.

(f) Any person who commits a simple assault or battery upon a handicapped person is guilty of a Class A1 misdemeanor. (1981, c. 780, s. 1; 1993, c. 539, ss. 15, 1139; 1994, Ex. Sess., c. 24, s. 14(c); 1993 (Reg. Sess., 1994), c. 767, s. 31; 2006-179, s. 1.)

**Effect of Amendments.** — Session Laws 2006-179, effective December 1, 2006, and applicable to offenses committed on or after De-

cember 1, 2006, substituted "Class A1" for "Class 1" near the end of subsection (f).

## § 14-32.4. Assault inflicting serious bodily injury; strangulation; penalties.

### CASE NOTES

#### Serious Bodily Injury Shown. —

Evidence was sufficient to support defendants' convictions for assault inflicting serious bodily injury where the victim testified that his facial injuries were "very" painful, and that he suffered pain for about a month, and a doctor testified that the injuries suffered by the victim were the type that caused "severe" and "extreme" pain. *State v. Brown*, — N.C. App. —, 628 S.E.2d 787, 2006 N.C. App. LEXIS 882 (2006).

#### Prosecution Under G.S. 14-32 and This Section Double Jeopardy. —

Trial court violated defendant's right to be free of double jeopardy when it sentenced him for both assault with a deadly weapon inflicting

serious injury under G.S. 14-32(b) and misdemeanor assault inflicting serious injury under G.S. 14-33(c)(1) based on an incident in which defendant punched his girlfriend into a wall and stabbed her multiple times in the arm and leg; because defendant's convictions under G.S. 14-32(b) provided for greater punishment than G.S. 14-32.4 or 14-33(c), the trial court could not convict and sentence defendant under two statutes for the same conduct in each incident without violating the double jeopardy provisions of USCS Const. Amend. 5 and N. C. Const. art. I, § 19. *State v. McCoy*, 174 N.C. App. 105, 620 S.E.2d 863, 2005 N.C. App. LEXIS 2289 (2005).

## § 14-33. Misdemeanor assaults, batteries, and affrays, simple and aggravated; punishments.

### CASE NOTES

II. Other Crimes.

III. Infliction of Serious Injury.

VI. Assaults on Law-Enforcement Officers.

VII. Sufficiency of Evidence.

VIII. Punishment.

## II. OTHER CRIMES.

**Use of Conviction in Another Jurisdiction.** — Trial court erred in sentencing defendant as a level IV offender on his conviction of second-degree murder, as the trial court erred in finding that a prior New York conviction of N.Y. Penal Law § 120.05 was substantially similar to North Carolina's offense of simple assault set forth in G.S. 14-33(a), as the North Carolina offense required serious injury to the victim and the New York offense did not; furthermore, under G.S. 14-2.5, an attempt to commit a misdemeanor or a felony is punishable under the next lower classification as the offense the offender attempted to commit, and defendant's prior New York conviction for attempted second-degree assault should have been treated as a class 3 misdemeanor, which would have not had any point value for prior record purposes. *State v. Hanton*, — N.C. App. —, 623 S.E.2d 600, 2006 N.C. App. LEXIS 45 (2006).

## III. INFLECTION OF SERIOUS INJURY.

**Evidence Insufficient to Show Felony Child Abuse but Sufficient for Misdemeanor Assault Charge.** — Remand for resentencing on felony child abuse inflicting serious physical injury was improper because the indictment failed to allege an essential element required for proof of that crime: that injury be inflicted by a parent or any other person providing care to or supervision of a child less than 16 years of age; however, the indictment and jury verdict did support a conviction for class A1 misdemeanor assault. *State v. Locklear*, — N.C. App. —, 632 S.E.2d 516, 2006 N.C. App. LEXIS 1641 (2006).

## VI. ASSAULTS ON LAW-ENFORCEMENT OFFICERS.

**Lesser Included Offense.** — Misdemeanor assault on a government official is not a lesser included offense of felony malicious conduct by a prisoner; therefore, defendant was not entitled to such a jury instruction in a case where defendant spat in an officer's face. *State v. Crouse*, 169 N.C. App. 382, 610 S.E.2d 454, 2005 N.C. App. LEXIS 691 (2005).

## Trial court did not violate the Double Jeopardy Clause, etc.

Defendant's convictions for malicious conduct by a prisoner and habitual misdemeanor assault did not charge the same offense, and, thus, did not violate the double jeopardy clause; although the conduct alleged in both indictments was identical, the evidence needed to prove both malicious conduct by a prisoner and habitual misdemeanor assault based on an assault on a government employee was different, which meant separate offenses were involved. *State v. Artis*, — N.C. App. —, 622 S.E.2d 204, 2005 N.C. App. LEXIS 2610 (2005).

## VII. SUFFICIENCY OF EVIDENCE.

### Evidence Sufficient. —

State produced sufficient evidence to support a conviction of assault with a deadly weapon where testimony revealed that defendant went into the room where the victims were, later reemerged from the room wearing one victim's jacket, and that at the time of the assault, the victim was undressed and facing downward in an unlit bedroom, was hit in the head from behind, and dragged to the ground, where he was then kicked while facing downward. *State v. Yarrell*, 172 N.C. App. 135, 616 S.E.2d 258, 2005 N.C. App. LEXIS 1428 (2005).

## VIII. PUNISHMENT.

### Double Punishment Prohibited. —

Trial court violated defendant's right to be free of double jeopardy when it sentenced him for both assault with a deadly weapon inflicting serious injury under G.S. 14-32(b) and misdemeanor assault inflicting serious injury under G.S. 14-33(c)(1) based on an incident in which defendant punched his girlfriend into a wall and stabbed her multiple times in the arm and leg; because defendant's convictions under G.S. 14-32(b) provided for greater punishment than G.S. 14-32.4 or 14-33(c), the trial court could not convict and sentence defendant under two statutes for the same conduct in each incident without violating the double jeopardy provisions of USCS Const. Amend. 5 and N. C. Const. art. I, § 19. *State v. McCoy*, 174 N.C. App. 105, 620 S.E.2d 863, 2005 N.C. App. LEXIS 2289 (2005).

## § 14-34.1. Discharging certain barreled weapons or a firearm into occupied property.

## CASE NOTES

### Instruction Held Erroneous. —

Defendant was awarded a new trial on charges of discharging a firearm into occupied property because the trial court, when it gave

the final mandate as to the charge, did not instruct the jury that it could return a verdict of not guilty as to that charge if it found that defendant acted in self-defense. Further, be-

cause there was evidence that defendant was not the initial aggressor and his right to stand his ground was at least a substantial feature of his defense of self-defense; the trial court's failure to instruct the jury that defendant had no duty to retreat was plain error. *State v. Davis*, — N.C. App. —, 627 S.E.2d 474, 2006 N.C. App. LEXIS 696 (2006).

**Evidence Held Sufficient.** —

Substantial evidence existed from which a jury could have found that defendant had reasonable grounds to believe that the restaurant

was occupied when he fired the shots in its direction; prior to the subject incident, the restaurant had stayed open until 3:00 a.m., and the restaurant was located in an area where other establishments were open until the early morning hours. *State v. Everett*, 172 N.C. App. 237, 616 S.E.2d 237, 2005 N.C. App. LEXIS 1437 (2005).

**Cited in** *State v. Langley*, 173 N.C. App. 194, 618 S.E.2d 253, 2005 N.C. App. LEXIS 1920 (2005).

**§ 14-34.2. Assault with a firearm or other deadly weapon upon governmental officers or employees, company police officers, or campus police officers.**

**CASE NOTES**

**Erroneous Admission of Irrelevant Motive Evidence Held Non-Prejudicial.** — Since the State presented evidence that defendant assaulted a deputy sheriff by dragging the officer with his car, any error committed in admitting evidence of another traffic stop

where defendant also fled in a vehicle was non-prejudicial. *State v. Brewington*, 170 N.C. App. 264, 612 S.E.2d 648, 2005 N.C. App. LEXIS 1011 (2005), cert. denied, 360 N.C. 67, 621 S.E.2d 881 (2005).

**§ 14-34.5. Assault with a firearm on a law enforcement, probation, or parole officer or on a person employed at a State or local detention facility.**

**CASE NOTES**

**Cited in** *State v. Everett*, 172 N.C. App. 237, 616 S.E.2d 237, 2005 N.C. App. LEXIS 1437 (2005).

**ARTICLE 10.**

*Kidnapping and Abduction.*

**§ 14-39. Kidnapping.**

(a) Any person who shall unlawfully confine, restrain, or remove from one place to another, any other person 16 years of age or over without the consent of such person, or any other person under the age of 16 years without the consent of a parent or legal custodian of such person, shall be guilty of kidnapping if such confinement, restraint or removal is for the purpose of:

- (1) Holding such other person for a ransom or as a hostage or using such other person as a shield; or
- (2) Facilitating the commission of any felony or facilitating flight of any person following the commission of a felony; or
- (3) Doing serious bodily harm to or terrorizing the person so confined, restrained or removed or any other person; or
- (4) Holding such other person in involuntary servitude in violation of G.S. 14-43.12.



(5) Trafficking another person with the intent that the other person be held in involuntary servitude or sexual servitude in violation of G.S. 14-43.11.

(6) Subjecting or maintaining such other person for sexual servitude in violation of G.S. 14-43.13.

(b) There shall be two degrees of kidnapping as defined by subsection (a). If the person kidnapped either was not released by the defendant in a safe place or had been seriously injured or sexually assaulted, the offense is kidnapping in the first degree and is punishable as a Class C felony. If the person kidnapped was released in a safe place by the defendant and had not been seriously injured or sexually assaulted, the offense is kidnapping in the second degree and is punishable as a Class E felony.

(c) Any firm or corporation convicted of kidnapping shall be punished by a fine of not less than five thousand dollars (\$5,000) nor more than one hundred thousand dollars (\$100,000), and its charter and right to do business in the State of North Carolina shall be forfeited. (1933, c. 542; 1975, c. 843, s. 1; 1979, c. 760, s. 5; 1979, 2nd Sess., c. 1316, s. 47; 1981, c. 63, s. 1; c. 179, s. 14; 1983, c. 746, s. 2; 1993, c. 539, s. 1143; 1994, Ex. Sess., c. 24, s. 14(c); 1995, c. 509, s. 8; 2006-247, s. 20(c).)

**Editor's Note.** — Session Laws 2006-247, s. 1(a), provides: "That this shall be known as 'An Act To Protect North Carolina's Children/Sex Offender Law Changes.'"

Session Laws 2006-247, s. 21 is a severability clause.

Session Laws 2006-247, s. 22, provides, in part: "Prosecutions for offenses committed before the effective date of this act are not abated

or affected by this act, and the statutes that would be applicable but for this act remain applicable to those prosecutions."

**Effect of Amendments.** — Session Laws 2006-247, s. 20(c), effective December 1, 2006, and applicable to offenses committed on or after that date, substituted "14-43.12" for "14-43.2" at the end of subdivision (a)(4) and added subdivisions (a)(5) and (a)(6).

## CASE NOTES

- I. General Consideration.
- II. Kidnapping, Generally.
- VI. First-Degree Kidnapping.
- VII. Second-Degree Kidnapping.
  - A. In General.
- VIII. Charge and Indictment, Generally.
- IX. Instructions.

### I. GENERAL CONSIDERATION.

**When Defendant May Be Convicted of Both Kidnapping and Another Felony.** — Since the State failed to show that the removal of the victims was separate from the robbery, that it increased the danger beyond that inherent in the robbery, that the victims were physically injured, or that they were subjected to restraint beyond that of the threatened use of a firearm, defendant's kidnapping convictions were reversed as being in violation of double jeopardy. *State v. Ripley*, 172 N.C. App. 453, 617 S.E.2d 106, 2005 N.C. App. LEXIS 1801 (2005), *aff'd*, — N.C. —, 626 S.E.2d 289 (2006).

It was reversible error to impose sentences for first-degree kidnapping and attempted robbery with a dangerous weapon offenses, both of which the jury was instructed could serve as underlying felonies to the charge of felony mur-

der. *State v. Oglesby*, — N.C. App. —, 622 S.E.2d 152, 2005 N.C. App. LEXIS 2624 (2005).

**Instruction on Parole Ineligibility in Capital Case.** — Where a state prisoner, who was convicted of first-degree murder, first-degree rape, kidnapping, armed robbery, and the burning of personal property, in violation of G.S. 14-17, 14-27.2(a)(2), 14-39, 14-87, and 14-66, argued that the sentencing court erred by failing to provide a parole ineligibility instruction, the prisoner, who was sentenced to death for the murder conviction, was not entitled to federal habeas corpus relief because the prisoner would have been eligible for parole under former G.S. 15A-1371(a1) if the jury had recommended life imprisonment; thus, because the prisoner was eligible for parole as a matter of law, the prisoner was not entitled to a parole ineligibility instruction. *Campbell v. Polk*, 447

F.3d 270, 2006 U.S. App. LEXIS 11591 (4th Cir. 2006).

## II. KIDNAPPING, GENERALLY.

### **Evidence held sufficient, etc.**

Trial court did not err in denying defendant's motion to dismiss the second-degree kidnapping charges, a violation of G.S. 14-39(a), which arose from two separate incidents in which defendant beat and restrained his girlfriend against her will because the evidence was sufficient to support the trial court's denial of defendant's motion to dismiss the charges of second-degree kidnapping. The record showed that the hospital staff that treated defendant's girlfriend testified that defendant restrained his girlfriend by refusing to allow her to seek medical treatment for a broken arm after the first incident, and after the second incident, a police officer testified that the girlfriend told him that defendant had been holding her against her will for days and would not let her contact her family. *State v. McCoy*, 174 N.C. App. 105, 620 S.E.2d 863, 2005 N.C. App. LEXIS 2289 (2005).

## VI. FIRST-DEGREE KIDNAPPING.

### **Restraint Must be Separate and Apart From that Inherent in Committing Other Felonies. —**

Defendant's kidnapping conviction was vacated because there was insufficient evidence of confinement, restraint, or removal of the victim beyond that which was inherent to the additional crimes of armed robbery and rape. The victim's testimony was that defendant grabbed the victim by her arm, pushed her back into her kitchen, pulled out a knife and demanded money, pushed the victim through a hall and into a den where he raped her, and left when the victim gave him her money. *State v. Cartwright*, — N.C. App. —, 629 S.E.2d 318, 2006 N.C. App. LEXIS 1076 (2006).

## VII. SECOND-DEGREE KIDNAPPING.

### **A. In General.**

### **The evidence was sufficient to show that the defendant acted with the purpose of terrorizing the victim, etc. —**

Trial court did not err in denying defendant's motion to dismiss the charge of second-degree kidnapping as the evidence that defendant grabbed the victim on the street at night, attempted to drag the victim to some bushes, wrestled with and sexually molested the victim, fled from the scene when the police were called by a woman who heard the victim screaming, and that the victim was emotionally upset and distraught when the police arrived and when she saw defendant at a showup identification about 30 minutes later was sufficient for the

jury to conclude that defendant acted with the purpose of terrorizing the victim. *State v. Harrison*, 169 N.C. App. 257, 610 S.E.2d 407, 2005 N.C. App. LEXIS 608 (2005), cert. denied, 360 N.C. 71, 622 S.E.2d 496 (2005).

### **Evidence Insufficient to Sustain Removal Requirement. —**

Trial court erred in denying defendant's motion to dismiss a second-degree kidnapping charge under G.S. 14-39(a)(2) where defendant's act of pushing a convenience store clerk toward the register during a robbery did not expose her to a greater danger than inherent in an armed robbery, and thus was insufficient to support the charge. *State v. Stephens*, — N.C. App. —, 623 S.E.2d 610, 2006 N.C. App. LEXIS 50 (2006).

## VIII. CHARGE AND INDICTMENT, GENERALLY.

**Evidence Was Sufficient to Deny Motion to Dismiss. —** Trial court properly denied defendant's motion to dismiss criminal charges against him; evidence that defendant forced the victim at knifepoint from the front of her home to a bedroom and then sexually assaulted her constituted sufficient evidence to satisfy the charge of kidnapping under G.S. 14-39(a), as well as the charge of rape under G.S. 14-27.2 and burglary under G.S. 14-51. *State v. Blizard*, 169 N.C. App. 285, 610 S.E.2d 245, 2005 N.C. App. LEXIS 680 (2005).

## IX. INSTRUCTIONS.

### **Instructions as to Lesser Included Offenses. —**

There was no error in the trial court's failure to submit the charge of second-degree kidnapping to the jury because there was no affirmative or willful action on the part of defendants to release the victims, as alleged by defendants. *State v. Love*, — N.C. App. —, 630 S.E.2d 234, 2006 N.C. App. LEXIS 1189 (2006).

### **Instruction on False Imprisonment as Lesser Offense. —**

Trial court did not err in failing to instruct on the lesser-included offense of false imprisonment, where the evidence showed that defendant restrained the victim for the purpose of terrorizing her; among other things, the evidence showed that defendant approached the victim with a rifle, grabbed her hair, and forced her into his vehicle, where he placed her in headlock, choked her, and caused her to hit her head against the side of the vehicle. *State v. Jacobs*, 172 N.C. App. 220, 616 S.E.2d 306, 2005 N.C. App. LEXIS 1586 (2005).

Defendant's conviction for second-degree kidnapping was affirmed because the trial court did not err in denying defendant's request to instruct the jury regarding the lesser-included offense of false imprisonment, as defendant had



the specific intent to terrorize his victim, a woman whom defendant grabbed on the street, attempted to drag toward some bushes, and wrestled with and sexually molested before

defendant fled. State v. Harrison, 169 N.C. App. 257, 610 S.E.2d 407, 2005 N.C. App. LEXIS 608 (2005), cert. denied, 360 N.C. 71, 622 S.E.2d 496 (2005).

§ 14-43.2: Repealed by Session Laws 2006-247, s. 20(a), effective December 1, 2006, and applicable to offenses committed on or after that date.

**Cross References.** — For current provisions regarding involuntary servitude, see G.S. 14-43.12.

**Editor's Note.** — Session Laws 2006-247, s. 1(a) provides: "This act shall be known as 'An

Act To Protect North Carolina's Children/Sex Offender Law Changes.'"

Session Laws 2006-247, s. 21 is a severability clause.

## ARTICLE 10A.

### *Human Trafficking.*

#### § 14-43.10. Definitions.

(a) Definitions. — The following definitions apply in this Article:

(1) Coercion. — The term includes all of the following:

- a. Causing or threatening to cause bodily harm to any person, physically restraining or confining any person, or threatening to physically restrain or confine any person.
- b. Exposing or threatening to expose any fact or information that if revealed would tend to subject a person to criminal or immigration proceedings, hatred, contempt, or ridicule.
- c. Destroying, concealing, removing, confiscating, or possessing any actual or purported passport or other immigration document, or any other actual or purported government identification document, of any person.
- d. Providing a controlled substance, as defined by G.S. 90-87, to a person.

(2) Deception. — The term includes all of the following:

- a. Creating or confirming another's impression of an existing fact or past event that is false and which the accused knows or believes to be false.
- b. Maintaining the status or condition of a person arising from a pledge by that person of his or her personal services as security for a debt, if the value of those services as reasonably assessed is not applied toward the liquidation of the debt or the length and nature of those services are not respectively limited and defined, or preventing a person from acquiring information pertinent to the disposition of such debt.
- c. Promising benefits or the performance of services that the accused does not intend to deliver or perform or knows will not be delivered or performed.

(3) Involuntary servitude. — The term includes the following:

- a. The performance of labor, whether or not for compensation, or whether or not for the satisfaction of a debt; and
- b. By deception, coercion, or intimidation using violence or the threat of violence or by any other means of coercion or intimidation.

(4) Minor. — A person who is less than 18 years of age.

(5) Sexual servitude. — The term includes the following:



- a. Any sexual activity as defined in G.S. 14-190.13 for which anything of value is directly or indirectly given, promised to, or received by any person, which conduct is induced or obtained by coercion or deception or which conduct is induced or obtained from a person under the age of 18 years; or
- b. Any sexual activity as defined in G.S. 14-190.13 that is performed or provided by any person, which conduct is induced or obtained by coercion or deception or which conduct is induced or obtained from a person under the age of 18 years. (2006-247, s. 20(b).)

**Editor's Note.** — Session Laws 2006-247, s. 20(b), enacted this section as G.S. 14-43.4. It was recodified as this section at the direction of the Revisor of Statutes.

Session Laws 2006-247, s. 1(a) provides: "This act shall be known as 'An Act to Protect North Carolina's Children/Sex Offender Law Changes.'"

Session Laws 2006-247, s. 21 is a severability clause.

Session Laws 2006-247, s. 22, makes this article effective December 1, 2006, and applicable to offenses committed on or after that date, and provides, in part: "Prosecutions for offenses committed before the effective date of this act are not abated or affected by this act, and the statutes that would be applicable but for this act remain applicable to those prosecutions."

### § 14-43.11. Human trafficking.

(a) A person commits the offense of human trafficking when that person knowingly recruits, entices, harbors, transports, provides, or obtains by any means another person with the intent that the other person be held in involuntary servitude or sexual servitude.

(b) A person who violates this section is guilty of a Class F felony if the victim of the offense is an adult. A person who violates this section is guilty of a Class C felony if the victim of the offense is a minor.

(c) Each violation of this section constitutes a separate offense and shall not merge with any other offense. Evidence of failure to deliver benefits or perform services standing alone shall not be sufficient to authorize a conviction under this section. (2006-247, s. 20(b).)

**Editor's Note.** — Session Laws 2006-247, s. 20(b), enacted this section as G.S. 14-43.5. It

was recodified as this section at the direction of the Revisor of Statutes.

### § 14-43.12. Involuntary servitude.

(a) A person commits the offense of involuntary servitude when that person knowingly and willfully holds another in involuntary servitude.

(b) A person who violates this section is guilty of a Class F felony if the victim of the offense is an adult. A person who violates this section is guilty of a Class C felony if the victim of the offense is a minor.

(c) Each violation of this section constitutes a separate offense and shall not merge with any other offense. Evidence of failure to deliver benefits or perform services standing alone shall not be sufficient to authorize a conviction under this section.

(d) Nothing in this section shall be construed to affect the laws governing the relationship between an unemancipated minor and his or her parents or legal guardian.

(e) If any person reports a violation of this section, which violation arises out of any contract for labor, to any party to the contract, the party shall immediately report the violation to the sheriff of the county in which the violation is alleged to have occurred for appropriate action. A person violating

this subsection shall be guilty of a Class 1 misdemeanor. (1983, ch. 746, s. 1; 1993, c. 539, ss. 23, 1146; 1994, Ex. Sess., c. 24, s. 14(c); 2006-247, s. 20(b).)

**Editor’s Note.** — Session Laws 2006-247, s. 20(b), enacted this section as G.S. 14-43.6. It was recodified as this section at the direction of the Revisor of Statutes.

§ 14-43.13. Sexual servitude.

(a) A person commits the offense of sexual servitude when that person knowingly subjects or maintains another in sexual servitude.

(b) A person who violates this section is guilty of a Class F felony if the victim of the offense is an adult. A person who violates this section is guilty of a Class C felony if the victim of the offense is a minor.

(c) Each violation of this section constitutes a separate offense and shall not merge with any other offense. Evidence of failure to deliver benefits or perform services standing alone shall not be sufficient to authorize a conviction under this section. (2006-247, s. 20(b).)

**Editor’s Note.** — Session Laws 2006-247, s. 20(b), enacted this section as G.S. 14-43.7. It was recodified as this section at the direction of the Revisor of Statutes.

SUBCHAPTER IV. OFFENSES AGAINST THE HABITATION AND OTHER BUILDINGS.

ARTICLE 14.

*Burglary and Other Housebreakings.*

§ 14-51. First and second degree burglary.

CASE NOTES

- I. General Consideration.
- VIII. Indictment.
- X. Evidence.

I. GENERAL CONSIDERATION.

**Steps on Appeal.** — While convictions that result in a judgment of death are automatically appealable to the Supreme Court of North Carolina, all other convictions are properly appealed to the Court of Appeals pursuant to G.S. 7A-27 and N.C. R. App. P. 4(d), and while neither party filed a motion to bypass the Court of Appeals as to defendant’s non-capital conviction for burglary, when he appealed his conviction for murder and his death sentence, the Supreme Court of North Carolina, on its own initiative, and consistently with N.C. R. App. P. 2, considered defendant’s assignments of error that concerned his burglary conviction under G.S. 14-51 because the issue also related to one of his arguments regarding an aggravating circumstance. *State v. Elliott*, 360 N.C. 400, 628 S.E.2d 735, 2006 N.C. LEXIS 46 (2006).

VIII. INDICTMENT.

**Felony Must Be Specified.** —

When an indictment charged defendant with first-degree burglary for breaking and entering with the intent to commit larceny, but the jury was instructed that, in order to convict defendant of first-degree burglary, it had to find he broke and entered with the intent to commit robbery with a dangerous weapon, defendant was convicted of a crime of which he was not given sufficient notice in order to prepare a defense, so his conviction was vacated. *State v. Farrar*, — N.C. App. —, 634 S.E.2d 253, 2006 N.C. App. LEXIS 1966 (2006).

When the prosecution amended an indictment for felonious breaking and entering in such a manner that the defendant could no longer rely upon its statement of the felony defendant allegedly intended, such an amend-

ment was a substantial alteration and was prohibited by G.S. 15A-923(e), as to allow such practice would enable the state to thwart the very purpose of an indictment, which was to enable the accused to prepare for trial. *State v. Farrar*, — N.C. App. —, 634 S.E.2d 253, 2006 N.C. App. LEXIS 1966 (2006).

It is axiomatic that where the state alleges an intent to commit a specific felony as an element of burglary in the indictment, the jury is required to find defendant possessed the intent to commit the specific felony alleged in order to convict on the charge. *State v. Farrar*, — N.C. App. —, 634 S.E.2d 253, 2006 N.C. App. LEXIS 1966 (2006).

## X. EVIDENCE.

### **Evidence Was Sufficient to Deny Motion to Dismiss. —**

Trial court properly denied defendant's motion to dismiss criminal charges against him; evidence that defendant forced the victim at

knifepoint from the front of her home to a bedroom and then sexually assaulted her constituted sufficient evidence to satisfy the charge of kidnapping under G.S. 14-39(a), as well as the charge of rape under G.S. 14-27.2 and burglary under G.S. 14-51. *State v. Blizzard*, 169 N.C. App. 285, 610 S.E.2d 245, 2005 N.C. App. LEXIS 680 (2005).

**Sufficient Evidence of Burglary in the First Degree. —** There was sufficient evidence to convict defendant of burglary in the first degree under G.S. 14-51, given that the State showed that he broke and entered his murder victim's home in the nighttime. While the evidence that the victim was in or near her nightclothes at the time of the murder was not dispositive of whether the breaking and entering occurred at night, such evidence was relative and was properly considered with the other evidence that tended to show that the crime occurred during the nighttime. *State v. Elliott*, 360 N.C. 400, 628 S.E.2d 735, 2006 N.C. LEXIS 46 (2006).

## § 14-54. Breaking or entering buildings generally.

### CASE NOTES

- I. General Consideration.
- II. Elements of Offense.
- III. Breaking or Entering.
- V. Intent.
- VII. Indictment.
- IX. Trial.
- C. Instructions.

### I. GENERAL CONSIDERATION.

**Construction With Armed Career Criminal Act. —** Burglary convictions under G.S. 14-54 were violent felonies for purposes of the Armed Career Criminal Act (ACCA), 18 U.S.C.S. § 924(e); district court did not violate defendant's right to trial by jury under the Sixth Amendment to the U.S. Constitution or commit other error when it reviewed the record to determine if defendant was convicted of violating G.S. 14-54 on separate occasions without submitting that issue to a jury, found that he was subject to enhanced punishment under the ACCA, and sentenced him to fifteen years' imprisonment, five years of supervised release, and a \$100 special assessment. *United States v. Thompson*, 421 F.3d 278, 2005 U.S. App. LEXIS 19223 (4th Cir. 2005), cert. denied, — U.S. —, 126 S. Ct. 1463, 164 L. Ed. 2d 250 (2006).

**Guilty Plea Supported. —** Arresting officer's testimony established a sufficient factual basis to support defendant's guilty plea to breaking and entering; the officer testified that he found defendant's truck near a burglarized residence, that he saw jewelry and boxes in the

truck, that footprints in the snow led up to the residence where a window was broken, and that, during a search of the residence, the officer found defendant underneath a bed with a stolen rifle laying next to him. *State v. Poore*, 172 N.C. App. 839, 616 S.E.2d 639, 2005 N.C. App. LEXIS 1774 (2005).

**Cited in** *State v. Scanlon*, — N.C. App. —, 626 S.E.2d 770, 2006 N.C. App. LEXIS 541 (2006).

### II. ELEMENTS OF OFFENSE.

**Identification of Owner of Property Not An Element. —** Relying on analogous statute, G.S. 14-54(a), prohibiting breaking and entering, the appellate court found that the identification of the owner of the property was not an element of breaking into a coin-operated machine under G.S. 14-56.1; therefore, defendant was properly convicted of breaking into a coin-operated machine, although the State did not allege that the owner of the property was a natural person or a person capable of owning property. *State v. Price*, 170 N.C. App. 672, 613 S.E.2d 60, 2005 N.C. App. LEXIS 1085 (2005).



### III. BREAKING OR ENTERING.

#### Entry with Consent of Owner. —

While defendant entered a law office with implied consent from the firm, that consent was void ab initio when defendant went into areas of the firm that were not open to the public so that defendant could commit theft; thus, defendant's convictions for felonious breaking and entering and felonious larceny were supported by sufficient evidence. *State v. Brooks*, — N.C. App. —, 631 S.E.2d 54, 2006 N.C. App. LEXIS 1334 (2006).

**Possession of Stolen Goods Conviction Vacated.** — Where defendant was acquitted on the underlying charge; the trial court erred in accepting the jury's guilty verdict on a charge of felony possession of stolen goods when the jury found defendant not guilty of the underlying breaking and entering charge. *State v. Goblet*, 173 N.C. App. 112, 618 S.E.2d 257, 2005 N.C. App. LEXIS 1929 (2005).

### V. INTENT.

#### Intent May Be Inferred from Circumstances. —

Trial court properly denied motion to dismiss the charge of felonious breaking and entering, under G.S. 14-54(a) where substantial evidence existed that defendant and two accomplices entered a locked building without permission in the early morning hours, they ransacked the inside of the building, and they placed items that belonged to the business located in the building into bags. The jury could infer that defendant and his accomplices intended to com-

mit larceny. *State v. Garcia*, — N.C. App. —, 621 S.E.2d 292, 2005 N.C. App. LEXIS 2493 (2005).

### VII. INDICTMENT.

**Overruling of Case Law on Indictment Requirements.** — There is no requirement that an indictment for felonious breaking or entering contain specific allegations of the intended felony, and *State v. Vick*, 70 N.C. App. 338, 319 S.E.2d 327 (N.C. Ct. App. 1984), is overruled insofar as it is inconsistent with this; however, if an indictment does specifically allege the intended felony, G.S. § 15A-923(e) mandates such allegations may not be amended. *State v. Silas*, 360 N.C. 377, 627 S.E.2d 604, 2006 N.C. LEXIS 26 (2006).

### IX. TRIAL.

#### C. Instructions.

**Instruction As To Diminished Capacity Defense.** — Trial court did not commit plain error by failing to instruct the jury on diminished capacity from defendant having taken medication before breaking and entering into a building with his accomplices, despite defendant's contention that he was in a fog, because defendant's two statements regarding his mental condition were insufficient to create a reasonable doubt in the juror's minds that defendant was unable to form the specific intent necessary to commit the crime of breaking and entering. *State v. Garcia*, — N.C. App. —, 621 S.E.2d 292, 2005 N.C. App. LEXIS 2493 (2005).

## § 14-56. Breaking or entering into or breaking out of railroad cars, motor vehicles, trailers, aircraft, boats, or other watercraft.

### CASE NOTES

Cited in *State v. Flemming*, 171 N.C. App. 413, 615 S.E.2d 310, 2005 N.C. App. LEXIS 1260 (2005).

## § 14-56.1. Breaking into or forcibly opening coin- or currency-operated machines.

### CASE NOTES

**Identification of Owner of Property Not An Element.** — Relying on an analogous statute, G.S. 14-54(a), prohibiting breaking and entering, the appellate court found that the identification of the owner of the property was not an element of breaking into a coin-operated machine under G.S. 14-56.1; therefore, defen-

dant was properly convicted of breaking into a coin-operated machine, although the State did not allege that the owner of the property was a natural person or a person capable of owning property. *State v. Price*, 170 N.C. App. 672, 613 S.E.2d 60, 2005 N.C. App. LEXIS 1085 (2005).

## ARTICLE 15.

*Arson and Other Burnings.*

## § 14-58. Punishment for arson.

## CASE NOTES

**Evidence Sufficient to Defeat Motion to Dismiss.** — Trial court properly denied defendant's motion to dismiss a charge of first-degree arson; evidence which indicated that defendant had threatened to burn the victims, was in the vicinity of the scene when he made another threatening call, and that a fire was deliberately set was sufficient evidence that defendant was the perpetrator. *State v. Curmon*, 171 N.C. App. 697, 615 S.E.2d 417, 2005 N.C. App. LEXIS 1362 (2005).

**Curtilage.** — Defendant, who allegedly set fire to a garage about 30 feet from an inhabited house, was properly charged with first-degree arson under G.S. 14-58 and not with burning an outbuilding under G.S. 14-62 because the

garage was located within the curtilage of an inhabited house; although tension existed between caselaw applying G.S. 14-62 to outbuildings within the curtilage of dwelling houses and the common-law definition of arson, the appellate court was bound by precedent to find that defendant's motion to dismiss the arson charge was properly denied. *State v. Nipper*, — N.C. App. —, 629 S.E.2d 883, 2006 N.C. App. LEXIS 1181 (2006).

**Applied** in *State v. Norris*, 360 N.C. 507, 630 S.E.2d 915, 2006 N.C. LEXIS 592 (2006).

**Cited** in *State v. Norris*, 172 N.C. App. 722, 617 S.E.2d 298, 2005 N.C. App. LEXIS 1787 (2005).

## § 14-58.2. Burning of mobile home, manufactured-type house or recreational trailer home.

## CASE NOTES

**Sufficiency of Evidence.** — Fact that vinyl siding on a mobile home melted as a result of a fire set by defendant was sufficient to constitute the "charring" necessary to find that the mobile

home had burned and it supported defendant's conviction under G.S. 14-58.2. *State v. Norris*, 172 N.C. App. 722, 617 S.E.2d 298, 2005 N.C. App. LEXIS 1787 (2005).

## § 14-62. Burning of certain buildings.

## CASE NOTES

## IV. Buildings.

## IV. BUILDINGS.

**Garage.** — Defendant, who allegedly set fire to a garage about 30 feet from an inhabited house, was properly charged with first-degree arson under G.S. 14-58 and not with burning an outbuilding under G.S. 14-62 because the garage was located within the curtilage of an inhabited house; although tension existed be-

tween caselaw applying G.S. 14-62 to outbuildings within the curtilage of dwelling houses and the common-law definition of arson, the appellate court was bound by precedent to find that defendant's motion to dismiss the arson charge was properly denied. *State v. Nipper*, — N.C. App. —, 629 S.E.2d 883, 2006 N.C. App. LEXIS 1181 (2006).

## § 14-66. Burning of personal property.

## CASE NOTES

**Instruction on Parole Ineligibility in Capital Case.** — Where a state prisoner, who

was convicted of first-degree murder, first-degree rape, kidnapping, armed robbery, and the

burning of personal property, in violation of G.S. 14-17, 14-27.2(a)(2), 14-39, 14-87, and 14-66, argued that the sentencing court erred by failing to provide a parole ineligibility instruction, the prisoner, who was sentenced to death for the murder conviction, was not entitled to federal habeas corpus relief because the prisoner would have been eligible for parole under

former G.S. 15A-1371(a1) if the jury had recommended life imprisonment; thus, because the prisoner was eligible for parole as a matter of law, the prisoner was not entitled to a parole ineligibility instruction. *Campbell v. Polk*, 447 F.3d 270, 2006 U.S. App. LEXIS 11591 (4th Cir. 2006).

## SUBCHAPTER V. OFFENSES AGAINST PROPERTY.

### ARTICLE 16.

#### *Larceny.*

### § 14-70. Distinctions between grand and petit larceny abolished; punishment; accessories to larceny.

#### CASE NOTES

#### II. Elements of the Offense.

##### II. ELEMENTS OF THE OFFENSE.

**An indictment for larceny that fails to allege the ownership of the property either in a natural person or a legal entity capable of owning property is fatally defective; etc. —**

Indictments alleging that the city transit and parking services owned the parking meters

allegedly broken into by defendant, were insufficient to allege injury to personal property in violation of G.S. 14-160 and larceny because the city transit and parking services was not a natural person, and the indictments did not allege that the city transit and parking services was capable of owning property. *State v. Price*, 170 N.C. App. 672, 613 S.E.2d 60, 2005 N.C. App. LEXIS 1085 (2005).

### § 14-71.1. Possessing stolen goods.

#### CASE NOTES

**Elements of Felonious Possession of Stolen Property. —**

Respondent, a juvenile, was erroneously found delinquent for the felonious possession of his mother's stolen car; he should have been adjudicated delinquent for misdemeanor possession of stolen goods. The State did not introduce evidence of the car's condition or its value; thus, the State did not satisfy G.S. 14-71.1, which required a stolen item to have a value of more than \$1,000. In *re J.H.*, — N.C. App. —, 630 S.E.2d 457, 2006 N.C. App. LEXIS 1223 (2006).

**Separate Offenses Not Shown. —** Trial court erred by sentencing defendant on five, rather than one, counts of felony possession of stolen goods, as defendant and his companions stole five all-terrain vehicles (ATVs) from the same victim during one break-in, occurring on the same night, and there was no interruption in the events once the transaction began such that defendant was divested of possession and

then came back into possession; the ATVs were stolen at approximately the same time, and defendant's actions were part of a single, continuous transaction. *State v. Phillips*, 172 N.C. App. 143, 615 S.E.2d 880, 2005 N.C. App. LEXIS 1426 (2005).

**Evidence Held Sufficient. —**

Substantial evidence existed to show that respondent, a juvenile, had possession of his mother's stolen car; the car was found in the driveway of a house in another city nine days after the car was stolen, respondent was found in the house, he had access to the car on the day that it was stolen, and he confessed to his mother that he had taken the car. In *re J.H.*, — N.C. App. —, 630 S.E.2d 457, 2006 N.C. App. LEXIS 1223 (2006).

**Evidence Held Insufficient. —**

Because substantial evidence of each element of an offense charged had to be shown to exist when a court ruled on a motion to dismiss, an adjudication finding that respondent, a juve-



nile, was delinquent for having the felonious possession of his mother's stolen car had to be reversed; the State introduced substantial evidence that he had possession of the stolen car, but the State failed to introduce any evidence as to the car's condition or that it was worth

more than \$1,000, as G.S. 14-71.1 required. Thus, a trial court erroneously denied respondent's motion to dismiss the charge against him. *In re J.H.*, — N.C. App. —, 630 S.E.2d 457, 2006 N.C. App. LEXIS 1223 (2006).

## **§ 14-72. Larceny of property; receiving stolen goods or possessing stolen goods.**

(a) Larceny of goods of the value of more than one thousand dollars (\$1,000) is a Class H felony. The receiving or possessing of stolen goods of the value of more than one thousand dollars (\$1,000) while knowing or having reasonable grounds to believe that the goods are stolen is a Class H felony. Larceny as provided in subsection (b) of this section is a Class H felony. Receiving or possession of stolen goods as provided in subsection (c) of this section is a Class H felony. Except as provided in subsections (b) and (c) of this section, larceny of property, or the receiving or possession of stolen goods knowing or having reasonable grounds to believe them to be stolen, where the value of the property or goods is not more than one thousand dollars (\$1,000), is a Class 1 misdemeanor. In all cases of doubt, the jury shall, in the verdict, fix the value of the property stolen.

(b) The crime of larceny is a felony, without regard to the value of the property in question, if the larceny is any of the following:

- (1) From the person.
- (2) Committed pursuant to a violation of G.S. 14-51, 14-53, 14-54, 14-54.1, or 14-57.
- (3) Of any explosive or incendiary device or substance. As used in this section, the phrase "explosive or incendiary device or substance" shall include any explosive or incendiary grenade or bomb; any dynamite, blasting powder, nitroglycerin, TNT, or other high explosive; or any device, ingredient for such device, or type or quantity of substance primarily useful for large-scale destruction of property by explosive or incendiary action or lethal injury to persons by explosive or incendiary action. This definition shall not include fireworks; or any form, type, or quantity of gasoline, butane gas, natural gas, or any other substance having explosive or incendiary properties but serving a legitimate nondestructive or nonlethal use in the form, type, or quantity stolen.
- (4) Of any firearm. As used in this section, the term "firearm" shall include any instrument used in the propulsion of a shot, shell or bullet by the action of gunpowder or any other explosive substance within it. A "firearm," which at the time of theft is not capable of being fired, shall be included within this definition if it can be made to work. This definition shall not include air rifles or air pistols.
- (5) Of any record or paper in the custody of the North Carolina State Archives as defined by G.S. 121-2(7) and G.S. 121-2(8).

(c) The crime of possessing stolen goods knowing or having reasonable grounds to believe them to be stolen in the circumstances described in subsection (b) is a felony or the crime of receiving stolen goods knowing or having reasonable grounds to believe them to be stolen in the circumstances described in subsection (b) is a felony, without regard to the value of the property in question.

(d) Where the larceny or receiving or possession of stolen goods as described in subsection (a) of this section involves the merchandise of any store, a merchant, a merchant's agent, a merchant's employee, or a peace officer who detains or causes the arrest of any person shall not be held civilly liable for

detention, malicious prosecution, false imprisonment, or false arrest of the person detained or arrested, when such detention is upon the premises of the store or in a reasonable proximity thereto, is in a reasonable manner for a reasonable length of time, and, if in detaining or in causing the arrest of such person, the merchant, the merchant's agent, the merchant's employee, or the peace officer had, at the time of the detention or arrest, probable cause to believe that the person committed an offense under subsection (a) of this section. If the person being detained by the merchant, the merchant's agent, or the merchant's employee, is a minor under the age of 18 years, the merchant, the merchant's agent, or the merchant's employee, shall call or notify, or make a reasonable effort to call or notify the parent or guardian of the minor, during the period of detention. A merchant, a merchant's agent, or a merchant's employee, who makes a reasonable effort to call or notify the parent or guardian of the minor shall not be held civilly liable for failing to notify the parent or guardian of the minor. (1895, c. 285; Rev., s. 3506; 1913, c. 118, s. 1; C.S., s. 4251; 1941, c. 178, s. 1; 1949, c. 145, s. 2; 1959, c. 1285; 1961, c. 39, s. 1; 1965, c. 621, s. 5; 1969, c. 522, s. 2; 1973, c. 238, ss. 1, 2; 1975, c. 163, s. 2; c. 696, s. 4; 1977, c. 978, ss. 2, 3; 1979, c. 408, s. 1; c. 760, s. 5; 1979, 2nd Sess., c. 1316, ss. 11, 47; 1981, c. 63, s. 1; c. 179, s. 14; 1991, c. 523, s. 2; 1993, c. 539, s. 34; 1994, Ex. Sess., c. 24, s. 14(c); 1995, c. 185, s. 2; 2006-259, s. 4(a).)

**Effect of Amendments.** — Session Laws 2006-259, s. 4(a), effective December 1, 2006, and applicable to acts committed on or after that date, added “any of the following” at the end of the introductory paragraph of subsection

(b), substituted a period for “; or” at the end of subdivision (b)(1), inserted “14-54.1” in subdivision (b)(2), and inserted “G.S.” preceding “121-2(8)” in subdivision (b)(5).

## CASE NOTES

- I. General Consideration.
- II. Larceny.
  - A. In General.
  - B. Degree of Offense.
- IV. Possession of Stolen Property.
- VIII. Practice and Procedure.
  - A. Indictment.
  - B. Evidence.
  - F. Verdict.

### I. GENERAL CONSIDERATION.

**Applied** in *In re J.H.*, — N.C. App. —, 630 S.E.2d 457, 2006 N.C. App. LEXIS 1223 (2006).

**Cited** in *State v. Ayscue*, 169 N.C. App. 548, 610 S.E.2d 389, 2005 N.C. App. LEXIS 677 (2005); *State v. Flemming*, 171 N.C. App. 413, 615 S.E.2d 310, 2005 N.C. App. LEXIS 1260 (2005); *State v. Johnston*, 173 N.C. App. 334, 618 S.E.2d 807, 2005 N.C. App. LEXIS 2034 (2005); *State v. Watson*, — N.C. App. —, 634 S.E.2d 231, 2006 N.C. App. LEXIS 1923 (2006).

### II. LARCENY.

#### A. In General.

**No Trespass.** — Absent a trespass, there was no felonious larceny under G.S. 14-72; a trial court should have dismissed a larceny charge which was based on defendant's admission that she dug up and spent money buried by

the victim in land defendant was renting, even though the money was buried before defendant's lease. No trespassory taking occurred since the lease granted defendant lawful possession of the land where the money was buried. *State v. Jones*, — N.C. App. —, 628 S.E.2d 436, 2006 N.C. App. LEXIS 842 (2006).

#### B. Degree of Offense.

**Insufficient Evidence for Felony Larceny Charge.** — Defendant's conviction of felonious larceny, G.S. 14-72, was reversed and remanded for resentencing because the trial court failed to find that the value of the property he took was more than \$ 1,000.00 or that he committed the larceny in the course of a felonious breaking and entering, as required by the statute. *State v. Matthews*, — N.C. App. —, 623 S.E.2d 815, 2006 N.C. App. LEXIS 138 (2006).



#### IV. POSSESSION OF STOLEN PROPERTY.

##### **Exclusive possession of stolen property may be joint possession, etc. —**

Trial court erred by sentencing defendant on five, rather than one, counts of felony possession of stolen goods, as defendant and his companions stole five all-terrain vehicles (ATVs) from the same victim during one break-in, occurring on the same night, and there was no interruption in the events once the transaction began such that defendant was divested of possession and then came back into possession; the ATVs were stolen at approximately the same time, and defendant's actions were part of a single, continuous transaction. *State v. Phillips*, 172 N.C. App. 143, 615 S.E.2d 880, 2005 N.C. App. LEXIS 1426 (2005).

**Possession of stolen goods conviction vacated** where defendant was acquitted on the underlying charge; the trial court erred in accepting the jury's guilty verdict on a charge of felony possession of stolen goods when the jury found defendant not guilty of the underlying breaking and entering charge. *State v. Goblet*, 173 N.C. App. 112, 618 S.E.2d 257, 2005 N.C. App. LEXIS 1929 (2005).

#### VIII. PRACTICE AND PROCEDURE.

##### **A. Indictment.**

##### **Ownership of Property. —**

Abbreviation "Inc." identifying the victim in a larceny indictment imported the entity's ability to own property, and thus, the indictment was sufficient; the fact of incorporation did not need to be alleged where the corporate name was correctly set out in the indictment. *State v. Cave*, — N.C. App. —, 621 S.E.2d 299, 2005 N.C. App. LEXIS 2479 (2005).

##### **B. Evidence.**

##### **Trial judge did not err in denying defendant's motion to dismiss the charges, etc.**

Evidence was sufficient to deny defendant's motion to dismiss and to present the case to the jury where defendant was a passenger in a car when he and others were detained by police, there were items from several stores in the car but none of the people in the car could produce receipts, one of the co-defendants testified that he told an investigating officer that defendant acted as a lookout while the others were stealing from the stores, and defendant provided contradictory testimony both that he was unaware of his co-defendants taking any items from the store and that he knew his co-defendants were taking merchandise. *State v. Cave*, — N.C. App. —, 621 S.E.2d 299, 2005 N.C. App. LEXIS 2479 (2005).

##### **Evidence Sufficient. —**

While defendant entered a law office with implied consent from the firm, that consent was void ab initio when defendant went into areas of the firm that were not open to the public so that defendant could commit theft; thus, defendant's convictions for felonious breaking and entering and felonious larceny were supported by sufficient evidence. *State v. Brooks*, — N.C. App. —, 631 S.E.2d 54, 2006 N.C. App. LEXIS 1334 (2006).

##### **F. Verdict.**

**Additional Convictions Vacated. —** Additional convictions for possession of the automobile and the credit cards were vacated because they violated double jeopardy. *State v. Scanlon*, — N.C. App. —, 626 S.E.2d 770, 2006 N.C. App. LEXIS 541 (2006).

## § 14-72.2. Unauthorized use of a motor-propelled conveyance.

#### CASE NOTES

**Cited in** *State v. Watson*, — N.C. App. —, 634 S.E.2d 231, 2006 N.C. App. LEXIS 1923 (2006).

#### ARTICLE 17.

##### *Robbery.*

## § 14-87. Robbery with firearms or other dangerous weapons.

#### CASE NOTES

##### **I. General Consideration.**



- V. Use or Threatened Use of Dangerous Weapon.
  - B. Dangerous Weapon.
- VI. Taking and Intent.
- VII. Lesser Offenses.
- VIII. Indictment.
- IX. Evidence.
- XI. Punishment.
- XII. Double Jeopardy.

## I. GENERAL CONSIDERATION.

**Plain Error Found.** — Trial court committed plain error in failing to instruct the jury on conspiracy to commit common law robbery as the jury was properly instructed on robbery with a dangerous weapon and common law robbery, apparently based on the conflicting evidence regarding whether the gun used was real or fake; the same conflicting evidence directly pertained to defendant's charge of conspiracy to commit common law robbery as there was conflicting evidence as to whether the agreement was that the person who committed the robbery would use a real or a fake gun. *State v. Carter*, — N.C. App. —, 629 S.E.2d 332, 2006 N.C. App. LEXIS 1078 (2006).

**Instruction on Parole Ineligibility in Capital Case.** — Where a state prisoner, who was convicted of first-degree murder, first-degree rape, kidnapping, armed robbery, and the burning of personal property, in violation of G.S. 14-17, 14-27.2(a)(2), 14-39, 14-87, and 14-66, argued that the sentencing court erred by failing to provide a parole ineligibility instruction, the prisoner, who was sentenced to death for the murder conviction, was not entitled to federal habeas corpus relief because the prisoner would have been eligible for parole under former G.S. 15A-1371(a1) if the jury had recommended life imprisonment; thus, because the prisoner was eligible for parole as a matter of law, the prisoner was not entitled to a parole ineligibility instruction. *Campbell v. Polk*, 447 F.3d 270, 2006 U.S. App. LEXIS 11591 (4th Cir. 2006).

**Cited in** *State v. Berryman*, 170 N.C. App. 336, 612 S.E.2d 672, 2005 N.C. App. LEXIS 1004 (2005), *aff'd*, — N.C. —, 624 S.E.2d 350 (2006).

## V. USE OR THREATENED USE OF DANGEROUS WEAPON.

### B. Dangerous Weapon.

**"Means."** — Because the term "means" in G.S. 14-87 follows the terms "firearm," "other dangerous weapon," and "implement," the legislature intended the "means" employed by an armed robber to consist of some extraneous instrument similar to a "firearm," "implement," or "other dangerous weapon." *State v. Duff*, 171 N.C. App. 662, 615 S.E.2d 373, 2005 N.C. App. LEXIS 1367 (2005).

**Requirement of "External" Weapon or Instrument.** — Common sense and the clear intent of G.S. 14-87 lead the North Carolina Court of Appeals to conclude that an individual cannot possess, use, or threaten to use a dangerous weapon during a robbery where that individual is not possessing, using, or threatening to use some external weapon or instrument during the robbery; the critical difference between armed and common law robbery is that the former is accomplished by the use or threatened use of a dangerous weapon whereby the life of a person is endangered or threatened. *State v. Duff*, 171 N.C. App. 662, 615 S.E.2d 373, 2005 N.C. App. LEXIS 1367 (2005).

**Fists, Hands, and Feet.** — Trial court erred by denying defendant's motion to dismiss the charge of robbery with a dangerous weapon because the State failed to demonstrate that he either possessed or used a dangerous weapon, implement, or means during the attack; defendant's fists, hands, and feet could not be considered dangerous weapons for purposes of G.S. 14-87. *State v. Duff*, 171 N.C. App. 662, 615 S.E.2d 373, 2005 N.C. App. LEXIS 1367 (2005).

Although G.S. 14-87 refers to the possession, use, or threatened use of "means" during the robbery, the North Carolina Court of Appeals is not convinced that "means" was included in the statute in order to reach the situation where a robbery was perpetrated by the use of hands, fists, or feet; it is a recognized principle of statutory construction that when particular or specific words or acts, the subject of a statute, are followed by general words, the latter must as a rule be confined to acts and things of the same kind. *State v. Duff*, 171 N.C. App. 662, 615 S.E.2d 373, 2005 N.C. App. LEXIS 1367 (2005).

Despite prior holdings of the North Carolina Court of Appeals that, under certain circumstances, a defendant's hands, fists, and feet can be considered deadly weapons for the purposes of an assault conviction, the court has never held that hands, fists, and feet can be considered dangerous weapons for the purposes of G.S. 14-87. *State v. Duff*, 171 N.C. App. 662, 615 S.E.2d 373, 2005 N.C. App. LEXIS 1367 (2005).

**Conflicting Evidence as to Whether Gun Was Real.** — Defendant's motion to dismiss a conspiracy to commit robbery with a dangerous weapon charge was properly denied as there was conflicting evidence as to whether a gun given to a person who committed a robbery (the

actor) was real or not and there was sufficient evidence that the gun was an operable weapon where: (1) defendant and two other men told the actor to rob a store in exchange for drugs, which she agreed to do, (2) the men provided the actor with a gun and she committed the robbery, (3) the actor spoke primarily with defendant regarding the robbery, (4) the actor stated that one of the men told her that the gun was fake, but that she was uncertain whether it was fake, and (5) the actor stated that defendant and the others had a real gun and a fake gun and that she believed she had been given the fake one. *State v. Carter*, — N.C. App. —, 629 S.E.2d 332, 2006 N.C. App. LEXIS 1078 (2006).

## VI. TAKING AND INTENT.

### Person or persons in attendance. —

Store clerk saw the defendant in her store in a “mask” and with a gun and fled the store; even though the defendant took the money after the store clerk fled, the robbery occurred in the store clerk’s “presence” under G.S. 14-87 because the defendant made his purposes known to her. *State v. Tuck*, 173 N.C. App. 61, 618 S.E.2d 265, 2005 N.C. App. LEXIS 1930 (2005).

## VII. LESSER OFFENSES.

**Merger of Sentences.** — Trial court erred when it failed to arrest judgment on defendant’s armed robbery conviction under G.S. 14-87(a); when defendant was convicted of first-degree murder pursuant to the felony murder rule, and a verdict of guilty was returned on the underlying felony, the armed robbery conviction provided no basis for an additional sentence, hence it merged into the murder conviction. *State v. Staten*, 172 N.C. App. 673, 616 S.E.2d 650, 2005 N.C. App. LEXIS 1777 (2005).

## VIII. INDICTMENT.

**Amended Indictment Upheld.** — Because a showing of a taking is not a necessary element of the crime of robbery with a dangerous weapon, the amendment of the indictment against defendant from attempted robbery with a dangerous weapon to robbery with a dangerous weapon sufficiently apprised defendant of the charge against him with enough certainty to have enabled him to prepare his defense and was not in error; further, since the classifications and punishments of the crimes of attempted robbery with a dangerous weapon and robbery with a dangerous weapon are identical, the amendment to defendant’s indictment did not deprive the trial court of knowledge as to the judgment to pronounce in the event of conviction since the amendment did not substantially alter the charge. *State v. Van Trusell*, 170 N.C. App. 33, 612 S.E.2d 195, 2005 N.C.

App. LEXIS 886 (2005), cert. denied, — N.C. —, 620 S.E.2d 196 (2005).

## IX. EVIDENCE.

### Evidence held sufficient to sustain conviction, etc.

State’s evidence was sufficient to support a felony murder charge based on robbery with a dangerous weapon, as the evidence showed defendant and the victim together on a store surveillance videotape, and the next evening defendant was in possession of the victim’s car, wallet, boom box, and other personal property; the evidence also showed that the victim kept his wallet in the pocket of his trousers and his boom box in the house. DNA evidence placed defendant at the victim’s home, and the victim’s blood was found on defendant’s trousers. *State v. Campbell*, 359 N.C. 644, 617 S.E.2d 1, 2005 N.C. LEXIS 842 (2005).

**Evidence Held Insufficient to Support Conviction.** — Where there was not sufficient evidence to show the juvenile knew that his friend was going to rob the victim, nor did the State introduce any evidence tending to show that the juvenile encouraged the commission of the crime, and in fact, tried to help stop the attack, the robbery charge should have been dismissed. *In re R.P.M.*, 172 N.C. App. 782, 616 S.E.2d 627, 2005 N.C. App. LEXIS 1803 (2005).

Defendant’s conviction of armed robbery, pursuant to G.S. 14-87, had to be reversed because defendant used only his hands in the robbery and, thus, the evidence was not sufficient to support the conviction of armed robbery; however, pursuant to G.S. 15-170, there was sufficient evidence for a conviction of the lesser included offense of common law robbery, as defendant stole a car from the victim with the use of force. *State v. Staten*, 172 N.C. App. 673, 616 S.E.2d 650, 2005 N.C. App. LEXIS 1777 (2005).

### Evidence Sufficient to Deny Motion to Dismiss. —

Evidence was sufficient to show defendant attempted to commit the crime of attempted robbery with a dangerous weapon because, viewing the evidence in the light most favorable to the state, a reasonable person could find that defendant and his accomplices, while acting in concert, tried to rob a victim of her pocketbook as they entered the victim’s house with guns drawn. *State v. Farrar*, — N.C. App. —, 634 S.E.2d 253, 2006 N.C. App. LEXIS 1966 (2006).

## XI. PUNISHMENT.

**“Great Monetary Value” Aggravating Factor Not Supported By Evidence.** — Defendant was entitled to a new sentencing hearing after his armed robbery conviction because a finding as an aggravating factor that the offense involved the actual taking of great mon-



etary value was not supported by the evidence where \$1,300 and \$700 were taken from the victims; the amounts of \$1,300 and \$700 do not constitute great or extraordinary amounts such that either represents a sum of “great monetary value” within the aggravating factor list. State v. Pender, — N.C. App. —, 622 S.E.2d 664, 2005 N.C. App. LEXIS 2710 (2005).

XII. DOUBLE JEOPARDY.

It was reversible error to impose sen-

§ 14-89.1. Safecracking.

CASE NOTES

**Evidence Insufficient For Conviction.** — Legislature did not intend “safe” or “vault” to include a locking side compartment in a particle board desk; evidence that defendant tried to break open the locking side compartment of a

**tences for a first-degree kidnapping and attempted robbery with a dangerous weapon offenses**, both of which the jury was instructed could serve as underlying felonies to the charge of felony murder. State v. Oglesby, — N.C. App. —, 622 S.E.2d 152, 2005 N.C. App. LEXIS 2624 (2005).

desk did not support his conviction for safecracking in violation of G.S. 14-89.1. State v. Goodson, — N.C. App. —, 631 S.E.2d 842, 2006 N.C. App. LEXIS 1565 (2006).

ARTICLE 18.

*Embezzlement.*

§ 14-90. Embezzlement of property received by virtue of office or employment.

CASE NOTES

- II. Elements of the Offense.
- III. Who May Be Guilty of Embezzlement.
- V. Evidence.

II. ELEMENTS OF THE OFFENSE.

**Evidence held insufficient, etc.** — Evidence was insufficient to support an embezzlement conviction where defendant opened a post office box and bank accounts in the name of her employers without authorization, directed checks to the post office box, deposited the checks into the unauthorized accounts, and wrote checks to herself from those accounts; defendant never took lawful possession of the incoming checks, nor was she entrusted with the checks by virtue of a fiduciary capacity, but, instead, acquired the incoming checks through misrepresentation, State v. Palmer, — N.C. App. —, 622 S.E.2d 676, 2005 N.C. App. LEXIS 2712 (2005).

III. WHO MAY BE GUILTY OF EMBEZZLEMENT.

**As a local alcoholic beverage control board employee**, defendant should have been

charged with embezzlement under G.S. 14-90; a trial court lacked jurisdiction to hear the case where defendant was charged with violation of G.S. 14-92. State v. Jones, 172 N.C. App. 161, 615 S.E.2d 896, 2005 N.C. App. LEXIS 1438 (2005), cert. denied, stay denied, 360 N.C. 72, 624 S.E.2d 365 (2005), cert. dismissed, 360 N.C. 72, 624 S.E.2d 366 (2005).

V. EVIDENCE.

**Knowing and Wilfull Misapplication of Funds.** — North Carolina State Bar presented substantial evidence that the attorney knowingly and willfully misapplied a client’s settlement money for other purposes; for months the attorney was aware that not only was the attorney’s trust account out of balance, but it was woefully short of the necessary funds. N.C. State Bar v. Leonard, — N.C. App. —, 632 S.E.2d 183, 2006 N.C. App. LEXIS 1573 (2006).



## § 14-91. Embezzlement of State property by public officers and employees.

### CASE NOTES

**Sufficiency of evidence.** — Defendant's conviction for embezzlement of North Carolina property of a value of \$100,000 or more by aiding and abetting was affirmed because the state presented substantial evidence that defendant committed the crime by testimony that defendant was the only person authorized to

make withdrawals from the corporate account from which the missing funds that were withheld from employee wages for remittance to the North Carolina Department of Revenue were deposited. *State v. Ross*, 173 N.C. App. 569, 620 S.E.2d 33, 2005 N.C. App. LEXIS 2084 (2005), *aff'd*, — N.C. —, 625 S.E.2d 779 (2006).

## § 14-92. Embezzlement of funds by public officers and trustees.

### CASE NOTES

**Trial court lacked jurisdiction** to hear the case where defendant, a local alcoholic beverage control board employee, was charged with violation of G.S. 14-92; defendant should have been charged with embezzlement under G.S.

14-90. *State v. Jones*, 172 N.C. App. 161, 615 S.E.2d 896, 2005 N.C. App. LEXIS 1438 (2005), *cert. denied*, *stay denied*, 360 N.C. 72, 624 S.E.2d 365 (2005), *cert. dismissed*, 360 N.C. 72, 624 S.E.2d 366 (2005).

## ARTICLE 19.

### *False Pretenses and Cheats.*

## § 14-100. Obtaining property by false pretenses.

### CASE NOTES

- I. General Consideration.
- III. Indictment.
- IV. Illustrative Cases.

### I. GENERAL CONSIDERATION.

**Cited** in *State v. King*, — N.C. App. —, 630 S.E.2d 719, 2006 N.C. App. LEXIS 1307 (2006).

### III. INDICTMENT.

#### **Same — Property Obtained. —**

Since a superseding indictment sufficiently described the false pretense incident as the defendant representing to the store employee that he was entitled to a cash refund for a watch band, when in truth and in fact, he knew that he had unlawfully taken the watch band and was not entitled to a refund, the indictment gave him proper notice and was properly not dismissed. *State v. Ledwell*, 171 N.C. App. 314, 614 S.E.2d 562, 2005 N.C. App. LEXIS 1212 (2005).

Since the indictment alleged the defendant sought to exchange the watch band that he had

taken from the store for cash, the indictment did not have to allege the exact amount of cash that the defendant had tried to obtain by false pretenses. *State v. Ledwell*, 171 N.C. App. 314, 614 S.E.2d 562, 2005 N.C. App. LEXIS 1212 (2005).

### IV. ILLUSTRATIVE CASES.

#### **Evidence Held Sufficient. —**

Evidence was sufficient to survive defendant's motion to dismiss the charge of aiding and abetting obtaining property by false pretenses; defendant did not deny asking a county employee to come to defendant's residence and fix a toilet on county time, and defendant stated that the employee may have come on county time and in a county vehicle. *State v. Sink*, — N.C. App. —, 631 S.E.2d 16, 2006 N.C. App. LEXIS 1312 (2006).

## § 14-104. Obtaining advances under promise to work and pay for same.

### CASE NOTES

**Motion to Dismiss Properly Denied.** — Superior court did not err in denying defendant's motion to dismiss misdemeanor charge of failure to work after being paid, as a conflict in the evidence presented created a question for the jury to resolve; moreover, even though the \$ 100 defendant received was intended for pur-

chasing materials, his conviction was supported by the evidence presented, as he still obtained an advance of money, provisions, goods, wares or merchandise on the false promise of completing the work. *State v. Octetree*, 173 N.C. App. 228, 617 S.E.2d 356, 2005 N.C. App. LEXIS 1923 (2005).

## § 14-112.2. Exploitation of an elder adult or disabled adult.

(a) The following definitions apply in this section:

- (1) Disabled adult. — A person 18 years of age or older or a lawfully emancipated minor who is present in the State of North Carolina and who is physically or mentally incapacitated as defined in G.S. 108A-101(d).
- (2) Elder adult. — A person 60 years of age or older who is not able to provide for the social, medical, psychiatric, psychological, financial, or legal services necessary to safeguard the person's rights and resources and to maintain the person's physical and mental well-being.

(b) It is unlawful for a person: (i) who stands in a position of trust and confidence with an elder adult or disabled adult, or (ii) who has a business relationship with an elder adult or disabled adult to knowingly, by deception or intimidation, obtain or use, or endeavor to obtain or use, an elder adult's or disabled adult's funds, assets, or property with the intent to temporarily or permanently deprive the elder adult or disabled adult of the use, benefit, or possession of the funds, assets, or property, or to benefit someone other than the elder adult or disabled adult.

(c) It is unlawful for a person, who knows or reasonably should know that an elder adult or disabled adult lacks the capacity to consent, to obtain or use, endeavor to obtain or use, or conspire with another to obtain or use an elder adult's or disabled adult's funds, assets, or property with the intent to temporarily or permanently deprive the elder adult or disabled adult of the use, benefit, or possession of the funds, assets, or property, or benefit someone other than the elder adult or disabled adult. This subsection shall not apply to a person acting within the scope of that person's lawful authority as the agent for the elder adult or disabled adult.

(d) A violation of subsection (b) of this section is punishable as follows:

- (1) If the funds, assets, or property involved in the exploitation of the elderly person or disabled adult is valued at one hundred thousand dollars (\$100,000) or more, then the offense is a Class F felony.
- (2) If the funds, assets, or property involved in the exploitation of the elderly person or disabled adult is valued at twenty thousand dollars (\$20,000) or more but less than one hundred thousand dollars (\$100,000), then the offense is a Class G felony.
- (3) If the funds, assets, or property involved in the exploitation of the elderly person or disabled adult is valued at less than twenty thousand dollars (\$20,000), then the offense is a Class H felony.

(e) A violation of subsection (c) of this section is punishable as follows:

- (1) If the funds, assets, or property involved in the exploitation of the elderly person or disabled adult is valued at one hundred thousand dollars (\$100,000) or more, then the offense is a Class G felony.

- (2) If the funds, assets, or property involved in the exploitation of the elderly person or disabled adult is valued at twenty thousand dollars (\$20,000) or more but less than one hundred thousand dollars (\$100,000), then the offense is a Class H felony.
- (3) If the funds, assets, or property involved in the exploitation of the elderly person or disabled adult is valued at less than twenty thousand dollars (\$20,000), then the offense is a Class I felony. (2005-272, s. 2; 2006-264, s. 99.)

**Effect of Amendments.** — Session Laws 2006-264, s. 99, effective January 1, 2007, substituted “that person’s” for “their” near the end of subsection (c).

ARTICLE 19A.

*Obtaining Property or Services by False or Fraudulent Use of Credit Device or Other Means.*

**§ 14-113.5. Making, distributing, possessing, transferring, or programming device for theft of telecommunication service; publication of information regarding schemes, devices, means, or methods for such theft; concealment of existence, origin or destination of any telecommunication.**

CASE NOTES

**Cited in** *Directv, Inc. v. Jarman*, — F. Supp. 2d —, 2005 U.S. Dist. LEXIS 9523 (W.D.N.C. May 11, 2005).

ARTICLE 21.

*Forgery.*

**§ 14-119. Forgery of notes, checks, and other securities; counterfeiting of instruments.**

CASE NOTES

III. Evidence.

III. EVIDENCE.

**Evidence Insufficient to Support Convictions.** — Trial court erred in failing to dismiss all but three of the forgery and uttering

convictions because defendant signed her own name to the withdrawal slips on the other ten occasions. *State v. King*, — N.C. App. —, 630 S.E.2d 719, 2006 N.C. App. LEXIS 1307 (2006).

**§ 14-120. Uttering forged paper or instrument containing a forged endorsement.**

CASE NOTES

**Evidence Held Sufficient.** — Trial court erred in failing to dismiss all but three of the forgery and uttering convictions because defendant signed her own name to the



withdrawal slips on the other ten occasions.  
State v. King, — N.C. App. —, 630 S.E.2d 719,  
2006 N.C. App. LEXIS 1307 (2006).

SUBCHAPTER VI. CRIMINAL TRESPASS.

ARTICLE 23.

*Trespasses to Personal Property.*

§ 14-160. Willful and wanton injury to personal property;  
punishments.

CASE NOTES

**Indictment That Failed to Allege Ownership of the Property Was Defective.** — Indictments alleging that the city transit and parking services owned the parking meters allegedly broken into by defendant, were insufficient to allege injury to personal property in violation of G.S. 14-160 and larceny because

the city transit and parking services was not a natural person, and the indictments did not allege that the city transit and parking services was capable of owning property. State v. Price, 170 N.C. App. 672, 613 S.E.2d 60, 2005 N.C. App. LEXIS 1085 (2005).

SUBCHAPTER VII. OFFENSES AGAINST PUBLIC  
MORALITY AND DECENCY.

ARTICLE 26.

*Offenses Against Public Morality and Decency.*

§ 14-177. Crime against nature.

CASE NOTES

**This section is constitutional.**  
Although G.S. 14-177 is not unconstitutional on its face, it was unconstitutional as applied to defendant's conviction since a minor was not involved, the conduct did not involve non-con-

sensual or coercive sexual acts, the conduct did not occur in a public place, and the conduct did not involve prostitution or solicitation. State v. Whiteley, 172 N.C. App. 772, 616 S.E.2d 576, 2005 N.C. App. LEXIS 1795 (2005).

§ 14-178. Incest.

CASE NOTES

**Sufficiency of Evidence.** —  
Testimony of the victim's mother that defendant was the victim's father and testimony of the victim that defendant started molesting her

when she was four years old provided support for defendant's incest conviction. State v. Locklear, 172 N.C. App. 249, 616 S.E.2d 334, 2005 N.C. App. LEXIS 1583 (2005).

## § 14-190.1. Obscene literature and exhibitions.

### CASE NOTES

**Cited in** State v. Hill, — N.C. App. —, 632 S.E.2d 777, 2006 N.C. App. LEXIS 1636 (2006).

## § 14-190.7. Dissemination to minors under the age of 16 years.

### CASE NOTES

**Evidence Sufficient to Withstand Motion to Dismiss.** — There was enough evidence that defendant provided obscene and harmful materials to minors to carry those charges to the jury; thus, the trial court's denial of defendant's

motion to dismiss the charges of dissemination to minors under the age of 16 was proper. State v. Hill, — N.C. App. —, 632 S.E.2d 777, 2006 N.C. App. LEXIS 1636 (2006).

## § 14-190.15. Disseminating harmful material to minors; exhibiting harmful performances to minors.

### CASE NOTES

**Evidence Sufficient to Withstand Motion to Dismiss.** — There was enough evidence that defendant provided obscene and harmful materials to minors to carry those charges to the jury; thus, the trial court's denial of defendant's

motion to dismiss the charges of disseminating harmful material to minors was proper. State v. Hill, — N.C. App. —, 632 S.E.2d 777, 2006 N.C. App. LEXIS 1636 (2006).

## § 14-202. Secretly peeping into room occupied by another person.

### CASE NOTES

**Cited in** State v. Bradley, — N.C. App. —, 634 S.E.2d 258, 2006 N.C. App. LEXIS 1968 (2006).

## § 14-202.1. Taking indecent liberties with children.

### CASE NOTES

- I. General Consideration.
- II. Elements and Proof of Offense.
- III. Evidence.

#### I. GENERAL CONSIDERATION.

**Violation of This Section Is Not a Lesser Included Offense of First Degree Sexual Offense.** — Because indecent liberties with a minor does not merge with and is not a lesser included offense of first-degree sexual offense, evidence presented on the charges of first-degree sexual offense may also support a conviction for indecent liberties; thus, it was im-

possible to tell which particular acts corresponded with which charges and convictions for indecent liberties where defendant was convicted of seven of ten counts of taking indecent liberties with a minor and the trial court failed to indicate which offenses were to be considered for which verdict sheets. State v. Bates, 172 N.C. App. 27, 616 S.E.2d 280, 2005 N.C. App. LEXIS 1585 (2005).

**Sufficiency of Indictment. —**

Indictment for indecent liberties that matched the form required by G.S. 14-202.1 was sufficient to inform defendant of the charges against him. *State v. Massey*, 174 N.C. App. 216, 621 S.E.2d 633, 2005 N.C. App. LEXIS 2400 (2005).

**Prior Convictions as Aggravating Factors. —** Appellate court found no error in the trial court's determination, by a preponderance of the evidence, that defendant's prior North Carolina convictions for assault inflicting serious injury and larceny merited one point each because that determination was a fact of a prior conviction and not precluded by Blakely or Allen. The trial court also properly determined, by a preponderance of the evidence, that four of defendant's out-of-state convictions were substantially similar to offenses under North Carolina law; thus, defendant's sentence of 25 to 30 months for each violation of G.S. 14-202.1, to be served consecutively, was affirmed. *State v. Hadden*, — N.C. App. —, 624 S.E.2d 417, 2006 N.C. App. LEXIS 190 (2006).

**Multiple Short-Form Indictments Did Not Create a Danger of Unanimous Verdicts. —** Appellate court erred in reversing defendant's convictions of first-degree statutory rape, G.S. 14-27.2, and taking indecent liberties with a minor, G.S. 14-202.1(a)(1), as defendant was properly charged by short-form indictments on all the charges as authorized by G.S. 15-144.2(a), because there was no danger of a nonunanimous verdict resulting from the multiple indictments in violation of N.C. Const. art. 1, § 24, and G.S. 15A-1237(b), as even if some jurors disagreed on the kinds of sexual misconduct committed, the jury as a whole would unanimously find that there occurred sexual conduct within the ambit of any immoral, improper, or indecent liberties as required by G.S. 14-202.1(a)(1), and because defendant was indicted on five counts of statutory rape, the victim testified to five specific incidents of statutory rape, and five verdicts of guilty were returned. *State v. Lawrence*, 360 N.C. 368, 627 S.E.2d 609, 2006 N.C. LEXIS 30 (2006).

**Unanimous Verdict Requirement. —** Defendant's claim, that his right to a unanimous jury verdict as to each of the charges against him was violated because none of the verdict sheets set out the specific actus reus that the jury had to find in order to convict, was rejected as the indecent liberties statute did not list distinct criminal offenses in the disjunctive. *State v. Brigman*, — N.C. App. —, 632 S.E.2d 498, 2006 N.C. App. LEXIS 1298 (2006).

**Cited in** *State v. Brigman*, — N.C. App. —, 629 S.E.2d 307, 2006 N.C. App. LEXIS 1071 (2006); *State v. Browning*, — N.C. App. —, 629 S.E.2d 299, 2006 N.C. App. LEXIS 1079 (2006).

**II. ELEMENTS AND PROOF OF OFFENSE.****Single Offense Provable by Commission of Various Acts. —**

Defendant's convictions on five counts of statutory rape and three counts of taking indecent liberties with a child had to be reversed, and he had to be retried on those charges, as the State's proof at trial of many more acts than were pled in those counts meant that the appellate court could not determine whether defendant was found guilty by the required unanimous jury on the counts pled or some other acts that were not pled; accordingly, defendant's right to conviction by a unanimous jury may have been compromised. *State v. Lawrence*, 170 N.C. App. 200, 612 S.E.2d 678, 2005 N.C. App. LEXIS 1016 (2005).

**Evidence Held Insufficient. —**

Evidence was insufficient to support defendant's conviction on one of the two counts charged against him of indecent liberties with children; the State, at most, only proved that a single sex act occurred, which could only support one of the two convictions, and not both convictions. *State v. Jones*, 172 N.C. App. 308, 616 S.E.2d 15, 2005 N.C. App. LEXIS 1580 (2005).

**III. EVIDENCE.**

**Evidence of Touching Supported Only One Charge. —** Trial court erred in denying motion to dismiss one of the two charges of indecent liberties because a single act could support only one conviction; the evidence showed that the sole act involved was touching and that there was no gap in time between defendant's touching of the victim's breasts and putting his hand inside the waistband of the victims' pants. *State v. Laney*, — N.C. App. —, 631 S.E.2d 522, 2006 N.C. App. LEXIS 1398 (2006).

**Evidence Supported Finding of Abuse. —**

Victim's testimony that defendant tickled her in her private parts, that he was tickling her leg and would start going up to her private parts, provided substantial evidence in support conviction for taking indecent liberties with a child. *State v. Verrier*, 173 N.C. App. 123, 617 S.E.2d 675, 2005 N.C. App. LEXIS 1899 (2005).

**Evidence Held Sufficient. —**

Trial court did not err in dismissing for insufficiency of the evidence the taking indecent liberties with a minor child counts against defendant where defendant argued that the child victims' accounts contained conflicting details and, therefore, lacked credibility, as the appellate court, in a sufficiency of the evidence analysis, was required to resolve such discrepancies in favor of the State and was not permitted to weigh the evidence. *State v. Lewis*, 172



N.C. App. 97, 616 S.E.2d 1, 2005 N.C. App. LEXIS 1439 (2005).

## § 14-202.2. Indecent liberties between children.

### CASE NOTES

#### **Evidence Held Sufficient.** —

Defendant's adjudication of indecent liberties between children was affirmed and the trial court did not err in denying defendant's motion to dismiss at the end of all the evidence, where: (1) defendant, who was 14 years old, told the victim, his 8-year-old step-sister, to come into his room; (2) when the victim entered the room, defendant pulled down her pants; (3) defendant then pulled down his own pants and touched

the victim's vagina with his penis; (4) when he heard his step-mother coming, defendant ran to his closet while pulling up his pants; (4) the step-mother found the victim under the covers in defendant's bed not wearing pants or underwear; and (5) while the step-mother was in the room defendant hid in the closet was sufficient to support the adjudication. In re D.W., 171 N.C. App. 496, 615 S.E.2d 90, 2005 N.C. App. LEXIS 1358 (2005).

### ARTICLE 27A.

## *Sex Offender and Public Protection Registration Programs.*

### Part 1. Registration Programs, Purpose and Definitions Generally.

## § 14-208.5. Purpose.

**Editor's Note.** — Session Laws 2006-247, s. 18, provides: "The Department of Correction shall study and develop a plan for offering mental health treatment for incarcerated sex offenders designed to reduce the likelihood of recidivism. The Department shall study appropriate and effective mental health treatment techniques and alternatives. Services must be best practices, as determined by the Department. The Department will consult various stakeholders from organizations dedicated to the prevention of sexual assault, victims' advocacy organizations, and experts in the field of

treatment of sexual offenders. The Department shall consider the fiscal impact, if any, of implementing the plan developed pursuant to this study.

"The Department shall make a preliminary report to the Joint Legislative Oversight Committee on Mental Health, Developmental Disabilities, and Substance Abuse Services no later than January 15, 2007, and a final report to the Joint Legislative Oversight Committee on Mental Health, Developmental Disabilities, and Substance Abuse Services and the General Assembly on or before October 1, 2007."

### CASE NOTES

**A convicted sex offender's failure to inquire into a state's laws on registration requirement** is neither entirely innocent nor wholly passive, particularly when combined with that sex offender's violation of his previous resident state's sex offender registration laws; convicted sex offender from another jurisdiction who subsequently moved to North Carolina had

actual notice of his lifelong duty to register with South Carolina, which led a reasonable individual to inquire of a duty to register in any state upon relocation. *State v. Bryant*, 359 N.C. 554, 614 S.E.2d 479, 2005 N.C. LEXIS 647 (2005).

**Cited in** *State v. Harris*, 171 N.C. App. 127, 613 S.E.2d 701, 2005 N.C. App. LEXIS 1169 (2005).

## § 14-208.6. Definitions.

The following definitions apply in this Article:

- (1a) "Aggravated offense" means any criminal offense that includes either of the following: (i) engaging in a sexual act involving vaginal, anal, or oral penetration with a victim of any age through the use of force or

the threat of serious violence; or (ii) engaging in a sexual act involving vaginal, anal, or oral penetration with a victim who is less than 12 years old.

- (1b) “County registry” means the information compiled by the sheriff of a county in compliance with this Article.
- (1c) “Division” means the Division of Criminal Statistics of the Department of Justice.
- (1d) “Employed” includes employment that is full-time or part-time for a period of time exceeding 14 days or for an aggregate period of time exceeding 30 days during any calendar year, whether financially compensated, volunteered, or for the purpose of government or educational benefit.
- (1e) “Institution of higher education” means any postsecondary public or private educational institution, including any trade or professional institution, college, or university.
- (1f) “Mental abnormality” means a congenital or acquired condition of a person that affects the emotional or volitional capacity of the person in a manner that predisposes that person to the commission of criminal sexual acts to a degree that makes the person a menace to the health and safety of others.
- (1g) “Nonresident student” means a person who is not a resident of North Carolina but who is enrolled in any type of school in the State on a part-time or full-time basis.
- (1h) “Nonresident worker” means a person who is not a resident of North Carolina but who has employment or carries on a vocation in the State, on a part-time or full-time basis, with or without compensation or government or educational benefit, for more than 14 days, or for an aggregate period exceeding 30 days in a calendar year.
- (1i) “Offense against a minor” means any of the following offenses if the offense is committed against a minor, and the person committing the offense is not the minor’s parent: G.S. 14-39 (kidnapping), G.S. 14-41 (abduction of children), and G.S. 14-43.3 (felonious restraint). The term also includes the following if the person convicted of the following is not the minor’s parent: a solicitation or conspiracy to commit any of these offenses; aiding and abetting any of these offenses.
- (2) “Penal institution” means:
  - a. A detention facility operated under the jurisdiction of the Division of Prisons of the Department of Correction;
  - b. A detention facility operated under the jurisdiction of another state or the federal government; or
  - c. A detention facility operated by a local government in this State or another state.
- (2a) “Personality disorder” means an enduring pattern of inner experience and behavior that deviates markedly from the expectations of the individual’s culture, is pervasive and inflexible, has an onset in adolescence or early adulthood, is stable over time, and leads to distress or impairment.
- (2b) “Recidivist” means a person who has a prior conviction for an offense that is described in G.S. 14-208.6(4).
- (3) “Release” means discharged or paroled.
- (4) “Reportable conviction” means:
  - a. A final conviction for an offense against a minor, a sexually violent offense, or an attempt to commit any of those offenses unless the conviction is for aiding and abetting. A final conviction for aiding and abetting is a reportable conviction only if the court sentenc-

ing the individual finds that the registration of that individual under this Article furthers the purposes of this Article as stated in G.S. 14-208.5.

- b. A final conviction in another state of an offense, which if committed in this State, is substantially similar to an offense against a minor or a sexually violent offense as defined by this section, or a final conviction in another state of an offense that requires registration under the sex offender registration statutes of that state.
  - c. A final conviction in a federal jurisdiction (including a court martial) of an offense, which is substantially similar to an offense against a minor or a sexually violent offense as defined by this section.
  - d. A final conviction for a violation of G.S. 14-202(d), (e), (f), (g), or (h), or a second or subsequent conviction for a violation of G.S. 14-202(a), (a1), or (c), only if the court sentencing the individual issues an order pursuant to G.S. 14-202(l) requiring the individual to register.
- (5) "Sexually violent offense" means a violation of G.S. 14-27.2 (first degree rape), G.S. 14-27.3 (second degree rape), G.S. 14-27.4 (first degree sexual offense), G.S. 14-27.5 (second degree sexual offense), G.S. 14-27.5A (sexual battery), G.S. 14-27.6 (attempted rape or sexual offense), G.S. 14-27.7 (intercourse and sexual offense with certain victims), G.S. 14-27.7A(a) (statutory rape or sexual offense of person who is 13-, 14-, or 15-years-old where the defendant is at least six years older), G.S. 14-43.13 (subjecting or maintaining a person for sexual servitude), G.S. 14-178 (incest between near relatives), G.S. 14-190.6 (employing or permitting minor to assist in offenses against public morality and decency), G.S. 14-190.9(a1)(felonious indecent exposure), G.S. 14-190.16 (first degree sexual exploitation of a minor), G.S. 14-190.17 (second degree sexual exploitation of a minor), G.S. 14-190.17A (third degree sexual exploitation of a minor), G.S. 14-190.18 (promoting prostitution of a minor), G.S. 14-190.19 (participating in the prostitution of a minor), G.S. 14-202.1 (taking indecent liberties with children), or G.S. 14-202.3 (Solicitation of child by computer to commit an unlawful sex act). The term also includes the following: a solicitation or conspiracy to commit any of these offenses; aiding and abetting any of these offenses.
- (6) "Sexually violent predator" means a person who has been convicted of a sexually violent offense and who suffers from a mental abnormality or personality disorder that makes the person likely to engage in sexually violent offenses directed at strangers or at a person with whom a relationship has been established or promoted for the primary purpose of victimization.
- (7) "Sheriff" means the sheriff of a county in this State.
- (8) "Statewide registry" means the central registry compiled by the Division in accordance with G.S. 14-208.14.
- (9) "Student" means a person who is enrolled on a full-time or part-time basis, in any postsecondary public or private educational institution, including any trade or professional institution, or other institution of higher education. (1995, c. 545, s. 1; 1997-15, ss. 1, 2; 1997-516, s. 1; 1999-363, s. 1; 2001-373, s. 1; 2002-147, s. 16; 2003-303, s. 2; 2004-109, s. 8; 2005-121, s. 2; 2005-130, s. 1; 2005-226, s. 2; 2006-247, ss. 1(b), 19(a), 20(d).)



**Editor's Note.** — Session Laws 2006-247, s. 1(a), provides: "This act shall be known as 'An Act To Protect North Carolina's Children/Sex Offender Law Changes.'"

Session Laws 2006-247, s. 17, provides: "No later than January 1, 2007, the Department of Correction shall develop a graduated risk assessment program that identifies, assesses, and closely monitors a high-risk sex offender who, while not classified as a sexually violent predator, a recidivist, or convicted of an aggravated offense as those terms are defined in G.S. 14-208.6, may still require extraordinary supervision and may be placed on probation, parole, or post-release supervision only on the conditions provided in G.S. 15A-1343(b2) or G.S. 15A-1368.4(b1)."

Session Laws 2006-247, s. 21 is a severability clause.

Session Laws 2006-247, s. 22, provides, in part: "Prosecutions for offenses committed before the effective date of this act are not abated

or affected by this act, and the statutes that would be applicable but for this act remain applicable to those prosecutions."

**Effect of Amendments.** —

Session Laws 2006-247, ss. 1(b) and 20(d), effective December 1, 2006, and applicable to offenses committed on or after that date, in subdivision (5), inserted "G.S. 14-27.7A(a) (statutory rape or sexual offense of person who is 13-, 14-, or 15-years-old where the defendant is at least six years older)," and inserted "G.S. 14-43.13 (subjecting or maintaining a person for sexual servitude);" and, s. 19(a), effective December 1, 2006, and applicable to all applications for a drivers license, learner's permit, instruction permit, or special identification card submitted on or after that date, inserted "or a final conviction in another state of an offense that requires registration under the sex offender registration statutes of that state" at the end of subdivision (4)b.

### CASE NOTES

**Convicted sex offender from another jurisdiction who subsequently moved to North Carolina** had actual notice of his lifelong duty to register with South Carolina, which led a reasonable individual to inquire of a duty to register in any state upon relocation.

*State v. Bryant*, 359 N.C. 554, 614 S.E.2d 479, 2005 N.C. LEXIS 647 (2005).

**Cited in** *State v. Harris*, 171 N.C. App. 127, 613 S.E.2d 701, 2005 N.C. App. LEXIS 1169 (2005).

## § 14-208.6A. Lifetime registration requirements for criminal offenders.

It is the objective of the General Assembly to establish a 10-year registration requirement for persons convicted of certain offenses against minors or sexually violent offenses. It is the further objective of the General Assembly to establish a more stringent set of registration requirements for recidivists, persons who commit aggravated offenses, and for a subclass of highly dangerous sex offenders who are determined by a sentencing court with the assistance of a board of experts to be sexually violent predators.

To accomplish this objective, there are established two registration programs: the Sex Offender and Public Protection Registration Program and the Sexually Violent Predator Registration Program. Any person convicted of an offense against a minor or of a sexually violent offense as defined by this Article shall register in person as an offender in accordance with Part 2 of this Article. Any person who is a recidivist, who commits an aggravated offense, or who is determined to be a sexually violent predator shall register in person as such in accordance with Part 3 of this Article.

The information obtained under these programs shall be immediately shared with the appropriate local, State, federal, and out-of-state law enforcement officials and penal institutions. In addition, the information designated under G.S. 14-208.10(a) as public record shall be readily available to and accessible by the public. However, the identity of the victim is not public record and shall not be released as a public record. (1997-516, s. 1; 2001-373, s. 2; 2006-247, s. 2(a).)

**Editor's Note.** — Session Laws 2006-247, s. 1(a), provides: "This act shall be known as 'An Act To Protect North Carolina's Children/Sex Offender Law Changes.'"

Session Laws 2006-247, s. 21 is a severability clause.

Session Laws 2006-247, s. 22, provides, in part: "Prosecutions for offenses committed before the effective date of this act are not abated

or affected by this act, and the statutes that would be applicable but for this act remain applicable to those prosecutions."

**Effect of Amendments.** — Session Laws 2006-247, s. 2(a), effective December 1, 2006, and applicable to offenses committed on or after that date, inserted "in person" in the second and third sentences of the second paragraph.

## § 14-208.6B. Registration requirements for juveniles transferred to and convicted in superior court.

A juvenile transferred to superior court pursuant to G.S. 7B-2200 who is convicted of a sexually violent offense or an offense against a minor as defined in G.S. 14-208.6 shall register in person in accordance with this Article just as an adult convicted of the same offense must register. (1997-516, s. 1; 1998-202, s. 13(e); 2006-247, s. 3(a).)

**Editor's Note.** — Session Laws 2006-247, s. 1(a), provides, "This act shall be known as 'An Act To Protect North Carolina's Children/Sex Offender Law Changes.'"

Session Laws 2006-247, s. 21 is a severability clause.

Session Laws 2006-247, s. 22, provides, in part: "Prosecutions for offenses committed be-

fore the effective date of this act are not abated or affected by this act, and the statutes that would be applicable but for this act remain applicable to those prosecutions."

**Effect of Amendments.** — Session Laws 2006-247, s. 3(a), effective December 1, 2006, and applicable to offenses committed on or after that date, inserted "in person."

## Part 2. Sex Offender and Public Protection Registration Program.

### § 14-208.7. Registration.

(a) A person who is a State resident and who has a reportable conviction shall be required to maintain registration with the sheriff of the county where the person resides. If the person moves to North Carolina from outside this State, the person shall register within 10 days of establishing residence in this State, or whenever the person has been present in the State for 15 days, whichever comes first. If the person is a current resident of North Carolina, the person shall register:

- (1) Within 10 days of release from a penal institution or arrival in a county to live outside a penal institution; or
- (2) Immediately upon conviction for a reportable offense where an active term of imprisonment was not imposed.

Registration shall be maintained for a period of at least 10 years following the date of initial county registration.

(a1) A person who is a nonresident student or a nonresident worker and who has a reportable conviction, or is required to register in the person's state of residency, is required to maintain registration with the sheriff of the county where the person works or attends school. In addition to the information required under subsection (b) of this section, the person shall also provide information regarding the person's school or place of employment as appropriate and the person's address in his or her state of residence.

(b) The Division shall provide each sheriff with forms for registering persons as required by this Article. The registration form shall require:



- (1) The person's full name, each alias, date of birth, sex, race, height, weight, eye color, hair color, drivers license number, and home address;
- (2) The type of offense for which the person was convicted, the date of conviction, and the sentence imposed;
- (3) A current photograph;
- (4) The person's fingerprints;
- (5) A statement indicating whether the person is a student or expects to enroll as a student within a year of registering. If the person is a student or expects to enroll as a student within a year of registration, then the registration form shall also require the name and address of the educational institution at which the person is a student or expects to enroll as a student; and
- (6) A statement indicating whether the person is employed or expects to be employed at an institution of higher education within a year of registering. If the person is employed or expects to be employed at an institution of higher education within a year of registration, then the registration form shall also require the name and address of the educational institution at which the person is or expects to be employed.

The sheriff shall photograph the individual at the time of registration and take fingerprints from the individual at the time of registration both of which will be kept as part of the registration form. The registrant will not be required to pay any fees for the photograph or fingerprints taken at the time of registration.

(c) When a person registers, the sheriff with whom the person registered shall immediately send the registration information to the Division in a manner determined by the Division. The sheriff shall retain the original registration form and other information collected and shall compile the information that is a public record under this Part into a county registry.

(d) Any person required to register under this section shall report in person at the appropriate sheriff's office to comply with the registration requirements set out in this section. The sheriff shall provide the registrant with written proof of registration at the time of registration. (1995, c. 545, s. 1; 1997-516, s. 1; 2001-373, s. 4; 2002-147, s. 17; 2006-247, s. 5(a).)

**Editor's Note.** — Session Laws 2006-247, s. 1(a), provides: "This act shall be known as 'An Act To Protect North Carolina's Children/Sex Offender Law Changes.'"

Session Laws 2006-247, s. 21 is a severability clause.

Session Laws 2006-247, s. 22, provides, in part: "Prosecutions for offenses committed before the effective date of this act are not abated

or affected by this act, and the statutes that would be applicable but for this act remain applicable to those prosecutions."

**Effect of Amendments.** — Session Laws 2006-247, s. 5(a), effective December 1, 2006, and applicable to offenses committed on or after that date, rewrote the last paragraph of subsection (a) and added subsection (d).

## CASE NOTES

**Convicted sex offender from another jurisdiction who subsequently moved to North Carolina** had actual notice of his lifelong duty to register with South Carolina, which led a reasonable individual to inquire of a duty to register in any state upon relocation.

State v. Bryant, 359 N.C. 554, 614 S.E.2d 479, 2005 N.C. LEXIS 647 (2005).

**Cited in** State v. Harris, 171 N.C. App. 127, 613 S.E.2d 701, 2005 N.C. App. LEXIS 1169 (2005); State v. Wise, — N.C. App. —, 630 S.E.2d 732, 2006 N.C. App. LEXIS 1293 (2006).



## § 14-208.8. Prerelease notification.

### CASE NOTES

**Untimely notification of requirement.** — Although the penal institution failed to inform defendant that he was required to register as a sex offender until five days prior to release from prison, the late notice did not eliminate the registration requirement. *State v. Harris*, 171 N.C. App. 127, 613 S.E.2d 701, 2005 N.C. App. LEXIS 1169 (2005).

**Convicted sex offender from another jurisdiction who subsequently moved to North Carolina** had actual notice of his life-long duty to register with South Carolina, which led a reasonable individual to inquire of a duty to register in any state upon relocation. *State v. Bryant*, 359 N.C. 554, 614 S.E.2d 479, 2005 N.C. LEXIS 647 (2005).

## § 14-208.8A. (Effective June 1, 2007) Notification requirement for out-of-county employment if temporary residence established.

(a) Notice Required. — A person required to register under G.S. 14-208.7 shall notify the sheriff of the county with whom the person is registered of the person's place of employment and temporary residence, which includes a hotel, motel, or other transient lodging place, if the person meets both of the following conditions:

- (1) Is employed or carries on a vocation in a county in the State other than the county in which the person is registered for more than 10 business days within a 30-day period, or for an aggregate period exceeding 30 days in a calendar year, on a part-time or full-time basis, with or without compensation or government or educational benefit.
- (2) Maintains a temporary residence, including in that county for more than 10 business days within a 30-day period, or for an aggregate period exceeding 30 days in a calendar year.

(b) Time Period. — The notice required by subsection (a) of this section shall be provided within 72 hours after the person knows or should know that he or she will be working and maintaining a temporary residence in a county other than the county in which the person resides for more than 10 business days within a 30-day period, or within 10 days after the person knows or should know that he or she will be working and maintaining a temporary residence in a county other than the county in which the person resides for an aggregate period exceeding 30 days in a calendar year.

(c) Notice to Division. — Upon receiving the notice required under subsection (a) of this section, the sheriff shall immediately forward the information to the Division. The Division shall notify the sheriff of the county where the person is working and maintaining a temporary residence of the person's place of employment and temporary address in that county. (2006-247, s. 4(a).)

**Editor's Note.** — Session Laws 2006-247, s. 1(a), provides: "This act shall be known as 'An Act To Protect North Carolina's Children/Sex Offender Law Changes.'"

Session Laws 2006-247, s. 4(b), makes this section effective June 1, 2007, and applicable to offenses committed on or after that date.

Session Laws 2006-247, s. 21 is a severability clause.

Session Laws 2006-247, s. 22, provides, in part: "Prosecutions for offenses committed before the effective date of this act are not abated or affected by this act, and the statutes that would be applicable but for this act remain applicable to those prosecutions."

## § 14-208.9. Change of address; change of academic status or educational employment status.

(a) If a person required to register changes address, the person shall report in person and provide written notice of the new address not later than the tenth day after the change to the sheriff of the county with whom the person had last registered. Upon receipt of the notice, the sheriff shall immediately forward this information to the Division. If the person moves to another county in this State, the Division shall inform the sheriff of the new county of the person's new residence.

(b) If a person required to register intends to move to another state, the person shall report in person to the sheriff of the county of current residence at least 10 days before the date the person intends to leave this State to establish residence in another state or jurisdiction. The person shall provide to the sheriff a written notification that includes all of the following information: the address, municipality, county, and state of intended residence.

(1) If it appears to the sheriff that the record photograph of the sex offender no longer provides a true and accurate likeness of the sex offender, then the sheriff shall take a photograph of the offender to update the registration.

(2) The sheriff shall inform the person that the person must comply with the registration requirements in the new state of residence. The sheriff shall also immediately forward the information included in the notification to the Division, and the Division shall inform the appropriate state official in the state to which the registrant moves of the person's notification and new address.

(b1) A person who indicates his or her intent to reside in another state or jurisdiction and later decides to remain in this State shall, within 10 days after the date upon which the person indicated he or she would leave this State, report in person to the sheriff's office to which the person reported the intended change of residence, of his or her intent to remain in this State. If the sheriff is notified by the sexual offender that he or she intends to remain in this State, the sheriff shall promptly report this information to the Division.

(c) If a person required to register changes his or her academic status either by enrolling as a student or by terminating enrollment as a student, then the person shall, within 10 days, report in person to the sheriff of the county with whom the person registered and provide written notice of the person's new status. The written notice shall include the name and address of the institution of higher education at which the student is or was enrolled. The sheriff shall immediately forward this information to the Division.

(d) If a person required to register changes his or her employment status either by obtaining employment at an institution of higher education or by terminating employment at an institution of higher education, then the person shall, within 10 days, report in person to the sheriff of the county with whom the person registered and provide written notice of the person's new status not later than the tenth day after the change to the sheriff of the county with whom the person registered. The written notice shall include the name and address of the institution of higher education at which the person is or was employed. The sheriff shall immediately forward this information to the Division. (1995, c. 545, s. 1; 1997-516, s. 1; 2001-373, s. 5; 2002-147, s. 19; 2006-247, s. 6(a).)

**Editor's Note.** — Session Laws 2006-247, s. 1(a), provides: "This act shall be known as 'An Act To Protect North Carolina's Children/Sex Offender Law Changes.'"

Session Laws 2006-247, s. 21 is a severability clause.

Session Laws 2006-247, s. 22, provides, in part: "Prosecutions for offenses committed before the effective date of this act are not abated or affected by this act, and the statutes that would be applicable but for this act remain applicable to those prosecutions."



**Effect of Amendments.** — Session Laws 2006-247, s. 6(a), effective December 1, 2006,

and applicable to offenses committed on or after that date, rewrote the section.

### CASE NOTES

**Motion to Dismiss Properly Denied.** — Denial of defendant's motion to dismiss a failure to register as a sex offender charge was proper as defendant's confession permitted the jury to infer that defendant had not lived at the registered address within 10 days of his arrest,

and there was evidence that on June 2, 1998, defendant was released from a prison sentence imposed for taking indecent liberties with a child. *State v. Wise*, — N.C. App. —, 630 S.E.2d 732, 2006 N.C. App. LEXIS 1293 (2006).

## § 14-208.9A. Verification of registration information.

(a) The information in the county registry shall be verified semiannually for each registrant as follows:

- (1) Every year on the anniversary of a person's initial registration date, and again six months after that date, the Division shall mail a nonforwardable verification form to the last reported address of the person.
- (2) The person shall return the verification form in person to the sheriff within 10 days after the receipt of the form.
- (3) The verification form shall be signed by the person and shall indicate whether the person still resides at the address last reported to the sheriff. If the person has a different address, then the person shall indicate that fact and the new address.
- (3a) If it appears to the sheriff that the record photograph of the sex offender no longer provides a true and accurate likeness of the sex offender, then the sheriff shall take a photograph of the offender to include with the verification form.
- (4) If the person fails to return the verification form in person to the sheriff within 10 days after receipt of the form, the person is subject to the penalties provided in G.S. 14-208.11. If the person fails to report in person and provide the written verification as provided by this section, the sheriff shall make a reasonable attempt to verify that the person is residing at the registered address. If the person cannot be found at the registered address and has failed to report a change of address, the person is subject to the penalties provided in G.S. 14-208.11, unless the person reports in person to the sheriff and proves that the person has not changed his or her residential address.

(b) **Additional Verification May Be Required.** — During the period that an offender is required to be registered under this Article, the sheriff is authorized to attempt to verify that the offender continues to reside at the address last registered by the offender.

(c) **Additional Photograph May Be Required.** — If it appears to the sheriff that the current photograph of the sex offender no longer provides a true and accurate likeness of the sex offender, upon in-person notice from the sheriff, the sex offender shall allow the sheriff to take another photograph of the sex offender at the time of the sheriff's request. If requested by the sheriff, the sex offender shall appear in person at the sheriff's office during normal business hours within 72 hours of being requested to do so and shall allow the sheriff to take another photograph of the sex offender. A person who willfully fails to comply with this subsection is guilty of a Class 1 misdemeanor. (1997-516, s. 1; 2006-247, s. 7(a).)

**Editor's Note.** — Session Laws 2006-247, s. 1(a), provides: "This act shall be known as 'An

Act To Protect North Carolina's Children/Sex Offender Law Changes.'"



Session Laws 2006-247, s. 21 is a severability clause.

Session Laws 2006-247, s. 22, provides, in part: "Prosecutions for offenses committed before the effective date of this act are not abated or affected by this act, and the statutes that

would be applicable but for this act remain applicable to those prosecutions."

**Effect of Amendments.** — Session Laws 2006-247, s. 7(a), effective December 1, 2006, and applicable to offenses committed on or after that date, rewrote the section.

## § 14-208.10. Registration information is public record; access to registration information.

### CASE NOTES

**Convicted sex offender from another jurisdiction who subsequently moved to North Carolina** had actual notice of his life-long duty to register with South Carolina,

which led a reasonable individual to inquire of a duty to register in any state upon relocation. *State v. Bryant*, 359 N.C. 554, 614 S.E.2d 479, 2005 N.C. LEXIS 647 (2005).

## § 14-208.11. Failure to register; falsification of verification notice; failure to return verification form; order for arrest.

(a) A person required by this Article to register who willfully does any of the following is guilty of a Class F felony:

- (1) Fails to register as required by this Article.
- (2) Fails to notify the last registering sheriff of a change of address as required by this Article.
- (3) Fails to return a verification notice as required under G.S. 14-208.9A.
- (4) Forges or submits under false pretenses the information or verification notices required under this Article.
- (5) Fails to inform the registering sheriff of enrollment or termination of enrollment as a student.
- (6) Fails to inform the registering sheriff of employment at an institution of higher education or termination of employment at an institution of higher education.
- (7) Fails to report in person to the sheriff's office as required by G.S. 14-208.7, 14-208.9, and 14-208.9A.
- (8) Reports his or her intent to reside in another state or jurisdiction but remains in this State without reporting to the sheriff in the manner required by G.S. 14-208.9.
- (9) **(Effective June 1, 2007)** Fails to notify the registering sheriff of out-of-county employment if temporary residence is established as required under G.S. 14-208.8A.

(a1) If a person commits a violation of subsection (a) of this section, the probation officer, parole officer, or any other law enforcement officer who is aware of the violation shall immediately arrest the person in accordance with G.S. 15A-401, or seek an order for the person's arrest in accordance with G.S. 15A-305.

(b) Before a person convicted of a violation of this Article is due to be released from a penal institution, an official of the penal institution shall conduct the prerelease notification procedures specified under G.S. 14-208.8(a)(2) and (3). If upon a conviction for a violation of this Article, no active term of imprisonment is imposed, the court pronouncing sentence shall, at the time of sentencing, conduct the notification procedures specified under G.S. 14-208.8(a)(2) and (3).

(c) A person who is unable to meet the registration or verification requirements of this Article shall be deemed to have complied with its requirements if:

- (1) The person is incarcerated in, or is in the custody of, a local, State, private, or federal correctional facility,
- (2) The person notifies the official in charge of the facility of their status as a person with a legal obligation or requirement under this Article and
- (3) The person meets the registration or verification requirements of this Article no later than 10 days after release from confinement or custody. (1995, c. 545, s. 1; 1997-516, s. 1; 2002-147, s. 20; 2006-247, ss. 8(a), 8(b).)

**Editor's Note.** — Session Laws 2006-247, s. 1(a), provides: "This act shall be known as 'An Act To Protect North Carolina's Children/Sex Offender Law Changes.'"

Session Laws 2006-247, s. 21 is a severability clause.

Session Laws 2006-247, s. 22, provides, in part: "Prosecutions for offenses committed before the effective date of this act are not abated or affected by this act, and the statutes that would be applicable but for this act remain applicable to those prosecutions."

**Effect of Amendments.** — Session Laws 2006-247, s. 8(a), effective December 1, 2006, and applicable to offenses committed on or after that date, inserted "willfully" in the introductory paragraph of subsection (a), added "as required by this Article" at the end of subdivision (a)(1), added subdivisions (a)(7) and (a)(8); and added subsection (c); and, s. 8(b), effective June 1, 2007, and applicable to offenses committed on or after that date, added subdivision (a)(9).

#### CASE NOTES

**This statute is facially constitutional as applied to a convicted sex offender from another jurisdiction,** who subsequently moved to North Carolina, because such a defendant has actual notice of his or her lifelong duty to register as a result of his or her out-of-state conviction, which provides a reasonable individual to inquire of a duty to register in any state upon relocation. *State v. Bryant*, 359 N.C. 554, 614 S.E.2d 479, 2005 N.C. LEXIS 647 (2005).

**Untimely Notice Did Not Mandate Dismissal of Charges.** — Failure to inform defendant that he was required to register as a sex offender until five days prior to release from prison did not require dismissal of charge for failure to register; the late notice was not fatal

as defendant was not prejudiced. *State v. Harris*, 171 N.C. App. 127, 613 S.E.2d 701, 2005 N.C. App. LEXIS 1169 (2005).

**Motion to Dismiss Properly Denied.** — Denial of defendant's motion to dismiss a failure to register as a sex offender charge was proper as defendant's confession permitted the jury to infer that defendant had not lived at the registered address within 10 days of his arrest, and there was evidence that on June 2, 1998, defendant was released from a prison sentence imposed for taking indecent liberties with a child. *State v. Wise*, — N.C. App. —, 630 S.E.2d 732, 2006 N.C. App. LEXIS 1293 (2006).

**Cited in** *State v. Verrier*, 173 N.C. App. 123, 617 S.E.2d 675, 2005 N.C. App. LEXIS 1899 (2005).

### § 14-208.11A. Duty to report noncompliance of a sex offender; penalty for failure to report in certain circumstances.

(a) It shall be unlawful and a Class H felony for any person who has reason to believe that an offender is in violation of the requirements of this Article, and who has the intent to assist the offender in eluding arrest, to do any of the following:

- (1) Withhold information from, or fail to notify, a law enforcement agency about the offender's noncompliance with the requirements of this Article, and, if known, the whereabouts of the offender.
- (2) Harbor, attempt to harbor, or assist another person in harboring or attempting to harbor, the offender.
- (3) Conceal, or attempt to conceal, or assist another person in concealing or attempting to conceal, the offender.



(4) Provide information to a law enforcement agency regarding the offender that the person knows to be false information.

(b) This section does not apply if the offender is incarcerated in or is in the custody of a local, State, private, or federal correctional facility. (2006-247, s. 9.1(a).)

**Editor's Note.** — Session Laws 2006-247, s. 1(a), provides: "This act shall be known as 'An Act To Protect North Carolina's Children/Sex Offender Law Changes.'"

Session Laws 2006-247, s. 9.1(b), makes this section effective December 1, 2006, and applicable to offenses committed on or after that date.

Session Laws 2006-247, s. 21 is a severability clause.

Session Laws 2006-247, s. 22, provides, in part: "Prosecutions for offenses committed before the effective date of this act are not abated or affected by this act, and the statutes that would be applicable but for this act remain applicable to those prosecutions."

## § 14-208.12A. Request for termination of registration requirement.

(a) A person required to register under this Part may petition the superior court in the district where the person resides to terminate the registration requirement 10 years from the date of initial county registration if the person has not been convicted of a subsequent offense requiring registration under this Article.

(a1) The court may grant the relief if:

- (1) The petitioner demonstrates to the court that he or she has not been arrested for any crime that would require registration under this Article since completing the sentence,
- (2) The requested relief complies with the provisions of the federal Jacob Wetterling Act, as amended, and any other federal standards applicable to the termination of a registration requirement or required to be met as a condition for the receipt of federal funds by the State, and
- (3) The court is otherwise satisfied that the petitioner is not a current or potential threat to public safety.

(a2) The district attorney in the district in which the petition is filed shall be given notice of the petition at least three weeks before the hearing on the matter. The petitioner may present evidence in support of the petition and the district attorney may present evidence in opposition to the requested relief or may otherwise demonstrate the reasons why the petition should be denied.

(a3) If the court denies the petition, the person may again petition the court for relief in accordance with this section one year from the date of the denial of the original petition to terminate the registration requirement. If the court grants the petition to terminate the registration requirement, the clerk of court shall forward a certified copy of the order to the Division to have the person's name removed from the registry.

(b) If there is a subsequent offense, the county registration records shall be retained until the registration requirement for the subsequent offense is terminated by the court under subsection (a1) of this section. (1997-516, s. 1; 2006-247, s. 10(a).)

**Editor's Note.** — Session Laws 2006-247, s. 1(a), provides: "This act shall be known as 'An Act To Protect North Carolina's Children/Sex Offender Law Changes.'"

Session Laws 2006-247, s. 21 is a severability clause.

Session Laws 2006-247, s. 22, provides, in part: "Prosecutions for offenses committed before the effective date of this act are not abated

or affected by this act, and the statutes that would be applicable but for this act remain applicable to those prosecutions."

**Effect of Amendments.** — Session Laws 2006-247, s. 10(a), effective December 1, 2006, and applicable to persons for whom the period of registration would terminate on or after that date, rewrote the section.



## § 14-208.15. Certain statewide registry information is public record: access to statewide registry.

### CASE NOTES

**Convicted sex offender from another jurisdiction who subsequently moved to North Carolina** had actual notice of his lifelong duty to register with South Carolina,

which led a reasonable individual to inquire of a duty to register in any state upon relocation. *State v. Bryant*, 359 N.C. 554, 614 S.E.2d 479, 2005 N.C. LEXIS 647 (2005).

## § 14-208.16. Residential restrictions.

(a) A registrant under this Article shall not knowingly reside within 1,000 feet of the property on which any public or nonpublic school or child care center is located.

(b) As used in this section, “school” does not include home schools as defined in G.S. 115C-563 or institutions of higher education, and the term “child care center” is defined by G.S. 110-86(3). The term “registrant” means a person who is registered, or is required to register, under this Article.

(c) This section does not apply to child care centers that are located on or within 1,000 feet of the property of an institution of higher education where the registrant is a student or is employed.

(d) Changes in the ownership of or use of property within 1,000 feet of a registrant’s registered address that occur after a registrant establishes residency at the registered address shall not form the basis for finding that an offender is in violation of this section. For purposes of this subsection, a residence is established when the registrant does any of the following:

- (1) Purchases the residence or enters into a specifically enforceable contract to purchase the residence.
- (2) Enters into a written lease contract for the residence and for as long as the person is lawfully entitled to remain on the premises.
- (3) Resides with an immediate family member who established residence in accordance with this subsection. For purposes of this subsection, “immediate family member” means a child, sibling, or parent of the registrant.

(e) Nothing in this section shall be construed as creating a private cause of action against a real estate agent or landlord for any act or omission arising out of the residential restriction in this section.

(f) A violation of this section is a Class G felony. (2006-247, s. 11(a).)

**Editor’s Note.** — Session Laws 2006-247, s. 1(a), provides: “This act shall be known as ‘An Act To Protect North Carolina’s Children/Sex Offender Law Changes.’”

Session Laws 2006-247, s. 11(c), provides in part: “Subsection (a) of this section becomes effective December 1, 2006, and applies to all persons registered or required to register on or after that date. Subsection (a) of this section does not apply to a person who has established a residence prior to the effective date of this subsection in accordance with the provisions in G.S. 14-208.16 (d)(1), (2), or (3) as enacted by

this act. This subsection is effective when this act becomes law.” The remainder of this section is effective December 1, 2006, and is applicable to offenses committed on or after that date.

Session Laws 2006-247, s. 21 is a severability clause.

Session Laws 2006-247, s. 22, provides, in part: “Prosecutions for offenses committed before the effective date of this act are not abated or affected by this act, and the statutes that would be applicable but for this act remain applicable to those prosecutions.”

## § 14-208.17. Sexual predator prohibited from working or volunteering for child-involved activities; limitation on residential use.

(a) It shall be unlawful for any person required to register under this Article to work for any person or as a sole proprietor, with or without compensation, at any place where a minor is present and the person's responsibilities or activities would include instruction, supervision, or care of a minor or minors.

(b) It shall be unlawful for any person to conduct any activity at his or her residence where the person:

- (1) Accepts a minor or minors into his or her care or custody from another, and
- (2) Knows that a person who resides at that same location is required to register under this Article.

(c) A violation of this section is a Class F felony. (2006-247, s. 11(b).)

**Editor's Note.** — Session Laws 2006-247, s. 1(a), provided: "This act shall be known as 'An Act To Protect North Carolina's Children/Sex Offender Law Changes.'"

Session Laws 2006-247, s. 11(c), made this section effective December 1, 2006, and applicable to offenses committed on or after that date.

Session Laws 2006-247, s. 21 is a severability clause.

Session Laws 2006-247, s. 22, provides, in part: "Prosecutions for offenses committed before the effective date of this act are not abated or affected by this act, and the statutes that would be applicable but for this act remain applicable to those prosecutions."

§§ 14-208.18, 14-208.19: Reserved for future codification purposes.

## Part 4. Registration of Certain Juveniles Adjudicated for Committing Certain Offenses.

## § 14-208.28. Verification of registration information.

The information provided to the sheriff shall be verified semiannually for each juvenile registrant as follows:

- (1) Every year on the anniversary of a juvenile's initial registration date and six months after that date, the sheriff shall mail a verification form to the juvenile court counselor assigned to the juvenile.
- (2) The juvenile court counselor for the juvenile shall return the verification form to the sheriff within 10 days after the receipt of the form.
- (3) The verification form shall be signed by the juvenile court counselor and the juvenile and shall indicate whether the juvenile still resides at the address last reported to the sheriff. If the juvenile has a different address, then that fact and the new address shall be indicated on the form. (1997-516, s. 1; 2001-490, s. 2.37; 2006-247, s. 13.)

**Editor's Note.** — Session Laws 2006-247, s. 1(a), provided: "This act shall be known as 'An Act To Protect North Carolina's Children/Sex Offender Law Changes.'"

Session Laws 2006-247, s. 21 is a severability clause.

Session Laws 2006-247, s. 22, provides, in part: "Prosecutions for offenses committed before the effective date of this act are not abated

or affected by this act, and the statutes that would be applicable but for this act remain applicable to those prosecutions."

**Effect of Amendments.** — Session Laws 2006-247, s. 13, effective December 1, 2006, and applicable to offenses committed on or after that date, inserted "and six months after that date" in subdivision (1).



## Part 5. Sex Offender Monitoring.

### § 14-208.40. Establishment of program; creation of guidelines; duties.

(a) The Department of Correction shall establish a sex offender monitoring program that uses a continuous satellite-based monitoring system and shall create guidelines to govern the program. The program shall be designed to monitor two categories of offenders as follows:

- (1) Any offender who is convicted of a reportable conviction as defined by G.S. 14-208.6(4) and who is required to register under Part 3 of Article 27A of Chapter 14 of the General Statutes because the defendant is classified as a sexually violent predator, is a recidivist, or was convicted of an aggravated offense as those terms are defined in G.S. 14-208.6. An offender in this category who is ordered by the court to submit to satellite-based monitoring is subject to that requirement for the person's natural life, unless the requirement is terminated pursuant to G.S. 14-208.43.
- (2) Any offender who satisfies all of the following criteria: (i) is convicted of a reportable conviction as defined by G.S. 14-208.6(4), (ii) is required to register under Part 2 of Article 27A of Chapter 14 of the General Statutes, (iii) has committed an offense involving the physical, mental, or sexual abuse of a minor, and (iv) based on the Department's risk assessment program requires the highest possible level of supervision and monitoring. An offender in this category who is ordered by the court to submit to satellite-based monitoring is subject to that requirement only for the period of time ordered by the court and is not subject to a requirement of lifetime satellite-based monitoring.

(b) In developing the guidelines for the program, the Department shall require that any offender who is enrolled in the satellite-based program submit to an active continuous satellite-based monitoring program, unless an active program will not work as provided by this section. If the Department determines that an active program will not work as provided by this section, then the Department shall require that the defendant submit to a passive continuous satellite-based program that works within the technological or geographical limitations.

(c) The satellite-based monitoring program shall use a system that provides all of the following:

- (1) Time-correlated and continuous tracking of the geographic location of the subject using a global positioning system based on satellite and other location tracking technology.
- (2) Reporting of subject's violations of prescriptive and proscriptive schedule or location requirements. Frequency of reporting may range from once a day (passive) to near real-time (active).

(d) The Department may contract with a single vendor for the hardware services needed to monitor subject offenders and correlate their movements to reported crime incidents. The contract may provide for services necessary to implement or facilitate any of the provisions of this Part. (2006-247, s. 15(a).)

**Editor's Note.** — This section was enacted as G.S. 14-208.33 by Session Laws 2006-247, s. 15(a), and was recodified as this section at the direction of the Revisor of Statutes.

Session Laws 2006-247, s. 1(a), provides:

"This act shall be known as 'An Act To Protect North Carolina's Children/Sex Offender Law Changes.'"

Session Laws 2006-247, s. 15(j), provides: "The Department of Correction shall have the



program enacted by subsection (a) of this section established by January 1, 2007.”

Session Laws 2006-247, s. 15(l), provides: “Unless otherwise provided in the section, this section is effective when it becomes law [August 16, 2006] and applies to offenses committed on or after that date. This section also applies to any person sentenced to intermediate punishment on or after that date and to any person released from prison by parole or post-release supervision on or after that date. This section also applies to any person who completes his or her sentence on or after the effective date of this section who is not on post-release supervision or parole. However, the requirement to enroll in a satellite-based program is not mandatory until January 1, 2007, when the program is established.”

Session Laws 2006-247, s. 16, provides: “The Department of Correction shall either issue an RFP prior to signing a contract, or with prior approval by the State Chief Information Officer or his designee, enter into a contract through an approved contracting alliance or consortium for a passive and active Global Positioning System. The system shall be for use as an intermediate sanction and to help supervise certain sex offenders who are placed on probation, parole, or post-release supervision. If an RFP is issued, the contract shall be awarded by

October 1, 2006 for contract terms to begin January 1, 2007. The Department of Correction shall report by November 1, 2006 to the Chairs of the House of Representatives and Senate Appropriations Committees and the Chairs of the House of Representatives and Senate Appropriations Subcommittees on Justice and Public Safety on the details of the awarded contract.”

Session Laws 2006-247, s. 17, provides: “No later than January 1, 2007, the Department of Correction shall develop a graduated risk assessment program that identifies, assesses, and closely monitors a high-risk sex offender who, while not classified as a sexually violent predator, a recidivist, or convicted of an aggravated offense as those terms are defined in G.S. 14-208.6, may still require extraordinary supervision and may be placed on probation, parole, or post-release supervision only on the conditions provided in G.S. 15A-1343(b2) or G.S. 15A-1368.4(b1).”

Session Laws 2006-247, s. 21 is a severability clause.

Session Laws 2006-247, s. 22, provides, in part: “Prosecutions for offenses committed before the effective date of this act are not abated or affected by this act, and the statutes that would be applicable but for this act remain applicable to those prosecutions.”

## § 14-208.41. Enrollment in satellite-based monitoring programs mandatory; length of enrollment.

(a) Any person described by G.S. 14-208.40(a)(1) shall enroll in a satellite-based monitoring program with the Division of Community Corrections office in the county where the person resides. The person shall remain enrolled in the satellite-based monitoring program for the registration period imposed under G.S. 14-208.23 which is the person’s life, unless the requirement to enroll in the satellite-based monitoring program is terminated pursuant to G.S. 14-208.42.

(b) Any person described by G.S. 14-208.40(a)(2) who is ordered by the court to enroll in a satellite-based monitoring program shall do so with the Division of Community Corrections office in the county where the person resides. The person shall remain enrolled in the satellite-based monitoring program for the period of time ordered by the court. (2006-247, s. 15(a).)

**Editor’s Note.** — Session Laws 2006-247, s. 15(a), enacted this section as G.S. 14-208.34. It was recodified as this section at the direction of the Revisor of Statutes.

Session Laws 2006-247, s. 15(l), provides: “Unless otherwise provided in the section, this section is effective when it becomes law [August 16, 2006] and applies to offenses committed on or after that date. This section also applies to any person sentenced to intermediate punish-

ment on or after that date and to any person released from prison by parole or post-release supervision on or after that date. This section also applies to any person who completes his or her sentence on or after the effective date of this section who is not on post-release supervision or parole. However, the requirement to enroll in a satellite-based program is not mandatory until January 1, 2007, when the program is established.”

**§ 14-208.42. Lifetime registration offenders required to submit to satellite-based monitoring for life and to continue on unsupervised probation upon completion of sentence.**

Notwithstanding any other provision of law, when the court sentences an offender who is in the category described by G.S. 14-208.40(a)(1) for a reportable conviction as defined by G.S. 14-208.6(4), and orders the offender to enroll in a satellite-based monitoring program, the court shall also order that the offender, upon completion of the offender's sentence and any term of parole, post-release supervision, intermediate punishment, or supervised probation that follows the sentence, continue to be enrolled in the satellite-based monitoring program for the offender's life and be placed on unsupervised probation unless the requirement that the person enroll in a satellite-based monitoring program is terminated pursuant to G.S. 14-208.43. (2006-247, s. 15(a).)

**Editor's Note.** — Session Laws 2006-247, s. 15(a), enacted this section as G.S. 14-208.35. It was recodified as this section at the direction of the Revisor of Statutes.

Session Laws 2006-247, s. 15(l), provides: "Unless otherwise provided in the section, this section is effective when it becomes law [August 16, 2006] and applies to offenses committed on or after that date. This section also applies to any person sentenced to intermediate punish-

ment on or after that date and to any person released from prison by parole or post-release supervision on or after that date. This section also applies to any person who completes his or her sentence on or after the effective date of this section who is not on post-release supervision or parole. However, the requirement to enroll in a satellite-based program is not mandatory until January 1, 2007, when the program is established."

**§ 14-208.43. Request for termination of satellite-based monitoring requirement.**

(a) An offender described by G.S. 14-308.40(a)(1) who is required to submit to satellite-based monitoring for the offender's life may file a request for termination of monitoring requirement with the Post-Release Supervision and Parole Commission. The request to terminate the satellite-based monitoring requirement and to terminate the accompanying requirement of unsupervised probation may not be submitted until at least one year after the offender: (i) has served his or her sentence for the offense for which the satellite-based monitoring requirement was imposed, and (ii) has also completed any period of probation, parole, or post-release supervision imposed as part of the sentence.

(b) Upon receipt of the request for termination, the Commission shall review documentation contained in the offender's file and the statewide registry to determine whether the person has complied with the provisions of this Article. In addition, the Commission shall conduct fingerprint-based state and federal criminal history record checks to determine whether the person has been convicted of any additional reportable convictions.

(c) If it is determined that the person has not received any additional reportable convictions during the period of satellite-based monitoring and the person has substantially complied with the provisions of this Article, the Commission may terminate the monitoring requirement if the Commission finds that the person is not likely to pose a threat to the safety of others.

(d) If it is determined that the person has received any additional reportable convictions during the period of satellite-based monitoring or has not substantially complied with the provisions of this Article, the Commission shall not order the termination of the monitoring requirement.

(e) The Commission shall not consider any request to terminate a monitoring requirement except as provided by this section. The Commission has no



authority to consider or terminate a monitoring requirement for an offender described in G.S. 14-208.40(a)(2). (2006-247, s. 15(a).)

**Editor's Note.** — Session Laws 2006-247, s. 15(a), enacted this section as G.S. 14-208.36. It was recodified as this section at the direction of the Revisor of Statutes.

Session Laws 2006-247, s. 15(l), provides: "Unless otherwise provided in the section, this section is effective when it becomes law [August 16, 2006] and applies to offenses committed on or after that date. This section also applies to any person sentenced to intermediate punish-

ment on or after that date and to any person released from prison by parole or post-release supervision on or after that date. This section also applies to any person who completes his or her sentence on or after the effective date of this section who is not on post-release supervision or parole. However, the requirement to enroll in a satellite-based program is not mandatory until January 1, 2007, when the program is established."

## § 14-208.44. Failure to enroll; tampering with device.

(a) Any person required to enroll in a satellite-based monitoring program who fails to enroll shall be guilty of a Class F felony.

(b) Any person who intentionally tampers with, removes, or vandalizes a device issued pursuant to a satellite-based monitoring program to a person duly enrolled in the program shall be guilty of a Class E felony. (2006-247, s. 15(a).)

**Editor's Note.** — Session Laws 2006-247, s. 15(a), enacted this section as G.S. 14-208.37. It was recodified as this section at the direction of the Revisor of Statutes.

Session Laws 2006-247, s. 15(l), provides: "Unless otherwise provided in the section, this section is effective when it becomes law [August 16, 2006] and applies to offenses committed on or after that date. This section also applies to any person sentenced to intermediate punish-

ment on or after that date and to any person released from prison by parole or post-release supervision on or after that date. This section also applies to any person who completes his or her sentence on or after the effective date of this section who is not on post-release supervision or parole. However, the requirement to enroll in a satellite-based program is not mandatory until January 1, 2007, when the program is established."

## § 14-208.45. Fees.

(a) There shall be a one-time fee of ninety dollars (\$90.00) assessed to each person required to enroll pursuant to this Part. The court may exempt a person from paying the fee only for good cause and upon motion of the person placed on satellite-based monitoring. The court may require that the fee be paid in advance or in a lump sum or sums, and a probation officer may require payment by those methods if the officer is authorized by subsection (c) of this section to determine the payment schedule. This fee is intended to offset only the costs associated with the time-correlated tracking of the geographic location of subjects using the location tracking crime correlation system.

(b) The fee shall be payable to the clerk of superior court, and the fees shall be remitted quarterly to the Department of Correction.

(c) If a person placed on supervised probation, parole, or post-release supervision is required as a condition of that probation, parole, or post-release supervision to pay any moneys to the clerk of superior court, the court may delegate to a probation officer the responsibility to determine the payment schedule. (2006-247, s. 15(a).)

**Editor's Note.** — Session Laws 2006-247, s. 15(a), enacted this section as G.S. 14-208.38. It was recodified as this section at the direction of the Revisor of Statutes.

Session Laws 2006-247, s. 15(l), provides:

"Unless otherwise provided in the section, this section is effective when it becomes law [August 16, 2006] and applies to offenses committed on or after that date. This section also applies to any person sentenced to intermediate punish-



ment on or after that date and to any person released from prison by parole or post-release supervision on or after that date. This section also applies to any person who completes his or her sentence on or after the effective date of

this section who is not on post-release supervision or parole. However, the requirement to enroll in a satellite-based program is not mandatory until January 1, 2007, when the program is established.”

SUBCHAPTER VIII. OFFENSES AGAINST PUBLIC JUSTICE.

ARTICLE 30.

*Obstructing Justice.*

§ 14-223. Resisting officers.

CASE NOTES

- I. General Consideration.
- II. Nature and Evidence of Offense.

I. GENERAL CONSIDERATION.

**Cited** in State v. Brewington, 170 N.C. App. 264, 612 S.E.2d 648, 2005 N.C. App. LEXIS 1011 (2005), cert. denied, 360 N.C. 67, 621 S.E.2d 881 (2005).

II. NATURE AND EVIDENCE OF OFFENSE.

**Evidence Sufficient to Withstand Dismissal.** —

Facts of the case, when viewed in the light most favorable to the State, supported the

inference that the officer was discharging official duties by observing defendant, telling defendant to remain in the vehicle, and asking to search defendant after defendant reluctantly answered that defendant did not have any weapons; this evidence was sufficiently substantial to survive defendant’s motion to dismiss the resisting an officer charge. State v. Shearin, 170 N.C. App. 222, 612 S.E.2d 371, 2005 N.C. App. LEXIS 1002 (2005), appeal dismissed, cert. denied, — N.C. —, 624 S.E.2d 369 (2005).

§ 14-226. Intimidating or interfering with witnesses.

(a) If any person shall by threats, menaces or in any other manner intimidate or attempt to intimidate any person who is summoned or acting as a witness in any of the courts of this State, or prevent or deter, or attempt to prevent or deter any person summoned or acting as such witness from attendance upon such court, he shall be guilty of a Class H felony.

(b) A defendant in a criminal proceeding who threatens a witness in the defendant’s case with the assertion or denial of parental rights shall be in violation of this section. (1891, c. 87; Rev., s. 3696; C.S., s. 4380; 1977, c. 711, s. 16; 1993, c. 539, s. 1212; 1994, Ex. Sess., c. 24, s. 14(c); 2004-128, s. 15; 2006-264, s. 2.)

**Effect of Amendments.** —  
Session Laws 2006-264, s. 2, effective August

27, 2006, substituted “in violation” for “a violation” in subsection (b).

CASE NOTES

**Evidence Sufficient.** — Sufficient evidence existed to establish that juvenile attempted to intimate a witness in violation of G.S. 14-226, after a court counselor witnessed the juvenile

mouth the words, “I’m going to kick your ass,” while in court at his adjudication hearing after the witness testified against the juvenile with regard to breaking and entering and trespass

charges. In re R.D.R., — N.C. App. —, 623 S.E.2d 341, 2006 N.C. App. LEXIS 52 (2006).

## **§ 14-226.2. Harassment of participant in neighborhood crime watch program.**

Any person who willfully threatens or intimidates an identifiable member or a resident in the same household as the member of a neighborhood crime watch program for the purpose of intimidating or retaliating against that person for the person's participation in a neighborhood crime watch program is guilty of a Class 1 misdemeanor including a fine of at least three hundred dollars (\$300.00). It is a violation of this section for a person to threaten or intimidate an identifiable member or a resident in the same household as the member of a neighborhood crime watch program while that member is traveling to or from a neighborhood crime watch meeting, actively participating in a neighborhood crime watch program activity, or actively participating in an ongoing criminal investigation. (2006-181, s. 3.)

**Editor's Note.** — Session Laws 2006-181, s. 4 makes this section effective December 1, 2006.

## **ARTICLE 31.**

### *Misconduct in Public Office.*

## **§ 14-234. Public officers or employees benefiting from public contracts; exceptions.**

- (a)(1) No public officer or employee who is involved in making or administering a contract on behalf of a public agency may derive a direct benefit from the contract except as provided in this section, or as otherwise allowed by law.
- (2) A public officer or employee who will derive a direct benefit from a contract with the public agency he or she serves, but who is not involved in making or administering the contract, shall not attempt to influence any other person who is involved in making or administering the contract.
- (3) No public officer or employee may solicit or receive any gift, reward, or promise of reward in exchange for recommending, influencing, or attempting to influence the award of a contract by the public agency he or she serves.
- (a1) For purposes of this section:
  - (1) As used in this section, the term "public officer" means an individual who is elected or appointed to serve or represent a public agency, other than an employee or independent contractor of a public agency.
  - (2) A public officer or employee is involved in administering a contract if he or she oversees the performance of the contract or has authority to make decisions regarding the contract or to interpret the contract.
  - (3) A public officer or employee is involved in making a contract if he or she participates in the development of specifications or terms or in the preparation or award of the contract. A public officer is also involved in making a contract if the board, commission, or other body of which he or she is a member takes action on the contract, whether or not the public officer actually participates in that action, unless the contract

is approved under an exception to this section under which the public officer is allowed to benefit and is prohibited from voting.

- (4) A public officer or employee derives a direct benefit from a contract if the person or his or her spouse: (i) has more than a ten percent (10%) ownership or other interest in an entity that is a party to the contract; (ii) derives any income or commission directly from the contract; or (iii) acquires property under the contract.
- (5) A public officer or employee is not involved in making or administering a contract solely because of the performance of ministerial duties related to the contract.
- (b) Subdivision (a)(1) of this section does not apply to any of the following:
  - (1) Any contract between a public agency and a bank, banking institution, savings and loan association, or with a public utility regulated under the provisions of Chapter 62 of the General Statutes.
  - (2) An interest in property conveyed by an officer or employee of a public agency under a judgment, including a consent judgment, entered by a superior court judge in a condemnation proceeding initiated by the public agency.
  - (3) Any employment relationship between a public agency and the spouse of a public officer of the agency.
  - (4) Remuneration from a public agency for services, facilities, or supplies furnished directly to needy individuals by a public officer or employee of the agency under any program of direct public assistance being rendered under the laws of this State or the United States to needy persons administered in whole or in part by the agency if: (i) the programs of public assistance to needy persons are open to general participation on a nondiscriminatory basis to the practitioners of any given profession, professions or occupation; (ii) neither the agency nor any of its employees or agents, have control over who, among licensed or qualified providers, shall be selected by the beneficiaries of the assistance; (iii) the remuneration for the services, facilities or supplies are in the same amount as would be paid to any other provider; and (iv) although the public officer or employee may participate in making determinations of eligibility of needy persons to receive the assistance, he or she takes no part in approving his or her own bill or claim for remuneration.
- (b1) No public officer who will derive a direct benefit from a contract entered into under subsection (b) of this section may deliberate or vote on the contract or attempt to influence any other person who is involved in making or administering the contract.
- (c) through (d) Repealed by Session Laws 2001-409, s. 1, effective July 1, 2002.
- (d1) Subdivision (a)(1) of this section does not apply to (i) any elected official or person appointed to fill an elective office of a village, town, or city having a population of no more than 15,000 according to the most recent official federal census, (ii) any elected official or person appointed to fill an elective office of a county within which there is located no village, town, or city with a population of more than 15,000 according to the most recent official federal census, (iii) any elected official or person appointed to fill an elective office on a city board of education in a city having a population of no more than 15,000 according to the most recent official federal census, (iv) any elected official or person appointed to fill an elective office as a member of a county board of education in a county within which there is located no village, town or city with a population of more than 15,000 according to the most recent official federal census, (v) any physician, pharmacist, dentist, optometrist, veterinarian, or nurse appointed to a county social services board, local health board, or area



mental health, developmental disabilities, and substance abuse board serving one or more counties within which there is located no village, town, or city with a population of more than 15,000 according to the most recent official federal census, and (vi) any member of the board of directors of a public hospital if all of the following apply:

- (1) The undertaking or contract or series of undertakings or contracts between the village, town, city, county, county social services board, county or city board of education, local health board or area mental health, developmental disabilities, and substance abuse board, or public hospital and one of its officials is approved by specific resolution of the governing body adopted in an open and public meeting, and recorded in its minutes and the amount does not exceed twelve thousand five hundred dollars (\$12,500) for medically related services and twenty-five thousand dollars (\$25,000) for other goods or services within a 12-month period.
- (2) The official entering into the contract with the unit or agency does not participate in any way or vote.
- (3) The total annual amount of contracts with each official, shall be specifically noted in the audited annual financial statement of the village, town, city, or county.
- (4) The governing board of any village, town, city, county, county social services board, county or city board of education, local health board, area mental health, developmental disabilities, and substance abuse board, or public hospital which contracts with any of the officials of their governmental unit shall post in a conspicuous place in its village, town, or city hall, or courthouse, as the case may be, a list of all such officials with whom such contracts have been made, briefly describing the subject matter of the undertakings or contracts and showing their total amounts; this list shall cover the preceding 12 months and shall be brought up-to-date at least quarterly.

(d2) Subsection (d1) of this section does not apply to contracts that are subject to Article 8 of Chapter 143 of the General Statutes, Public Building Contracts.

(d3) Subsection (a) of this section does not apply to an application for or the receipt of a grant under the Agriculture Cost Share Program for Nonpoint Source Pollution Control created pursuant to Part 9 of Article 21 of Chapter 143 of the General Statutes or the Community Conservation Assistance Program created pursuant to Part 11 of Article 21 of Chapter 143 of the General Statutes by a member of the Soil and Water Conservation Commission if the requirements of G.S. 139-4(e) are met, and does not apply to a district supervisor of a soil and water conservation district if the requirements of G.S. 139-8(b) are met.

(d4) Subsection (a) of this section does not apply to an application for, or the receipt of a grant or other financial assistance from, the Tobacco Trust Fund created under Article 75 of Chapter 143 of the General Statutes by a member of the Tobacco Trust Fund Commission or an entity in which a member of the Commission has an interest provided that the requirements of G.S. 143-717(h) are met.

(d5) This section does not apply to a public hospital subject to G.S. 131E-14.2 or a public hospital authority subject to G.S. 131E-21.

(e) Anyone violating this section shall be guilty of a Class 1 misdemeanor.

(f) A contract entered into in violation of this section is void. A contract that is void under this section may continue in effect until an alternative can be arranged when: (i) immediate termination would result in harm to the public health or welfare, and (ii) the continuation is approved as provided in this subsection. A public agency that is a party to the contract may request approval to continue contracts under this subsection as follows:

- (1) Local governments, as defined in G.S. 159-7(15), public authorities, as defined in G.S. 159-7(10), local school administrative units, and community colleges may request approval from the chair of the Local Government Commission.
- (2) All other public agencies may request approval from the State Director of the Budget.

Approval of continuation of contracts under this subsection shall be given for the minimum period necessary to protect the public health or welfare. (1825, c. 1269, P.R.; 1826, c. 29; R.C., c. 34, s. 38; Code, s. 1011; Rev., s. 3572; C.S., s. 4388; 1929, c. 19, s. 1; 1969, c. 1027; 1975, c. 409; 1977, cc. 240, 761; 1979, c. 720; 1981, c. 103, ss. 1, 2, 5; 1983, c. 544, ss. 1, 2; 1985, c. 190; 1987, c. 570; 1989, c. 231; 1991 (Reg. Sess., 1992), c. 1030, s. 5; 1993, c. 539, s. 145; 1994, Ex. Sess., c. 24, s. 14(c); 1995, c. 519, s. 4; 2000-147, s. 6; 2001-409, s. 1; 2001-487, ss. 44(a), 44(b), 45; 2002-159, s. 28; 2006-78, s. 2.)

**Effect of Amendments.** — Session Laws 2006-78, s. 2, effective July 10, 2006, substituted “Part 9 of Article 21 of Chapter 143 of the General Statutes or the Community Conserva-

tion Assistance Program created pursuant to Part 11 of Article 21 of Chapter 143 of the General Statutes” for “G.S. 143-215.74” in subsection (d3).

## ARTICLE 33.

### *Prison Breach and Prisoners.*

#### **§ 14-256. Prison breach and escape from county or municipal confinement facilities or officers.**

##### CASE NOTES

**Deputy of Officer of “Such Jail.”** — Deputy’s testimony he placed defendant in the Alamance County jail before and after defendant’s hearing led to the conclusion that the deputy was an officer of “such jail,” within the

meaning of G.S. 14-256, and thus there was sufficient evidence to support defendant’s conviction for felonious escape from local jail. *State v. Farrar*, — N.C. App. —, 631 S.E.2d 48, 2006 N.C. App. LEXIS 1345 (2006).

#### **§ 14-258.2. Possession of dangerous weapon in prison.**

##### CASE NOTES

**Cited in** *State v. Dent*, — N.C. App. —, 621 S.E.2d 274, 2005 N.C. App. LEXIS 2491 (2005).

#### **§ 14-258.3. Taking of hostage, etc., by prisoner.**

##### CASE NOTES

**Cited in** *State v. Dent*, — N.C. App. —, 621 S.E.2d 274, 2005 N.C. App. LEXIS 2491 (2005).

#### **§ 14-258.4. Malicious conduct by prisoner.**

##### CASE NOTES

**In Custody.** — Since no conclusion could be reached by reading the indictment other than that defendant was in custody at the time he allegedly committed malicious conduct by a

prisoner, the trial court had jurisdiction over his case, as the State adequately alleged the offense such that defendant was notified of the offense against which he was called to defend.

State v. Artis, — N.C. App. —, 622 S.E.2d 204, 2005 N.C. App. LEXIS 2610 (2005).

**Evidence.** — In a case involving felony malicious conduct by a prisoner, evidence regarding the treatment required for spitting when it went into an open wound, eyes, or mouth, even if erroneously admitted, did not constitute a prejudicial error. State v. Crouse, 169 N.C. App. 382, 610 S.E.2d 454, 2005 N.C. App. LEXIS 691 (2005).

**Lesser Included Offense.** —

Misdemeanor assault on a government official is not a lesser included offense of felony malicious conduct by a prisoner; therefore, defendant was not entitled to such a jury instruction in a case where defendant spat in an officer's face. State v. Crouse, 169 N.C. App.

382, 610 S.E.2d 454, 2005 N.C. App. LEXIS 691 (2005).

**Willful and Knowing Conduct.** — In a case involving felony malicious conduct by a prisoner, a motion to dismiss was properly denied because a jury could have inferred that defendant's act of spitting in an officer's face was knowing and willful; despite evidence that defendant was in a stupor, there was ample evidence that defendant had motor skill control because defendant expressed dissatisfaction with the officer, ran down the street, and collected saliva in her mouth prior to spitting. State v. Crouse, 169 N.C. App. 382, 610 S.E.2d 454, 2005 N.C. App. LEXIS 691 (2005).

**Cited in** State v. Dent, — N.C. App. —, 621 S.E.2d 274, 2005 N.C. App. LEXIS 2491 (2005).

## SUBCHAPTER IX. OFFENSES AGAINST THE PUBLIC PEACE.

### ARTICLE 35.

#### *Offenses Against the Public Peace.*

#### § 14-269. Carrying concealed weapons.

(a) It shall be unlawful for any person willfully and intentionally to carry concealed about his person any bowie knife, dirk, dagger, slung shot, loaded cane, metallic knuckles, razor, shurikin, stun gun, or other deadly weapon of like kind, except when the person is on the person's own premises.

(a1) It shall be unlawful for any person willfully and intentionally to carry concealed about his person any pistol or gun except in the following circumstances:

- (1) The person is on the person's own premises.
- (2) The deadly weapon is a handgun, and the person has a concealed handgun permit issued in accordance with Article 54B of this Chapter or considered valid under G.S. 14-415.24.
- (3) The deadly weapon is a handgun and the person is a military permittee as defined under G.S. 14-415.10(2a) who provides to the law enforcement officer proof of deployment as required under G.S. 14-415.11(a).

(b) This prohibition shall not apply to the following persons:

- (1) Officers and enlisted personnel of the armed forces of the United States when in discharge of their official duties as such and acting under orders requiring them to carry arms and weapons;
- (2) Civil and law enforcement officers of the United States;
- (3) Officers and soldiers of the militia and the national guard when called into actual service;
- (4) Officers of the State, or of any county, city, town, or company police agency charged with the execution of the laws of the State, when acting in the discharge of their official duties;
- (5) Sworn law-enforcement officers, when off-duty, provided that an officer does not carry a concealed weapon while consuming alcohol or an unlawful controlled substance or while alcohol or an unlawful controlled substance remains in the officer's body.

(b1) It is a defense to a prosecution under this section that:

- (1) The weapon was not a firearm;



- (2) The defendant was engaged in, or on the way to or from, an activity in which he legitimately used the weapon;
- (3) The defendant possessed the weapon for that legitimate use; and
- (4) The defendant did not use or attempt to use the weapon for an illegal purpose.

The burden of proving this defense is on the defendant.

(b2) It is a defense to a prosecution under this section that:

- (1) The deadly weapon is a handgun;
- (2) The defendant is a military permittee as defined under G.S. 14-415.10(2a); and
- (3) The defendant provides to the court proof of deployment as defined under G.S. 14-415.10(3a).

(c) Any person violating the provisions of subsection (a) of this section shall be guilty of a Class 2 misdemeanor. Any person violating the provisions of subsection (a1) of this section shall be guilty of a Class 2 misdemeanor for the first offense. A second or subsequent offense is punishable as a Class I felony.

(d) This section does not apply to an ordinary pocket knife carried in a closed position. As used in this section, "ordinary pocket knife" means a small knife, designed for carrying in a pocket or purse, that has its cutting edge and point entirely enclosed by its handle, and that may not be opened by a throwing, explosive, or spring action. (Code, s. 1005; Rev., s. 3708; 1917, c. 76; 1919, c. 197, s. 8; C.S., s. 4410; 1923, c. 57; Ex. Sess. 1924, c. 30; 1929, cc. 51, 224; 1947, c. 459; 1949, c. 1217; 1959, c. 1073, s. 1; 1965, c. 954, s. 1; 1969, c. 1224, s. 7; 1977, c. 616; 1981, c. 412, s. 4; c. 747, s. 66; 1983, c. 86; 1985, c. 432, ss. 1-3; 1993, c. 539, s. 163; 1994, Ex. Sess., c. 24, s. 14(c); 1995, c. 398, s. 2; 1997-238, s. 1; 2003-199, s. 2; 2005-232, ss. 4, 5; 2005-337, s. 1; 2006-259, s. 5(a).)

**Effect of Amendments. —**

Session Laws 2006-259, s. 5(a), effective October 1, 2006, substituted "any county, city,

town, or company police agency charged" for "any county, city, or town, charged" in subdivision (b)(4).

**CASE NOTES**

**I. General Consideration.**

**I. GENERAL CONSIDERATION.**

Supp. 2d 502, 2006 U.S. Dist. LEXIS 44918 (E.D.N.C. 2006).

**Applied** in *United States v. General*, 435 F.

**§ 14-269.2. Weapons on campus or other educational property.**

(a) The following definitions apply to this section:

- (1) Educational property. — Any school building or bus, school campus, grounds, recreational area, athletic field, or other property owned, used, or operated by any board of education or school board of trustees, or directors for the administration of any school.
- (1a) Employee. — A person employed by a local board of education or school whether the person is an adult or a minor.
- (1b) School. — A public or private school, community college, college, or university.
- (2) Student. — A person enrolled in a school or a person who has been suspended or expelled within the last five years from a school, whether the person is an adult or a minor.
- (3) Switchblade knife. — A knife containing a blade that opens automatically by the release of a spring or a similar contrivance.
- (4) Weapon. — Any device enumerated in subsection (b), (b1), or (d) of this section.

(b) It shall be a Class I felony for any person to possess or carry, whether openly or concealed, any gun, rifle, pistol, or other firearm of any kind on educational property or to a curricular or extracurricular activity sponsored by a school. Unless the conduct is covered under some other provision of law providing greater punishment, any person who willfully discharges a firearm of any kind on educational property is guilty of a Class F felony. However, this subsection does not apply to a BB gun, stun gun, air rifle, or air pistol.

(b1) It shall be a Class G felony for any person to possess or carry, whether openly or concealed, any dynamite cartridge, bomb, grenade, mine, or powerful explosive as defined in G.S. 14-284.1, on educational property or to a curricular or extracurricular activity sponsored by a school. This subsection shall not apply to fireworks.

(c) It shall be a Class I felony for any person to cause, encourage, or aid a minor who is less than 18 years old to possess or carry, whether openly or concealed, any gun, rifle, pistol, or other firearm of any kind on educational property. However, this subsection does not apply to a BB gun, stun gun, air rifle, or air pistol.

(c1) It shall be a Class G felony for any person to cause, encourage, or aid a minor who is less than 18 years old to possess or carry, whether openly or concealed, any dynamite cartridge, bomb, grenade, mine, or powerful explosive as defined in G.S. 14-284.1 on educational property. This subsection shall not apply to fireworks.

(d) It shall be a Class 1 misdemeanor for any person to possess or carry, whether openly or concealed, any BB gun, stun gun, air rifle, air pistol, bowie knife, dirk, dagger, slungshot, leaded cane, switchblade knife, blackjack, metallic knuckles, razors and razor blades (except solely for personal shaving), firework, or any sharp-pointed or edged instrument except instructional supplies, unaltered nail files and clips and tools used solely for preparation of food, instruction, and maintenance, on educational property.

(e) It shall be a Class 1 misdemeanor for any person to cause, encourage, or aid a minor who is less than 18 years old to possess or carry, whether openly or concealed, any BB gun, stun gun, air rifle, air pistol, bowie knife, dirk, dagger, slungshot, leaded cane, switchblade knife, blackjack, metallic knuckles, razors and razor blades (except solely for personal shaving), firework, or any sharp-pointed or edged instrument except instructional supplies, unaltered nail files and clips and tools used solely for preparation of food, instruction, and maintenance, on educational property.

(f) Notwithstanding subsection (b) of this section it shall be a Class 1 misdemeanor rather than a Class I felony for any person to possess or carry, whether openly or concealed, any gun, rifle, pistol, or other firearm of any kind, on educational property or to a curricular or extracurricular activity sponsored by a school if:

- (1) The person is not a student attending school on the educational property or an employee employed by the school working on the educational property; and
  - (1a) The person is not a student attending a curricular or extracurricular activity sponsored by the school at which the student is enrolled or an employee attending a curricular or extracurricular activity sponsored by the school at which the employee is employed; and
  - (2) Repealed by Session Laws 1999-211, s. 1, effective December 1, 1999, and applicable to offenses committed on or after that date.
  - (3) The firearm is not loaded, is in a motor vehicle, and is in a locked container or a locked firearm rack.
  - (4) Repealed by Session Laws 1999-211, s. 1, effective December 1, 1999, and applicable to offenses committed on or after that date.
- (g) This section shall not apply to:

- (1) A weapon used solely for educational or school-sanctioned ceremonial purposes, or used in a school-approved program conducted under the supervision of an adult whose supervision has been approved by the school authority;
  - (1a) A person exempted by the provisions of G.S. 14-269(b);
  - (2) Firefighters, emergency service personnel, North Carolina Forest Service personnel, and any private police employed by an educational institution, when acting in the discharge of their official duties;
  - (3) Home schools as defined in G.S. 115C-563(a); or
  - (4) Weapons used for hunting purposes on the Howell Woods Nature Center property in Johnston County owned by Johnston Community College when used with the written permission of Johnston Community College or for hunting purposes on other educational property when used with the written permission of the governing body of the school that controls the educational property.
- (h) No person shall be guilty of a criminal violation of this section with regard to the possession or carrying of a weapon so long as both of the following apply:
- (1) The person comes into possession of a weapon by taking or receiving the weapon from another person or by finding the weapon.
  - (2) The person delivers the weapon, directly or indirectly, as soon as practical to law enforcement authorities. (1971, c. 241, ss. 1, 2; c. 1224; 1991, c. 622, s. 1; 1993, c. 539, s. 164; c. 558, s. 1; 1994, Ex. Sess., c. 14, s. 4(a), (b); 1995, c. 49, s. 1; 1997-238, s. 2; 1999-211, s. 1; 1999-257, s. 3, 3.1; 2003-217, s. 1; 2004-198, ss. 1, 2, 3; 2006-264, s. 31.)

**Effect of Amendments.** — Session Laws 2006-264, s. 31, effective August 27, 2006, substituted “weapon” for “fire-  
arm” in the introductory paragraph of subsection (h).

### § 14-277.3. Stalking.

#### CASE NOTES

**Sufficiency of Evidence That Defendant Was in Presence of Victim Without Legal Purpose.** — Evidence that defendant hid in the woods outside the victim’s home, had weapons in his vehicle when he was stopped by police a short distance from the victim’s house, and admitted to another inmate that he was watching the victim and intended to kill her and her family was sufficient to support a stalking conviction under G.S. 14-277.3(a)(1); that evidence was sufficient to support the element of stalking that the defendant was following the victim or was in the victim’s presence without lawful purpose. *State v. Borkar*, 173 N.C. App. 162, 617 S.E.2d 341, 2005 N.C. App. LEXIS 1926 (2005), cert. dismissed, 360 N.C. 67, 623 S.E.2d 774 (2005), cert. denied, 360 N.C. 67, 623 S.E.2d 773 (2005).

## SUBCHAPTER X. OFFENSES AGAINST THE PUBLIC SAFETY.

### ARTICLE 36A.

#### *Riots and Civil Disorders.*

### § 14-288.1. Definitions.

#### CASE NOTES

**Forest Ranger.** — Negligence complaints against the Division of Forest Resources, alleging negligence in failing to extinguish a forest fire which caused smoke and fog to obscure the



vision of drivers on a highway, were not barred by the public duty doctrine, because the forest ranger alleged to have been negligent was not a law enforcement officer, as defined by the Tort Claims Act, and no allegations were made that

the forest ranger failed to detect and prevent misconduct of others through improper inspections. *Myers v. McGrady*, 170 N.C. App. 501, 613 S.E.2d 334, 2005 N.C. App. LEXIS 1087 (2005).

### § 14-288.4. Disorderly conduct.

(a) Disorderly conduct is a public disturbance intentionally caused by any person who does any of the following:

- (1) Engages in fighting or other violent conduct or in conduct creating the threat of imminent fighting or other violence.
- (2) Makes or uses any utterance, gesture, display or abusive language which is intended and plainly likely to provoke violent retaliation and thereby cause a breach of the peace.
- (3) Takes possession of, exercises control over, or seizes any building or facility of any public or private educational institution without the specific authority of the chief administrative officer of the institution, or his authorized representative.
- (4) Refuses to vacate any building or facility of any public or private educational institution in obedience to any of the following:
  - a. An order of the chief administrative officer of the institution, or the officer's representative, who shall include for colleges and universities the vice chancellor for student affairs or the vice-chancellor's equivalent for the institution, the dean of students or the dean's equivalent for the institution, the director of the law enforcement or security department for the institution, and the chief of the law enforcement or security department for the institution.
  - b. An order given by any fireman or public health officer acting within the scope of the fireman's or officer's authority.
  - c. If a state of emergency is occurring or is imminent within the institution, an order given by any law-enforcement officer acting within the scope of the officer's authority.
- (5) Shall, after being forbidden to do so by the chief administrative officer, or the officer's authorized representative, of any public or private educational institution:
  - a. Engage in any sitting, kneeling, lying down, or inclining so as to obstruct the ingress or egress of any person entitled to the use of any building or facility of the institution in its normal and intended use; or
  - b. Congregate, assemble, form groups or formations (whether organized or not), block, or in any manner otherwise interfere with the operation or functioning of any building or facility of the institution so as to interfere with the customary or normal use of the building or facility.
- (6) Disrupts, disturbs or interferes with the teaching of students at any public or private educational institution or engages in conduct which disturbs the peace, order or discipline at any public or private educational institution or on the grounds adjacent thereto.
- (6a) Engages in conduct which disturbs the peace, order, or discipline on any public school bus or public school activity bus.
- (7) Except as provided in subdivision (8) of this subsection, disrupts, disturbs, or interferes with a religious service or assembly or engages in conduct which disturbs the peace or order at any religious service or assembly.
- (8) Engages in conduct with the intent to impede, disrupt, disturb, or interfere with the orderly administration of any funeral, memorial

service, or family processional to the funeral or memorial service, including a military funeral, service, or family processional, or with the normal activities and functions occurring in the facilities or buildings where a funeral or memorial service, including a military funeral or memorial service, is taking place. Any of the following conduct that occurs within one hour preceding, during, or within one hour after a funeral or memorial service shall constitute disorderly conduct under this subdivision:

- a. Displaying, within 300 feet of the ceremonial site, location being used for the funeral or memorial, or the family's processional route to the funeral or memorial service, any visual image that conveys fighting words or actual or imminent threats of harm directed to any person or property associated with the funeral, memorial service, or processional route.
- b. Uttering, within 300 feet of the ceremonial site, location being used for the funeral or memorial service, or the family's processional route to the funeral or memorial service, loud, threatening, or abusive language or singing, chanting, whistling, or yelling with or without noise amplification in a manner that would tend to impede, disrupt, disturb, or interfere with a funeral, memorial service, or processional route.
- c. Attempting to block or blocking pedestrian or vehicular access to the ceremonial site or location being used for a funeral or memorial.

As used in this section the term "building or facility" includes the surrounding grounds and premises of any building or facility used in connection with the operation or functioning of such building or facility.

(b) Except as provided in subsection (c) of this section, any person who willfully engages in disorderly conduct is guilty of a Class 2 misdemeanor.

(c) A person who commits a violation of subdivision (8) of subsection (a) of this section is guilty of:

- (1) A Class 2 misdemeanor for a first offense.
- (2) A Class 1 misdemeanor for a second offense.
- (3) A Class I felony for a third or subsequent offense. (1969, c. 869, s. 1; 1971, c. 668, s. 1; 1973, c. 1347; 1975, c. 19, s. 4; 1983, c. 39, s. 5; 1987, c. 671, s. 1; 1993, c. 539, s. 189; 1994, Ex. Sess., c. 24, s. 14(c); 2001-26, s. 2; 2006-169, s. 1.)

**Effect of Amendments.** — Session Laws 2006-169, s. 1, effective December 1, 2006, and applicable to offenses committed on or after that date, in subsection (a), added "does any of the following" at the end of the introductory paragraph, rewrote subdivision (a)(4), substituted "the officer's" for "his" in the middle of

subdivision (a)(5), inserted "Except as provided in subdivision (8) of this subsection" at the beginning of subdivision (a)(7), added subdivision (a)(8), and made minor stylistic and punctuation changes; inserted "Except as provided in subsection (c) of this section" at the beginning of subsection (b); and added subsection (c).

## § 14-288.8. Manufacture, assembly, possession, storage, transportation, sale, purchase, delivery, or acquisition of weapon of mass death and destruction; exceptions.

### CASE NOTES

**Applied** in *State v. Crump*, — N.C. App. —, 632 S.E.2d 233, 2006 N.C. App. LEXIS 1671 (2006).

**Cited** in *State v. Langley*, 173 N.C. App. 194, 618 S.E.2d 253, 2005 N.C. App. LEXIS 1920 (2005).

## SUBCHAPTER XI. GENERAL POLICE REGULATIONS.

## ARTICLE 37.

*Lotteries, Gaming, Bingo and Raffles.*

## Part 1. Lotteries and Gaming.

## § 14-289. Advertising lotteries.

## CASE NOTES

**Illegal Lottery Not Shown.** — Trial court properly found that sale of a corporation's prepaid phone cards with game pieces was not an illegal lottery where the inclusion of game pieces was merely a marketing system, the phone card was sufficiently compatible with the price being charged and had sufficient value

and utility to support the conclusion that it, and not the associated game of chance, was the object being purchased, and consumers could receive free game pieces without purchasing the phone card via written request. *Am. Treasures, Inc. v. State*, 173 N.C. App. 170, 617 S.E.2d 346, 2005 N.C. App. LEXIS 1928 (2005).

**§ 14-306.1. (Repealed effective July 1, 2007) Types of machines and devices prohibited by law; penalties.**

(a) Ban on New Machines. — It shall be unlawful for any person to operate, allow to be operated, place into operation, or keep in that person's possession for the purpose of operation any video gaming machine as defined in subsection (c) of this section unless either:

(1) Such machine was:

- a. Lawfully in operation, and available for play, within this State on or before June 30, 2000; and
- b. Listed in this State by January 31, 2000 for ad valorem taxation for the 2000-2001 tax year; or

(2) Such machine is within the scope of the exclusion provided in G.S. 14-306(b)(1).

(b) **(Effective until March 1, 2007)** Prohibition of More Than Two Existing Video Gaming Machines at One Location. — It shall be unlawful for any person to operate, allow to be operated, place into operation, or keep in that person's possession for the purpose of operation at one location more than two video gaming machines as defined in subsection (c).

(b) **(Effective March 1, 2007)** Prohibition of More Than One Existing Video Gaming Machine at One Location. — It shall be unlawful for any person to operate, allow to be operated, place into operation, or keep in that person's possession for the purpose of operation at one location more than one video gaming machine as defined in subsection (c).

(c) Definitions. — As used in this section, a video gaming machine means a slot machine as defined in G.S. 14-306(a) and other forms of electrical, mechanical, or computer games such as by way of illustration:

- (1) A video poker game or any other kind of video playing card game.
- (2) A video bingo game.
- (3) A video craps game.
- (4) A video keno game.
- (5) A video lotto game.
- (6) Eight liner.



(7) Pot-of-gold.

(8) A video game based on or involving the random or chance matching of different pictures, words, numbers, or symbols not dependent on the skill or dexterity of the player.

For the purpose of this section, a video gaming machine is a video machine which requires deposit of any coin, token, or use of any credit card, debit card, or any other method that requires payment to activate play of any of the games listed in this subsection. The enumeration of games in the list in this subsection does not authorize the possession or operation of such game if it is otherwise prohibited by law.

For the purpose of this section, a video gaming machine includes those that are within the scope of the exclusion provided in G.S. 14-306(b)(2), but does not include those that are within the scope of the exclusion provided in G.S. 14-306(b)(1).

(d) Age Requirement. — It shall be an infraction for any person under the age of 18 years to play any video gaming machine defined in subsection (c) of this section. It shall be unlawful for the operator of the video gaming machine to knowingly allow a person under the age of 18 years to play any video gaming machine as proscribed by this subsection.

(e) Hours of Operation. — It shall be unlawful to operate or allow the operation of any video gaming machine during the hours of 2:00 A.M. Sunday through 7:00 A.M. Monday.

(f) Plain View. — Any video gaming machine available for operation shall be in plain view of persons visiting the premises.

(g) Advertising Prohibited. — It is unlawful to advertise the operation of video gaming machines by use of on-premise or off-premise signs.

(h) Proximity to Other Locations Regulated; Permanent Building Required. — Each location where it is lawful to operate any video gaming machines as defined in G.S. 14-306.1(c) shall be at least 300 feet in any plane from any other location where such machines are operated. For the purpose of this section, a location is a permanent building having, or being within, a single exterior structure. Notwithstanding this subsection, two or more places where video gaming machines were lawfully operated under separate ownership on June 30, 2000, shall be considered to be separate locations more than 300 feet from each other, regardless of the distance from each other or whether they are located in the same building or edifice. Video gaming machines as defined in G.S. 14-306.1(c) may be operated only within permanent buildings.

(i) Registration With Sheriff. — No later than October 1, 2000, the owner of any video game which is regulated by this section shall register the machine with the Sheriff of the county in which the machine is located using a standardized registration form supplied by the Sheriff. The registration form shall be signed under oath by the owner of the machine. A material false statement in the registration form shall subject the owner to seizure of the machine under G.S. 14-298 in addition to any other punishment imposed by law. At a minimum, the registration form shall require that the registrant provide evidence of the date on which the machine was placed in operation, the serial number of the machine, the location of the facility at which the machine is operated, and the name of the owner of the facility at which the machine is operated. Each Sheriff shall report to the Joint Legislative Commission on Governmental Operations no later than November 1, 2000, on the total number of machines registered in that county, itemizing how many locations have one, two, or three machines. No machine may be moved from its registered location except in conjunction with the activities described in subsections (l) and (m) of this section.

(j) Report on Receipts and Prizes and Merchandise Awarded. — The owner of each machine or the agent of that owner shall report each calendar quarter

to the Department of Revenue, under oath on a form provided by that Department, the total amount of gross receipts itemized by each machine, the number of machines at that location, and the total value of prizes and merchandise awarded to players of each machine at that location. The report shall be filed by the fifteenth day of the month after the quarter ends. Failure of the owner or agent to timely file the required report, or filing a report containing a material false statement shall subject the owner of the machine to seizure of the machine under G.S. 14-298 in addition to any other punishment imposed by law. Upon request of the Sheriff of the county, the Department of Revenue shall forward a copy of the report to the Sheriff of the county where the machines are located. The Department of Revenue shall compile the reports and make a summary report each quarter to the Joint Legislative Commission on Governmental Operations.

(k) Report to 2001 Session. — The North Carolina Sheriffs' Association, Inc., after consultation with the Division of Alcohol Law Enforcement, and the Conference of District Attorneys of North Carolina, shall report to the Joint Legislative Commission on Governmental Operations no later than January 1, 2001, its estimates of the costs of the registration process and the cost of enforcement of this section, along with suggested fees to make the registration and enforcement self-supporting, and recommendations as to a system with registration at the State level and primary enforcement at the local level. Such fee schedule is not effective until approved by the General Assembly.

(l) Exemption for Certain Machines. — This section shall not apply to:

- (1) Assemblers, repairers, manufacturers, sellers, lessors, or transporters of video gaming machines who assemble, repair, manufacture, sell, lease, or transport them for use out-of-state, or
- (2) Assemblers, repairers, manufacturers, sellers, lessors, or transporters of video gaming machines who assemble, repair, manufacture, sell, or lease video gaming machines for use only by a federally recognized Indian tribe if such machines may be lawfully used on Indian land under the Indian Gaming Regulatory Act.

To qualify for an exemption under this subsection, the machines must be disabled and not operable, unless the machines are located on Indian land where they may be lawfully operated under a Tribal-State Compact.

(m) Ban on Warehousing. — It is unlawful to warehouse any video gaming machine except in conjunction with the activities permitted under subsection (l) of this section.

(n) Exemption for Activities Under IGRA. — This section does not make any activities of a federally recognized Indian Tribe unlawful or against public policy, which are lawful for any federally recognized Indian Tribe under the Indian Gaming Regulatory Act, Public Law 100-497.

(o) No Local Preemption. — This section does not preempt any more restrictive ordinance lawfully adopted under Article 18 of Chapter 153A of the General Statutes or under Article 19 of Chapter 160A of the General Statutes.

(p) No person who has been convicted:

- (1) Once under G.S. 14-309(a) may possess any video gaming machine as defined in G.S. 14-306.1 for a period of one year.
- (2) Twice under G.S. 14-309(a) may possess any video gaming machine as defined in G.S. 14-306.1 for a period of two years.
- (3) Three or more times under G.S. 14-309(a) may possess any video gaming machine.

(q) Not Legalizing Unlawful Activity. — This section does not make lawful any activity which is currently unlawful. (2000-151, s. 1; 2006-6, ss. 1, 2, 7, 8, 9.)



**Subsection (b) Set Out Twice.** — The first version of subsection (b) set out above is effective October 1, 2006 through March 1, 2007. The second version of subsection (b) is effective March 1, 2007.

**Section Repealed Effective July 1, 2007.**

— This section is repealed effective July 1, 2007, and applicable to offenses committed on or after that date by Session Laws 2006-6, s. 3.

Session-Laws 2006-6, s. 12, provides, in part: “Prosecutions for offenses committed before the effective dates in this act are not abated or affected by this act, and the statutes that would be applicable but for this act remain applicable to those prosecutions. If a final Order by a court of competent jurisdiction prohibits possession or operation of video gaming machines by a federally recognized Indian tribe because that

activity is not allowed elsewhere in this State, this act is void.”

**Effect of Amendments.** — Session Laws 2006-6, ss. 1 and 2, effective October 1, 2006, and applicable to offenses committed on or after that date, substituted “Two” for “Three” twice in subsection (b); effective March 1, 2007, and applicable to offenses committed on or after that date, substituted “One” for “Two” twice and substituted “machine” for “machines” throughout subsection (b).

Session Laws 2006-6, ss. 7-9, effective June 6, 2006, in subsection (i), deleted the last sentence; rewrote subsection (l); in subsection (m), substituted “activities permitted under subsection (l) of this section” for “permitted assembly, manufacture, and transportation of such machines under subsection (l) of this section.”

## § 14-306.1A. (Effective July 1, 2007) Types of machines and devices prohibited by law; penalties.

(a) Ban on Machines. — It shall be unlawful for any person to operate, allow to be operated, place into operation, or keep in that person’s possession for the purpose of operation any video gaming machine as defined in subsection (b) of this section, except for the exemption for a federally recognized Indian tribe under subsection (e) of this section for whom it shall be lawful to operate and possess machines as listed in subsection (b) of this section if conducted in accordance with an approved Class III Tribal-State Compact applicable to that tribe, as provided in G.S. 147-12(14) and G.S. 71A-8.

(b) Definitions. — As used in this section, a video gaming machine means a slot machine as defined in G.S. 14-306(a) and other forms of electrical, mechanical, or computer games such as, by way of illustration:

- (1) A video poker game or any other kind of video playing card game.
- (2) A video bingo game.
- (3) A video craps game.
- (4) A video keno game.
- (5) A video lotto game.
- (6) Eight liner.
- (7) Pot-of-gold.
- (8) A video game based on or involving the random or chance matching of different pictures, words, numbers, or symbols not dependent on the skill or dexterity of the player.

For the purpose of this section, a video gaming machine is a video machine which requires deposit of any coin or token, or use of any credit card, debit card, or any other method that requires payment to activate play of any of the games listed in this subsection.

For the purpose of this section, a video gaming machine includes those that are within the scope of the exclusion provided in G.S. 14-306(b)(2) unless conducted in accordance with an approved Class III Tribal-State Compact applicable to that tribe as provided in G.S. 147-12(14) and G.S. 71A-8. For the purpose of this section, a video gaming machine does not include those that are within the scope of the exclusion provided in G.S. 14-306(b)(1).

(c) Exemption for Certain Machines. — This section shall not apply to:

- (1) Assemblers, repairers, manufacturers, sellers, lessors, or transporters of video gaming machines who assemble, repair, manufacture, sell, lease, or transport them for use out-of-state, or
- (2) Assemblers, repairers, manufacturers, sellers, lessors, or transporters of video gaming machines who assemble, repair, manufacture, sell, or



lease video gaming machines for use only by a federally recognized Indian tribe if such machines may be lawfully used on Indian land under the Indian Gaming Regulatory Act.

To qualify for an exemption under this subsection, the machines must be disabled and not operable, unless the machines are located on Indian land where they may be lawfully operated under a Tribal-State Compact.

(d) Ban on Warehousing. — It is unlawful to warehouse any video gaming machine except in conjunction with the activities permitted under subsection (c) of this section.

(e) Exemption for Activities Under IGRA. — Notwithstanding any other prohibitions in State law, the form of Class III gaming otherwise prohibited by subsections (a) through (d) of this section may be legally conducted on Indian lands which are held in trust by the United States government for and on behalf of federally recognized Indian tribes if conducted in accordance with an approved Class III Tribal-State Gaming Compact applicable to that tribe as provided in G.S. 147-12(14) and G.S. 71A-8.

(f) Machines described in G.S. 14-306(b)(1) are excluded from this section. (2006-6, s. 4; 2006-259, s. 6.)

**Editor's Note.** — Session Laws 2006-6, s. 12, makes this section effective July 1, 2007, and applicable to offenses committed on or after that date.

Session Laws 2006-6, s. 12, provides, in part: "Prosecutions for offenses committed before the effective dates in this act are not abated or affected by this act, and the statutes that would be applicable but for this act remain applicable

to those prosecutions. If a final Order by a court of competent jurisdiction prohibits possession or operation of video gaming machines by a federally recognized Indian tribe because that activity is not allowed elsewhere in this State, this act is void."

**Effect of Amendments.** — Session Laws 2006-259, s. 6, effective August 23, 2006, added subsection (f).

## § 14-306.2. (Effective July 1, 2007) Violation of G.S. 14-306.1A a violation of the ABC laws.

Violation of G.S. 14-306.1A is a violation of the gambling statutes for the purposes of G.S. 18B-1005(a)(3). (2000-151, s. 2.; 2006-6, s. 5.)

**Section Set Out Twice.** — The section above is effective July 1, 2007. For the section as in effect until July 1, 2007, see the main volume.

**Editor's Note.** — Session Laws 2006-6, s. 12, provides, in part: "Prosecutions for offenses committed before the effective dates in this act are not abated or affected by this act, and the statutes that would be applicable but for this act remain applicable to those prosecutions. If a

final Order by a court of competent jurisdiction prohibits possession or operation of video gaming machines by a federally recognized Indian tribe because that activity is not allowed elsewhere in this State, this act is void."

**Effect of Amendments.** — Session Laws 2006-6, s. 5, effective July 1, 2007, and applicable to offenses committed on or after that date, substituted "G.S. 14-306.1A" for "G.S. 14-306.1."

## § 14-309. (Effective July 1, 2007) Violation made criminal.

(a) Any person who violates any provision of G.S. 14-304 through 14-309 is guilty of a Class 1 misdemeanor for the first offense, and is guilty of a Class H felony for a second offense and a Class G felony for a third or subsequent offense.

(b) Notwithstanding the provisions of subsection (a) of this section, any person violating the provisions of G.S. 14-306.1A involving the operation of five or more machines prohibited by that section is guilty of a Class G felony. ( 1937, c. 196, s. 6; 1993, c. 366, s. 3, c. 539, s. 211; 1994, Ex. Sess., c. 14, s. 9(a), (b); 2000-151, s. 3.; 2006-6, s. 11.)

**Section Set Out Twice.** — The section above is effective July 1, 2007. For the section as in effect until July 1, 2007, see the main volume.

**Editor's Note.** — Session Laws 2006-6, s. 12, provides, in part: "Prosecutions for offenses committed before the effective dates in this act are not abated or affected by this act, and the statutes that would be applicable but for this act remain applicable to those prosecutions. If a final Order by a court of competent jurisdiction

prohibits possession or operation of video gaming machines by a federally recognized Indian tribe because that activity is not allowed elsewhere in this State, this act is void."

**Effect of Amendments.** — Session Laws 2006-6, s. 11, effective July 1, 2007, and applicable to offenses committed on or after that date, in subsection (a), substituted "Class H felony" for "Class I felony" and "Class G felony" for "Class H felony"; and substituted "G.S. 14-306.1A" for "G.S. 14-306.1" in subsection (b).

## Part 2. Bingo and Raffles.

### § 14-309.15. Raffles.

(a) It is lawful for any nonprofit organization or association, recognized by the Department of Revenue as tax-exempt pursuant to G.S. 105-130.11(a), and for any government entity within the State, to conduct raffles in accordance with this section. Any person who conducts a raffle in violation of any provision of this section shall be guilty of a Class 2 misdemeanor. Upon conviction that person shall not conduct a raffle for a period of one year. It is lawful to participate in a raffle conducted pursuant to this section. It shall not constitute a violation of State law to advertise a raffle conducted in accordance with this section. A raffle conducted pursuant to this section is not "gambling".

(b) For purposes of this section "raffle" means a game in which the prize is won by random drawing of the name or number of one or more persons purchasing chances.

(c) Raffles shall be limited to two per nonprofit organization per year.

(d) The maximum cash prize that may be offered or paid for any one raffle is fifty thousand dollars (\$50,000) and if merchandise is used as a prize, and it is not redeemable for cash, the maximum fair market value of that prize may be fifty thousand dollars (\$50,000). No real property may be offered as a prize in a raffle. The total cash prizes offered or paid by any nonprofit organization or association may not exceed fifty thousand dollars (\$50,000) in any calendar year. The total fair market value of all prizes offered by any nonprofit organization or association, either in cash or in merchandise that is not redeemable for cash, may not exceed fifty thousand dollars (\$50,000) in any calendar year.

(e) Raffles shall not be conducted in conjunction with bingo.

(f) As used in this subsection, "net proceeds of a raffle" means the receipts less the cost of prizes awarded. No less than ninety percent (90%) of the net proceeds of a raffle shall be used by the nonprofit organization or association for charitable, religious, educational, civic, or other nonprofit purposes. None of the net proceeds of the raffle may be used to pay any person to conduct the raffle, or to rent a building where the tickets are received or sold or the drawing is conducted. (1983 (Reg. Sess., 1984), c. 1107, s. 11; 1993, c. 219, s. 1; c. 539, s. 215; 1994, Ex. Sess., c. 24, s. 14(c); 1997-10, s. 1; 2005-276, s. 17.31; 2005-345, s. 31; 2006-264, s. 3(a).)

**Editor's Note.** — Session Laws 1993, c. 219, which amended this section, in s. 2 provides that for purposes of the act, government entities within the State of North Carolina shall be considered nonprofit as defined in G.S. 105-130.11(a). Session Laws 2006-264, s. 3(b) repealed Session Laws 1993, c. 219, s. 2, effective August 27, 2006.

**Effect of Amendments.** —

Session Laws 2006-264, s. 3(a), effective August 27, 2006, inserted "and for any government entity within the State" in the first sentence of subsection (a).

## ARTICLE 39.

*Protection of Minors.*

## § 14-318.4. Child abuse a felony.

## CASE NOTES

**Failure to Instruct Regarding “Serious Bodily Injury.”** — Because a trial court failed to instruct the jury regarding “serious bodily injury” as alleged in the indictment, it was error to sentence defendant for felonious child abuse inflicting serious bodily injury because

the jury was only instructed on the lesser offense of felony child abuse inflicting serious physical injury. *State v. Locklear*, — N.C. App. —, 632 S.E.2d 516, 2006 N.C. App. LEXIS 1641 (2006).

## ARTICLE 47.

*Cruelty to Animals.*

## § 14-362.2. Dog fighting and baiting.

(a) A person who instigates, promotes, conducts, is employed at, provides a dog for, allows property under the person’s ownership or control to be used for, gambles on, or profits from an exhibition featuring the baiting of a dog or the fighting of a dog with another dog or with another animal is guilty of a Class H felony. A lease of property that is used or is intended to be used for an exhibition featuring the baiting of a dog or the fighting of a dog with another dog or with another animal is void, and a lessor who knows this use is made or is intended to be made of the lessor’s property is under a duty to evict the lessee immediately.

(b) A person who owns, possesses, or trains a dog with the intent that the dog be used in an exhibition featuring the baiting of that dog or the fighting of that dog with another dog or with another animal is guilty of a Class H felony.

(c) A person who participates as a spectator at an exhibition featuring the baiting of a dog or the fighting of a dog with another dog or with another animal is guilty of a Class H felony.

(d) This section does not prohibit the use of dogs in the lawful taking of animals under the jurisdiction and regulation of the Wildlife Resources Commission. (1997-78, s. 1; 2006-113, s. 3.1; 2006-259, s. 37.)

**Effect of Amendments.** — Session Laws 2006-113, s. 3.1, as amended by Session Laws 2006-259, s. 37, effective December 1, 2006, and applicable to offenses committed on or after that date, throughout the section, deleted the language “fighting or” preceding “baiting” and

added the language “or the fighting of a dog with another dog or with another animal”; in subsection (a) substituted “the person’s” for “his” in the first sentence and “the lessor’s” for “his” in the second sentence; and added subsection (d).

## ARTICLE 52.

*Miscellaneous Police Regulations.*

## § 14-401.14. Ethnic intimidation; teaching any technique to be used for ethnic intimidation.

## CASE NOTES

**Evidence Sufficient for Conviction.** — Trial court did not err in denying a juvenile’s

motion to dismiss a charge that he committed a violation of North Carolina’s Ethnic Intimida-



tion Statute, G.S. 14-401.14 at the close of all the evidence, as the State presented sufficient evidence that he: (1) sent an E-mail to the African-American victim, which contained racial slurs and was signed “KKK,” and directly communicated an intent to harm her; and (2) testified that he sent the E-mail to the victim in

protest of her alleged differing treatment against him as compared with others who were African-American. Thus, the State met its burden in showing that the E-mail was sent to the victim for racially motivated reasons. In re B.C.D., — N.C. App. —, 629 S.E.2d 617, 2006 N.C. App. LEXIS 1073 (2006).

## ARTICLE 52A.

### *Sale of Weapons in Certain Counties.*

#### **§ 14-404. Issuance or refusal of permit; appeal from refusal; grounds for refusal; sheriff’s fee.**

(a) Upon application, the sheriff shall issue the license or permit to a resident of that county, unless the purpose of the permit is for collecting, in which case a sheriff can issue a permit to a nonresident, when the sheriff has done all of the following:

- (1) Verified, before the issuance of a permit, by a criminal history background investigation that it is not a violation of State or federal law for the applicant to purchase, transfer, receive, or possess a handgun. The sheriff shall determine the criminal and background history of any applicant by accessing computerized criminal history records as maintained by the State Bureau of Investigation and the Federal Bureau of Investigation, by conducting a national criminal history records check, by conducting a check through the National Instant Criminal Background Check System (NICS), and by conducting a criminal history check through the Administrative Office of the Courts.
- (2) Fully satisfied himself or herself by affidavits, oral evidence, or otherwise, as to the good moral character of the applicant.
- (3) Fully satisfied himself or herself that the applicant desires the possession of the weapon mentioned for (i) the protection of the home, business, person, family or property, (ii) target shooting, (iii) collecting, or (iv) hunting.

(b) If the sheriff is not fully satisfied, the sheriff may, for good cause shown, decline to issue the license or permit and shall provide to the applicant within seven days of the refusal a written statement of the reason(s) for the refusal. An appeal from the refusal shall lie by way of petition to the chief judge of the district court for the district in which the application was filed. The determination by the court, on appeal, shall be upon the facts, the law, and the reasonableness of the sheriff’s refusal, and shall be final.

(c) A permit may not be issued to the following persons:

- (1) One who is under an indictment or information for or has been convicted in any state, or in any court of the United States, of a felony (other than an offense pertaining to antitrust violations, unfair trade practices, or restraints of trade). However, a person who has been convicted of a felony in a court of any state or in a court of the United States and who is later pardoned may obtain a permit, if the purchase or receipt of a pistol or crossbow permitted in this Article does not violate a condition of the pardon.
- (2) One who is a fugitive from justice.
- (3) One who is an unlawful user of or addicted to marijuana or any depressant, stimulant, or narcotic drug (as defined in 21 U.S.C. section 802).

- (4) One who has been adjudicated mentally incompetent or has been committed to any mental institution.
- (5) One who is an alien illegally or unlawfully in the United States.
- (6) One who has been discharged from the armed forces under dishonorable conditions.
- (7) One who, having been a citizen of the United States, has renounced his or her citizenship.
- (8) One who is subject to a court order that:
  - a. Was issued after a hearing of which the person received actual notice, and at which the person had an opportunity to participate;
  - b. Restrains the person from harassing, stalking, or threatening an intimate partner of the person or child of the intimate partner of the person, or engaging in other conduct that would place an intimate partner in reasonable fear of bodily injury to the partner or child; and
  - c. Includes a finding that the person represents a credible threat to the physical safety of the intimate partner or child; or by its terms explicitly prohibits the use, attempted use, or threatened use of physical force against the intimate partner or child that would reasonably be expected to cause bodily injury.

(d) Nothing in this Article shall apply to officers authorized by law to carry firearms if the officers identify themselves to the vendor or donor as being officers authorized by law to carry firearms and state that the purpose for the purchase of the firearms is directly related to the law officers' official duties.

(e) The sheriff shall charge for the sheriff's services upon issuing the license or permit a fee of five dollars (\$5.00).

(f) Each applicant for a license or permit shall be informed by the sheriff within 30 days of the date of the application whether the license or permit will be granted or denied and, if granted, the license or permit shall be immediately issued to the applicant. (1919, c. 197, s. 3; C.S., s. 5108; 1959, c. 1073, s. 2; 1969, c. 73; 1981 (Reg. Sess., 1982), c. 1395, s. 1; 1987, c. 518, s. 1; 1995, c. 487, s. 2; 2006-39, s. 1; 2006-264, s. 4.)

**Effect of Amendments.** — Session Laws 2006-39, s. 1, as amended by Session Laws 2006-264, s. 4, effective June 30, 2006, made minor stylistic changes in subsection (a); in subdivision (a)(1), substituted "Verified, before the issuance of a permit" for "Verified" in the

first sentence, added "and background" following "The sheriff shall determine the criminal" and inserted "by conducting a check through the National Instant Criminal Background Check System (NICS)" in the last sentence.

## § 14-407.1. Sale of blank cartridge pistols.

The provisions of G.S. 14-402, 14-405, and 14-406 shall apply to the sale of pistols suitable for firing blank cartridges. The sheriffs of all the counties of this State are authorized and may in their discretion issue to any person, firm or corporation, in any such county, a license or permit to purchase or receive any pistol suitable for firing blank cartridges from any person, firm or corporation offering to sell or dispose of the same, which said permit shall be in substantially the following form:

North Carolina

\_\_\_\_\_ County

I, \_\_\_\_\_, sheriff of said county, do hereby certify that \_\_\_\_\_, whose place of residence is \_\_\_\_\_ Street in \_\_\_\_\_ (or) in \_\_\_\_\_ Township in \_\_\_\_\_

County, North Carolina, having this day satisfied me that the possession of a pistol suitable for firing blank cartridges will be used only for lawful purposes, a permit is therefore given said \_\_\_\_\_ to purchase said pistol from

any person, firm or corporation authorized to dispose of the same, this \_\_\_\_\_  
day of \_\_\_\_\_, \_\_\_\_\_.

\_\_\_\_\_  
Sheriff

The sheriff shall charge for the sheriff's services, upon issuing such permit, a fee of fifty cents (50¢). (1959, c. 1068; 1999-456, s. 59; 2006-264, s. 5.)

**Effect of Amendments.** — Session Laws 2006-264, s. 5, effective August 27, 2006, in the introductory paragraph, substituted "G.S. 14-402, 14-405, and 14-406" for "G.S. 14-402 and 14-405 to 14-407" in the first sentence and

"sheriffs" for "clerks of the superior courts" in the second sentence; substituted "sheriff" for "Clerk of the Superior Court" twice in the form; and substituted "sheriff" for "clerk" and "the sheriff's" for "his" in the last paragraph.

## ARTICLE 53A.

### *Other Firearms.*

#### § 14-409.11. "Antique firearm" defined.

(a) The term "antique firearm" means any of the following:

- (1) Any firearm (including any firearm with a matchlock, flintlock, percussion cap, or similar type of ignition system) manufactured on or before 1898.
- (2) Any replica of any firearm described in subdivision (1) of this subsection if the replica is not designed or redesigned for using rimfire or conventional centerfire fixed ammunition.
- (3) Any muzzle loading rifle, muzzle loading shotgun, or muzzle loading pistol, which is designed to use black powder substitute, and which cannot use fixed ammunition.

(b) For purposes of this section, the term "antique firearm" shall not include any weapon which:

- (1) Incorporates a firearm frame or receiver.
- (2) Is converted into a muzzle loading weapon.
- (3) Is a muzzle loading weapon that can be readily converted to fire fixed ammunition by replacing the barrel, bolt, breechblock, or any combination thereof. (1969, c. 101, s. 2; 2006-259, s. 7(a).)

**Effect of Amendments.** — Session Laws 2006-259, s. 7(a), effective August 23, 2006, rewrote the section.

## ARTICLE 53B.

### *Firearm Regulation.*

#### § 14-409.39. Definitions.

#### CASE NOTES

**Cited** in *State v. Langley*, 173 N.C. App. 194, 618 S.E.2d 253, 2005 N.C. App. LEXIS 1920 (2005).



## ARTICLE 54A.

*The Felony Firearms Act.***§ 14-415.1. Possession of firearms, etc., by felon prohibited.**

(a) It shall be unlawful for any person who has been convicted of a felony to purchase, own, possess, or have in his custody, care, or control any firearm or any weapon of mass death and destruction as defined in G.S. 14-288.8(c). For the purposes of this section, a firearm is (i) any weapon, including a starter gun, which will or is designed to or may readily be converted to expel a projectile by the action of an explosive, or its frame or receiver, or (ii) any firearm muffler or firearm silencer. This section does not apply to an antique firearm, as defined in G.S. 14-409.11.

Every person violating the provisions of this section shall be punished as a Class G felon.

(b) Prior convictions which cause disentitlement under this section shall only include:

- (1) Felony convictions in North Carolina that occur before, on, or after December 1, 1995; and
- (2) Repealed by Session Laws 1995, c. 487, s. 3, effective December 1, 1995.
- (3) Violations of criminal laws of other states or of the United States that occur before, on, or after December 1, 1995, and that are substantially similar to the crimes covered in subdivision (1) which are punishable where committed by imprisonment for a term exceeding one year.

When a person is charged under this section, records of prior convictions of any offense, whether in the courts of this State, or in the courts of any other state or of the United States, shall be admissible in evidence for the purpose of proving a violation of this section. The term "conviction" is defined as a final judgment in any case in which felony punishment, or imprisonment for a term exceeding one year, as the case may be, is permissible, without regard to the plea entered or to the sentence imposed. A judgment of a conviction of the defendant or a plea of guilty by the defendant to such an offense certified to a superior court of this State from the custodian of records of any state or federal court shall be prima facie evidence of the facts so certified.

(c) The indictment charging the defendant under the terms of this section shall be separate from any indictment charging him with other offenses related to or giving rise to a charge under this section. An indictment which charges the person with violation of this section must set forth the date that the prior offense was committed, the type of offense and the penalty therefor, and the date that the defendant was convicted or plead guilty to such offense, the identity of the court in which the conviction or plea of guilty took place and the verdict and judgment rendered therein. (1971, c. 954, s. 1; 1973, c. 1196; 1975, c. 870, ss. 1, 2; 1977, c. 1105, ss. 1, 2; 1979, c. 760, s. 5; 1979, 2nd Sess., c. 1316, s. 47; 1981, c. 63, s. 1; c. 179, s. 14; 1989, c. 770, s. 3; 1993, c. 539, s. 1245; 1994, Ex. Sess., c. 24, s. 14(c); 1995, c. 487, s. 3; c. 507, s. 19.5(k); 2004-186, s. 14.1; 2006-259, s. 7(b).)

**Effect of Amendments. —**

Session Laws 2006-259, s. 7(b), effective Au-

gust 23, 2006, added the last sentence of the first paragraph of subsection (a).

**CASE NOTES****Constitutionality. —**

By possessing a firearm, defendant commit-

ted a fresh violation of G.S. 14-288.8(c), and defendant's punishment for that new crime

could not reasonably be said to re-punish the earlier offense; rather, it only punished the new violation, and accordingly the mere reliance on the earlier conviction to establish that defendant was a recidivist for sentencing purposes did not implicate double jeopardy concerns. *State v. Crump*, — N.C. App. —, 632 S.E.2d 233, 2006 N.C. App. LEXIS 1671 (2006).

**Amendment of Statute in 1995 and Application to Ex-Felons Did Not Violate Ex Post Facto.** — Application of G.S. 14-415.1 to convict defendant, who was convicted of a felony in 1983 and had fully served his sentence on that conviction when he was found in possession of a handgun in 2001, did not violate ex post facto where the statute was amended in 1995 and applied to all occurrences after that date; ex post facto was also not violated since defendant's 1983 conviction, which was the predicate felony for his conviction under G.S. 14-415.1, was a felony in 1983, was a felony in 1995 when the statute was amended, and was a felony in 2001 when defendant was found in possession of a handgun; finally, the amendment to G.S. 14-415.1 in 1995 did not increase the punishment for defendant's prior 1983 felony, but created a new offense, so ex post facto was also not violated on that ground. *State v. Johnson*, 169 N.C. App. 301, 610 S.E.2d 739, 2005 N.C. App. LEXIS 612 (2005).

**Amendments to Statutes Criminalizing Possession of Guns by Ex-Felons Are Not Bills of Attainder.** — Application of G.S. 14-415.1 to convict defendant, who was convicted of a felony in 1983 and had fully served his sentence on that conviction when he was found in possession of a handgun in 2001, did not violate prohibitions against bills of attainder, or against bills of pain and penalties, since the statute's prohibition of possession of handguns by convicted felons outside their homes or businesses was not enacted as a retroactive punishment, was not historically regarded as punishment, and was not imposed without judicial process; defendant had a trial before being convicted under the statute; defendant was not punished for belonging to a designated class of people, but was convicted for violating a statute that was validly imposed on the group to which he belonged, so there was no violation of the bill

of attainder provisions in U.S. Const. art. I, § 10 and N.C. Const. art. I, § 16. *State v. Johnson*, 169 N.C. App. 301, 610 S.E.2d 739, 2005 N.C. App. LEXIS 612 (2005).

**Ex-Felon's Right to Possess Guns Not a Vested Right and Was Properly Restricted to Home and Business.** — Since a convicted felon's re-acquired right to bear arms was subject to regulation and was not completely abridged by a subsequent amendment to G.S. 14-415.1, which prohibited the ex-felon from possessing handguns outside his home or business, and since the regulation was reasonably related to further securing the public's safety, there was no interference with any vested right when the statute was amended to include the ex-felon; he was properly convicted and sentenced for violating the statute without any violation of his right to due process. *State v. Johnson*, 169 N.C. App. 301, 610 S.E.2d 739, 2005 N.C. App. LEXIS 612 (2005).

**Sawed-Off Shotguns.** —

State's decision to allege defendant's possession of a handgun required that it produce such evidence at trial, as the category of weapon was an essential element of G.S. 14-415.1(a); as the state failed to do so, there was a fatal variance between the indictment and the evidence, and the state's proof at trial was instead of a specific category of firearm, a sawed-off shotgun. *State v. Langley*, 173 N.C. App. 194, 618 S.E.2d 253, 2005 N.C. App. LEXIS 1920 (2005).

**Indictment Upheld.** —

Omission of the date of defendant's prior conviction of breaking and entering a motor vehicle was not material, did not affect a substantial right relating to defendant's charge of possession of firearm by a convicted felon, and was not fatal to jurisdiction. *State v. Inman*, — N.C. App. —, 621 S.E.2d 306, 2005 N.C. App. LEXIS 2480 (2005).

**Evidence Was Sufficient to Find Constructive Possession.** —

Instruction that the jury could have inferred defendant's constructive possession of a gun based on his control over the area where it was found, between his leg and the inner console of the vehicle he was driving, was proper. *State v. Inman*, — N.C. App. —, 621 S.E.2d 306, 2005 N.C. App. LEXIS 2480 (2005).

## ARTICLE 54B.

### *Concealed Handgun Permit.*

#### § 14-415.13. Application for a permit; fingerprints.

(a) A person shall apply to the sheriff of the county in which the person resides to obtain a concealed handgun permit. The applicant shall submit to the sheriff all of the following:

- (1) An application, completed under oath, on a form provided by the sheriff.



- (2) A nonrefundable permit fee.
- (3) A full set of fingerprints of the applicant administered by the sheriff.
- (4) An original certificate of completion of an approved course, adopted and distributed by the North Carolina Criminal Justice Education and Training Standards Commission, signed by the certified instructor of the course attesting to the successful completion of the course by the applicant which shall verify that the applicant is competent with a handgun and knowledgeable about the laws governing the carrying of a concealed handgun and the use of deadly force.
- (5) A release, in a form to be prescribed by the Administrative Office of the Courts, that authorizes and requires disclosure to the sheriff of any records concerning the mental health or capacity of the applicant.

(b) The sheriff shall submit the fingerprints to the State Bureau of Investigation for a records check of State and national databases. The State Bureau of Investigation shall submit the fingerprints to the Federal Bureau of Investigation as necessary. The sheriff shall determine the criminal and background history of an applicant also by conducting a check through the National Instant Criminal Background Check System (NICS). The cost of processing the set of fingerprints shall be charged to an applicant as provided by G.S. 14-415.19. (1995, c. 398, s. 1; c. 507, ss. 22.2(a), 22.1(b); 2006-39, s. 2.)

**Effect of Amendments.** — Session Laws 2006-39, s. 2, effective June 30, 2006, added the next-to-last sentence in subsection (b).

## ARTICLE 60.

### *Computer-Related Crime.*

#### § 14-453. Definitions.

##### CASE NOTES

**Authorization.** — Where the evidence showed that defendant removed software from a work computer without consent of the owner, she should have been convicted of misdemeanor damage to computers because no evidence of

damages was introduced, as she did not have consent to remove the files, even though she was allowed to operate the computer. *State v. Johnston*, 173 N.C. App. 334, 618 S.E.2d 807, 2005 N.C. App. LEXIS 2034 (2005).

#### § 14-455. Damaging computers, computer programs, computer systems, computer networks, and resources.

##### CASE NOTES

**Misdemeanor where no damages shown.** — Where the evidence showed that defendant removed software from a work computer without consent of the owner, she should have been convicted of misdemeanor damage to computers because no evidence of damages was introduced. *State v. Johnston*, 173 N.C. App. 334, 618 S.E.2d 807, 2005 N.C. App. LEXIS 2034 (2005).

**Construction.** — G.S. 14-455(b) does not modify G.S. 14-455(a) to limit the crime of damaging computers to damages caused by the

introduction of a virus. *State v. Johnston*, 173 N.C. App. 334, 618 S.E.2d 807, 2005 N.C. App. LEXIS 2034 (2005).

**Indictment Sufficient.** — Where indictment charged defendant with all of the essential elements of the crime of damaging computers, it was not fatally flawed; the indictment alleged that defendant unlawfully and without consent entered a computer system for the purpose of damaging files and caused a loss. *State v. Johnston*, 173 N.C. App. 334, 618 S.E.2d 807, 2005 N.C. App. LEXIS 2034 (2005).



## Chapter 15.

### Criminal Procedure.

#### ARTICLE 2.

#### *Record and Disposition of Seized, etc., Articles.*

### § 15-11.1. Seizure, custody and disposition of articles; exceptions.

#### CASE NOTES

**Applied** in *State v. Scanlon*, — N.C. App. —, 626 S.E.2d 770, 2006 N.C. App. LEXIS 541 (2006).

#### ARTICLE 15.

#### *Indictment.*

### § 15-144. Essentials of bill for homicide.

#### CASE NOTES

#### **Short-Form Murder Indictment Complied with Statutory Requirements. —**

Appeals court upheld the use of a short form murder indictment under G.S. 15-144 which stated that: The jurors for North Carolina upon their oath present that on or about the (the date was stated) in (the county was stated). (the defendant's name was stated) did unlawfully, wilfully, and feloniously and of malice aforethought kill and murder (the victim's name was stated). *State v. McClain*, 169 N.C. App. 657, 610 S.E.2d 783, 2005 N.C. App. LEXIS 804 (2005).

Short-form indictment in the capital murder case met the requirements of G.S. 15-144. *State v. Duke*, 360 N.C. 110, 623 S.E.2d 11, 2005 N.C. LEXIS 1314 (2005).

Defendant's attempt to have conviction for attempted first-degree murder vacated based on his claim that the use of a short-form indictment for the crime of attempted murder was not authorized in North Carolina was without merit; G.S. 15-144, when construed with G.S. 15-170, authorized use of a short-form indictment to charge attempted first-degree murder, and the indictment sufficiently alleged the offense of attempted first-degree murder using the statutory language. *State v. McVay*, 174 N.C. App. 335, 620 S.E.2d 883, 2005 N.C. App. LEXIS 2402 (2005).

Defendant had no right to a reversal in his murder trial, despite his claim that the indictment was insufficient for staying only that he violated G.S. 14-17. The indictment the require-

ments of G.S. 15-144. *State v. Elliott*, 360 N.C. 400, 628 S.E.2d 735, 2006 N.C. LEXIS 46 (2006).

#### **Offenses Which Indictment Will Support. —**

G.S. 15-144, when construed alongside N.C. G.S. 15-170, implicitly authorizes the State to utilize a short-form indictment to charge attempted first-degree murder; when drafting such a indictment, it is sufficient for statutory purposes for the State to allege that the accused person feloniously, willfully, and of his malice aforethought, did (attempt to) kill and murder the named victim. *State v. Jones*, 359 N.C. 832, 616 S.E.2d 496, 2005 N.C. LEXIS 845 (2005).

**Use of Short-Form Indictment Insufficient to Charge Attempted Murder. —** The application of G.S. 15-144 to indictments for attempted murder goes beyond the plain language of the statute, and absent statutory authority for a short-form indictment, the State must allege all essential elements of the crime charged; nothing in G.S. 15-153 or G.S. 15-155, which dealt with certain informalities and defects that did not vitiate a warrant or indictment, dispensed with the requirement that the essential elements of the offense had to be charged. *State v. Watkins*, 169 N.C. App. 518, 610 S.E.2d 746, 2005 N.C. App. LEXIS 683 (2005), cert. denied, appeal dismissed, — N.C. —, 624 S.E.2d 632 (2005).

**Cited** in *State v. McNeill*, 360 N.C. 231, 624 S.E.2d 329, 2006 N.C. LEXIS 1 (2006).

## § 15-144.1. Essentials of bill for rape.

### CASE NOTES

#### **Indictment Upheld. —**

Trial court did not err by entering judgment on short form indictments because short form indictments were specifically approved for the offense of first-degree rape of a child under the

age of 13 under G.S. 15-144.1(b). *State v. Bullock*, — N.C. App. —, 631 S.E.2d 868, 2006 N.C. App. LEXIS 1572 (2006).

**Cited** in *State v. Jones*, 359 N.C. 832, 616 S.E.2d 496, 2005 N.C. LEXIS 845 (2005).

## § 15-144.2. Essentials of bill for sex offense.

### CASE NOTES

#### **Evidence Must Correspond to Allegations. —**

Defendant's convictions on six counts of first-degree sexual offense had to be vacated, as a fatal variance existed between the offense charged, which the State said in the indictment was by force and against the victim's will, and the fact that the State did not present any evidence that the alleged offenses were forcible and the trial court's instruction to the jury that the offense was based on the victim being under 13-years-old. *State v. Lawrence*, 170 N.C. App. 200, 612 S.E.2d 678, 2005 N.C. App. LEXIS 1016 (2005).

#### **Indictment Sufficient to Charge First-Degree Sexual Offense. —**

Indictment for first-degree sex offense that matched the form required by G.S. 15-144.2 was sufficient to inform defendant of the charges against him. *State v. Massey*, 174 N.C. App. 216, 621 S.E.2d 633, 2005 N.C. App. LEXIS 2400 (2005).

Short-form indictment charging violation of G.S. 14-27.7A(a) was sufficient when it alleged that defendant unlawfully, willfully, and feloniously engaged in a sexual act with a person of the age of 13 years, that defendant was at least six years older than the victim, and that he was not lawfully married to the victim; the indictment complied with the requirements of G.S.

15-144.2(a) and was sufficient to put him on notice of the crime of which he was accused. *State v. Bradley*, — N.C. App. —, 634 S.E.2d 258, 2006 N.C. App. LEXIS 1968 (2006).

**Multiple Short-Form Indictments Did Not Create a Danger of Ununanimous Verdicts. —** Appellate court erred in reversing defendant's convictions of first-degree statutory rape, G.S. 14-27.2, and taking indecent liberties with a minor, G.S. 14-202.1(a)(1), as defendant was properly charged by short-form indictments on all the charges as authorized by G.S. 15-144.2(a), because there was no danger of a nonunanimous verdict resulting from the multiple indictments in violation of N.C. Const. art. 1, § 24, and G.S. 15A-1237(b), as even if some jurors disagreed on the kinds of sexual misconduct committed, the jury as a whole would unanimously find that there occurred sexual conduct within the ambit of any immoral, improper, or indecent liberties as required by G.S. 14-202.1(a)(1), and because defendant was indicted on five counts of statutory rape, the victim testified to five specific incidents of statutory rape, and five verdicts of guilty were returned. *State v. Lawrence*, 360 N.C. 368, 627 S.E.2d 609, 2006 N.C. LEXIS 30 (2006).

**Cited** in *State v. Jones*, 359 N.C. 832, 616 S.E.2d 496, 2005 N.C. LEXIS 845 (2005).

## § 15-153. Bill or warrant not quashed for informality.

### CASE NOTES

#### II. Form and Sufficiency of Indictments and Warrants.

##### A. In General.

#### II. FORM AND SUFFICIENCY OF INDICTMENTS AND WARRANTS.

##### A. In General.

**Indictment Sufficient. —** Since no conclusion could be reached by reading the indictment other than that defendant was in custody at the time he allegedly committed malicious conduct

by a prisoner, the trial court had jurisdiction over his case, as the State, pursuant to G.S. 15-153, adequately alleged the offense such that defendant was notified of the offense against which he was called to defend. *State v. Artis*, — N.C. App. —, 622 S.E.2d 204, 2005 N.C. App. LEXIS 2610 (2005).

§ 15-155. Defects which do not vitiate.

CASE NOTES

I. General Consideration.

I. GENERAL CONSIDERATION.

**Applied** in State v. Locklear, 172 N.C. App. 249, 616 S.E.2d 334, 2005 N.C. App. LEXIS 1583 (2005).

ARTICLE 17.

*Trial in Superior Court.*

§ 15-167. Extension of session of court by trial judge.

CASE NOTES

**Open Court Announcements Sufficient.** — Trial court, in making repeated announcements in open court concerning continuing the trial without objection from defendant, satisfied G. S. 15-167. State v. Locklear, — N.C. App. —, 621 S.E.2d 254, 2005 N.C. App. LEXIS 2465 (2005).

§ 15-170. Conviction for a less degree or an attempt.

CASE NOTES

I. General Consideration.  
III. Lesser and Included Offenses.

I. GENERAL CONSIDERATION.

**Construction With Other Statutes.** — G.S. 15-144, when construed alongside G.S. 15-170, implicitly authorizes the State to utilize a short-form indictment to charge attempted first-degree murder; when drafting such a indictment, it is sufficient for statutory purposes for the State to allege that the accused person feloniously, willfully, and of his malice aforethought, did (attempt to) kill and murder the named victim. State v. Jones, 359 N.C. 832, 616 S.E.2d 496, 2005 N.C. LEXIS 845 (2005).

**Use of Short-form Attempted Murder Indictment.** — Defendant's attempt to have conviction for attempted first-degree murder vacated based on his claim that the use of a short-form indictment for the crime of attempted murder was not authorized in North Carolina was without merit; the indictment sufficiently alleged the offense of attempted first-degree murder using the language from

G.S. 15-144 and G.S. 15-170 providing that defendant could be convicted of the crime charged therein, or of an attempt to commit the crime so charged, or of a less degree of the same crime. State v. McVay, 174 N.C. App. 335, 620 S.E.2d 883, 2005 N.C. App. LEXIS 2402 (2005).

III. LESSER AND INCLUDED OFFENSES.

**Armed Robbery.** —

Defendant's conviction of armed robbery, pursuant to G.S. 14-87, had to be reversed because defendant used only his hands in the robbery and, thus, the evidence was not sufficient to support the conviction of armed robbery; however, pursuant to G.S. 15-170, there was sufficient evidence for a conviction of the lesser included offense of common law robbery, as defendant stole a car from the victim with the use of force. State v. Staten, 172 N.C. App. 673, 616 S.E.2d 650, 2005 N.C. App. LEXIS 1777 (2005).



## § 15-173. Demurrer to the evidence.

### CASE NOTES

#### V. Denial of Motion.

##### A. In General.

##### B. Appeal from Denial of Motion.

#### V. DENIAL OF MOTION.

##### A. In General.

##### **Denial of Motion Held Proper. —**

Trial court properly denied defendant's motion to dismiss the charge of attempted murder of an infant child as the State of North Carolina presented sufficient evidence of defendant's specific intent to kill the child by showing that defendant carjacked a woman and her infant child, drove the woman and her infant child to a deserted area, raped the woman, beat the woman to death, and drove away while leaving the child behind in his diapers on a hot day in grass a foot tall at the deserted area. Additionally, a pediatric critical care expert testified that the infant's injuries, especially sunburns, were life-threatening and that if the infant had not been found by a passerby before nightfall he could have died as a result of exposure and dehydration. *State v. Edwards*, — N.C. App. —, 621 S.E.2d 333, 2005 N.C. App. LEXIS 2487 (2005).

##### B. Appeal from Denial of Motion.

##### **Denial of Motion to Dismiss Was Proper.**

— Defendant's motion to dismiss a conspiracy to commit robbery with a dangerous weapon charge was properly denied as there was conflicting evidence as to whether a gun given to a person who committed a robbery (the actor) was real or not and there was sufficient evidence that the gun was an operable weapon where: (1) defendant and two other men told the actor to rob a store in exchange for drugs, which she agreed to do, (2) the men provided the actor with a gun and she committed the robbery, (3) the actor spoke primarily with defendant regarding the robbery, (4) the actor stated that one of the men told her that the gun was fake, but that she was uncertain whether it was fake, and (5) the actor stated that defendant and the others had a real gun and a fake gun and that she believed she had been given the fake one. *State v. Carter*, — N.C. App. —, 629 S.E.2d 332, 2006 N.C. App. LEXIS 1078 (2006).

### ARTICLE 19A.

## *Credits against the Service of Sentences and for Attainment of Prison Privileges.*

## § 15-196.1. Credits allowed.

### CASE NOTES

##### **Treatment Program Constituted Custody in State Institution. —**

Trial court erred in denying defendant's motion for credit against his sentence for time he spent in a substance abuse program as defendant was confined and in custody pursuant to the plain meaning of G.S. 15-196.1 since defendant's freedom and liberty were limited by the programs and daily schedule and, although he could leave or withdraw from the program at any time, he was told that if he did so, he would be charged with additional crimes and have his

suspended sentence activated. *State v. Lutz*, — N.C. App. —, 628 S.E.2d 34, 2006 N.C. App. LEXIS 712 (2006).

##### **Incarceration for Probation Violation.**

— Trial court erred by failing to award defendant credit for her prior confinement for violation of her probation; the state conceded that defendant was entitled to a 30-day credit for the time she spent incarcerated for her violation of probation. *State v. Belcher*, 173 N.C. App. 620, 619 S.E.2d 567, 2005 N.C. App. LEXIS 2112 (2005).

## **Chapter 15A.**

### **Criminal Procedure Act.**

#### **SUBCHAPTER V. CUSTODY.**

##### **Article 26.**

##### **Bail.**

##### **Part 2. Bail Bond Forfeiture.**

Sec.

15A-544.7. Docketing and enforcement of final judgment of forfeiture.

#### **SUBCHAPTER VI. PRELIMINARY PROCEEDINGS.**

##### **Article 30.**

##### **Probable-Cause Hearing.**

15A-615. Testing of certain persons for sexually transmitted infections.

#### **SUBCHAPTER VIII-A. RIGHTS OF CRIME VICTIMS AND WITNESSES.**

##### **Article 46.**

##### **Crime Victims' Rights Act.**

15A-830. Definitions.

#### **SUBCHAPTER XIII. DISPOSITION OF DEFENDANTS.**

##### **Article 82.**

##### **Probation.**

15A-1341. Probation generally.

15A-1343. Conditions of probation.

15A-1343.2. Special probation rules for persons sentenced under Article 81B.

15A-1344. Response to violations; alteration and revocation.

##### **Article 84A.**

##### **Post-Release Supervision.**

15A-1368.2. Post-release supervision eligibility and procedure.

15A-1368.4. Conditions of post-release supervision.

##### **Article 85.**

##### **Parole.**

15A-1371. Parole eligibility, consideration, and refusal.

15A-1374. Conditions of parole.

#### **SUBCHAPTER XIV. CORRECTION OF ERRORS AND APPEAL.**

##### **Article 88.**

##### **Post-Trial Motions and Appeal.**

Sec.

15A-1401. Post-trial motions and appeal.

##### **Article 89.**

##### **Motion for Appropriate Relief and Other Post-Trial Relief.**

15A-1411. Motion for appropriate relief.

15A-1417. Relief available.

15A-1418. Motion for appropriate relief in the appellate division.

15A-1420. Motion for appropriate relief; procedure.

##### **Article 91.**

##### **Appeal to Appellate Division.**

15A-1454 through 15A-1459. [Reserved.]

##### **Article 92.**

##### **North Carolina Innocence Inquiry Commission.**

15A-1460. Definitions.

15A-1461. Purpose of Article.

15A-1462. Commission established.

15A-1463. Membership; chair; meetings; quorum.

15A-1464. Terms of members; compensation; expenses.

15A-1465. Director and other staff.

15A-1466. Duties.

15A-1467. Claims of innocence; waiver of convicted person's procedural safeguards and privileges; formal inquiry; notification of the crime victim.

15A-1468. Commission proceedings.

15A-1469. Postcommission three-judge panel.

15A-1470. No right to further review of decision by Commission or three-judge panel; convicted person retains right to other postconviction relief.

15A-1471 through 15A-1474. [Reserved.]

15A-1475. Reports.

##### **Articles 93 to 99. [Reserved.]**

15A-1476 through 15A-1999. [Reserved.]

SUBCHAPTER I. GENERAL.

ARTICLE 1.

*Definitions and General Provisions.*

§ 15A-101. Definitions.

CASE NOTES

**Clerk Properly Denied Request from Bond Company’s Attorney for an Order of Arrest.** — Where a bond company’s attorney made the request for an order for arrest of defendant who failed to appear at a scheduled court appearance, the county clerk complied with the statutory mandate in denying the request, because the attorney was not a law

enforcement officer. *State v. Gonzalez-Fernandez*, 170 N.C. App. 45, 612 S.E.2d 148, 2005 N.C. App. LEXIS 900 (2005).

**Cited** in *State v. Brown*, 170 N.C. App. 601, 613 S.E.2d 284, 2005 N.C. App. LEXIS 1069 (2005), cert. denied, 360 N.C. 68, 621 S.E.2d 882 (2005).

§ 15A-101.1. Electronic technology in criminal process and procedure.

CASE NOTES

**Cited** in *State v. Belton*, 169 N.C. App. 350, 610 S.E.2d 283, 2005 N.C. App. LEXIS 618 (2005).

ARTICLE 5.

*Expunction of Records.*

§ 15A-146. Expunction of records when charges are dismissed or there are findings of not guilty.

CASE NOTES

**Expungement Only Available for Dismissed Charge.** — Since an offender was convicted of assault inflicting serious bodily injury at the same time that his assault and battery charge was dismissed, he was eligible for expungement under G.S. 15A-146 only for the assault and battery charge, and an original order should have been amended to reflect expungement only for the assault and battery. *In re Expungement for Kearney*, 174 N.C. App. 213, 620 S.E.2d 276, 2005 N.C. App. LEXIS 2294 (2005).

Trial court improperly expunged, pursuant to G.S. 15A-146(a), numerous unrelated arrests that occurred over a period of years from the applicant’s record; the plain language of G.S. 15A-146(a) allowed only one expungement and did not allow expungements of multiple unrelated offenses occurring over a number of years. *In re Robinson*, 172 N.C. App. 272, 615 S.E.2d 884, 2005 N.C. App. LEXIS 1581 (2005).

**Cited** in *State v. Browning*, — N.C. App. —, 629 S.E.2d 299, 2006 N.C. App. LEXIS 1079 (2006).



## SUBCHAPTER II. LAW-ENFORCEMENT AND INVESTIGATIVE PROCEDURES.

### ARTICLE 9.

#### *Search and Seizure by Consent.*

### § 15A-221. General authorization; definition of “consent”.

#### CASE NOTES

#### **Use of Evidence Obtained in Search by Consent. —**

Handgun, cocaine, and several thousand dollars in cash found in a safe in the bedroom of defendant's apartment were admissible because the contents of the safe were discovered as the result of a valid consent search, pursuant to G.S. 15A-221 and G.S. 15A-222; defendant was arrested outside his apartment building after a confidential police informant made a

controlled purchase of cocaine from defendant; defendant was taken in handcuffs to his apartment; defendant, without being advised of his Miranda rights, consented to a search of rooms his apartment; defendant gave the officers the combination to the safe in his bedroom at their request; and at no time did defendant withdraw his consent to the search. *State v. Houston*, 169 N.C. App. 367, 610 S.E.2d 777, 2005 N.C. App. LEXIS 606 (2005).

### § 15A-222. Person from whom effective consent may be obtained.

#### CASE NOTES

#### **Consent by Person in Possession of Automobile. —**

Where defendant gave consent to the search of defendant's vehicle while defendant was seated in the patrol car with the officer who was writing defendant's traffic citation, the consent was validly given pursuant to G.S. 15A-222, N.C. Const. art. I, § 20, and U.S. Const. amend. IV; the officer read a consent form to defendant which defendant signed, and defendant stated that defendant believed defendant was free to leave after the citation was issued. *State v. Hernandez*, 170 N.C. App. 299, 612 S.E.2d 420, 2005 N.C. App. LEXIS 1006 (2005).

**Owner's Consent to Search of Safe. —** Handgun, cocaine, and several thousand dollars in cash found in a safe in the bedroom of

defendant's apartment were admissible because the contents of the safe were discovered as the result of a valid consent search, pursuant to G.S. 15A-221 and G.S. 15A-222; defendant was arrested outside his apartment building after a confidential police informant made a controlled purchase of cocaine from defendant; defendant was taken in handcuffs to his apartment; defendant, without being advised of his Miranda rights, consented to a search of rooms his apartment; defendant gave the officers the combination to the safe in his bedroom at their request; and at no time did defendant withdraw his consent to the search. *State v. Houston*, 169 N.C. App. 367, 610 S.E.2d 777, 2005 N.C. App. LEXIS 606 (2005).

### ARTICLE 11.

#### *Search Warrants.*

### § 15A-244. Contents of the application for a search warrant.

#### CASE NOTES

#### II. Probable Cause.

#### II. PROBABLE CAUSE.

#### **There was sufficient probable cause, etc.**

Evidence as a whole provided the magistrate

with a substantial basis for concluding that probable cause existed at the time the search warrant was issued; although the alleged victims did not provide specific dates, the allegations of inappropriate sexual touching by defen-

dant allowed a reasonably inference that defendant's criminal activity was protracted and continuing in nature. *State v. Pickard*, —

N.C. App. —, 631 S.E.2d 203, 2006 N.C. App. LEXIS 1413 (2006).

§ 15A-267. Access to DNA samples from crime scene.

CASE NOTES

**No Right to Appeal.** — Defendant's appeal of the trial court's denial of his motion for post-conviction DNA testing was dismissed because neither G.S. 15A-269 nor G.S. 15A-270 allows a defendant an appeal as of right from a grant or denial of a motion for post-conviction DNA. Review by writ of certiorari was also not available to defendant because his conviction

for attempted rape had already been entered and there was no statutory reason allowing a writ of certiorari regarding motions for post-conviction DNA testing. *State v. Brown*, 170 N.C. App. 601, 613 S.E.2d 284, 2005 N.C. App. LEXIS 1069 (2005), cert. denied, 360 N.C. 68, 621 S.E.2d 882 (2005).

§ 15A-268. Preservation of samples of biological materials.

CASE NOTES

**No Right to Appeal.** — Defendant's appeal of the trial court's denial of his motion for post-conviction DNA testing was dismissed because neither G.S. 15A-269 nor G.S. 15A-270 allows a defendant an appeal as of right from a grant or denial of a motion for post-conviction DNA. Review by writ of certiorari was also not available to defendant because his conviction

for attempted rape had already been entered and there was no statutory reason allowing a writ of certiorari regarding motions for post-conviction DNA testing. *State v. Brown*, 170 N.C. App. 601, 613 S.E.2d 284, 2005 N.C. App. LEXIS 1069 (2005), cert. denied, 360 N.C. 68, 621 S.E.2d 882 (2005).

§ 15A-269. Request for postconviction DNA testing.

CASE NOTES

**No Right to Appeal.** — Defendant's appeal of the trial court's denial of his motion for post-conviction DNA testing was dismissed because neither G.S. 15A-269 nor G.S. 15A-270 allows a defendant an appeal as of right from a grant or denial of a motion for post-conviction DNA. Review by writ of certiorari was also not available to defendant because his conviction for attempted rape had already been entered and there was no statutory reason allowing a writ of certiorari regarding motions for post-

conviction DNA testing. *State v. Brown*, 170 N.C. App. 601, 613 S.E.2d 284, 2005 N.C. App. LEXIS 1069 (2005), cert. denied, 360 N.C. 68, 621 S.E.2d 882 (2005).

No statutory right of appeal exists from a trial court's denial of a motion for post-conviction DNA testing. *State v. Brown*, 170 N.C. App. 601, 613 S.E.2d 284, 2005 N.C. App. LEXIS 1069 (2005), cert. denied, 360 N.C. 68, 621 S.E.2d 882 (2005).

§ 15A-270. Post-test procedures.

CASE NOTES

**No Right to Appeal.** — Defendant's appeal of the trial court's denial of his motion for post-conviction DNA testing was dismissed because neither G.S. 15A-269 nor G.S. 15A-270 allows a defendant an appeal as of right from a grant or denial of a motion for post-conviction DNA. Review by writ of certiorari was also not available to defendant because his conviction

for attempted rape had already been entered and there was no statutory reason allowing a writ of certiorari regarding motions for post-conviction DNA testing. *State v. Brown*, 170 N.C. App. 601, 613 S.E.2d 284, 2005 N.C. App. LEXIS 1069 (2005), cert. denied, 360 N.C. 68, 621 S.E.2d 882 (2005).

## ARTICLE 16.

*Electronic Surveillance.***§ 15A-287. Interception and disclosure of wire, oral, or electronic communications prohibited.**

## CASE NOTES

**Cited in** *Directv, Inc. v. Jarman*, — F. Supp. 2d —, 2005 U.S. Dist. LEXIS 9523 (W.D.N.C. May 11, 2005).

**§ 15A-297. Conformity to provisions of federal law.**

## CASE NOTES

**Immunity.** — State of North Carolina's wiretapping statute contains no clear intent to waive the State's immunity under USCS Const. Amend. 11; the general reference to federal wiretapping law does not clearly evidence an

intent to waive the state's immunity in federal courts. *Hooper v. North Carolina*, 379 F. Supp. 2d 804, 2005 U.S. Dist. LEXIS 19515 (M.D.N.C. Apr. 13, 2005).

## SUBCHAPTER III. CRIMINAL PROCESS.

## ARTICLE 17.

*Criminal Process.***§ 15A-301. Criminal process generally.**

## CASE NOTES

**Clerk Properly Denied Request from Bond Company's Attorney for an Order of Arrest.** — Where a bond company's attorney made the request for an order for arrest of defendant who failed to appear at a scheduled court appearance, the county clerk complied

with the statutory mandate in denying the request, because the attorney was not a law enforcement officer. *State v. Gonzalez-Fernandez*, 170 N.C. App. 45, 612 S.E.2d 148, 2005 N.C. App. LEXIS 900 (2005).

## SUBCHAPTER IV. ARREST.

## ARTICLE 20.

*Arrest.***§ 15A-401. Arrest by law-enforcement officer.**

## CASE NOTES

III. Arrest Without Warrant.

B. Illustrative Cases.

2. Offense Out of Presence of Officer.



**III. ARREST WITHOUT WARRANT.****B. Illustrative Cases.****2. Offense Out of Presence of Officer.****Sale of Illegal Drugs. —**

Defendant's arrest and subsequent search conducted by a police officer were permissible under U.S. Const. amend. IV because the officer had sufficient probable cause, pursuant to G.S. 15A-401(b)(1) and (b)(2)(a), to believe that defendant was committing, or had committed, a

felony in light of information provided by a confidential informant, to the effect that a black male matching defendant's description was selling drugs outside a local store in violation of G.S. 90-95(a)(1) and (b)(1); the informant's 14 years of personal dealings with the officer resulting in over 100 arrests and numerous convictions allowed the conclusion that the informant was reliable. *State v. Stanley*, — N.C. App. —, 622 S.E.2d 680, 2005 N.C. App. LEXIS 2707 (2005).

**SUBCHAPTER V. CUSTODY.****ARTICLE 24.***Initial Appearance.***§ 15A-511. Initial appearance.****CASE NOTES**

**Cited in** *State v. Lewis*, 360 N.C. 1, 619 S.E.2d 830, 2005 N.C. LEXIS 1000 (2005); *State v. Hocutt*, — N.C. App. —, 628 S.E.2d 832, 2006 N.C. App. LEXIS 966 (2006).

**ARTICLE 26.***Bail.***Part 1. General Provisions.****§ 15A-533. Right to pretrial release in capital and noncapital cases.****CASE NOTES**

**Denial of Right to Bail Permissible. —** Defendant's right was not violated when the trial court set bond as "no bond" and "zero" because defendant was charged with first-degree murder, a crime for which, under G.S. 15A-533(c), the trial court had the discretion not to set bail. *State v. Hocutt*, — N.C. App. —, 628 S.E.2d 832, 2006 N.C. App. LEXIS 966 (2006).

**Part 2. Bail Bond Forfeiture.****§ 15A-544.3. Entry of forfeiture.****CASE NOTES**

**Cited in** *State v. Gonzalez-Fernandez*, 170 N.C. App. 45, 612 S.E.2d 148, 2005 N.C. App. LEXIS 900 (2005); *State v. Belton*, 169 N.C. App. 350, 610 S.E.2d 283, 2005 N.C. App. LEXIS 618 (2005).

## § 15A-544.4. Notice of forfeiture.

### CASE NOTES

#### **Surety Entitled to Notice. —**

Because the bond company admitted that it was properly given notice of a bond forfeiture under G.S. 15A-544.4, it could only obtain relief from the final judgment of forfeiture if extraordinary circumstances existed. *State v. Gonzalez-Fernandez*, 170 N.C. App. 45, 612 S.E.2d 148, 2005 N.C. App. LEXIS 900 (2005).

G.S. 15A-544.4(e) states that notice is effective when the notice of bond forfeiture is mailed; it does not require that a surety receive the notice of bond forfeiture for notice to be effective. *State v. Ferrer*, 170 N.C. App. 131, 611 S.E.2d 881, 2005 N.C. App. LEXIS 892 (2005).

Trial court properly denied a surety's motion under G.S. 15A-544.8 to set aside a bond forfeiture; while the surety presented evidence that it had not received notice of forfeiture, an assistant clerk's testimony as to her actions and her office's procedures was sufficient to support the trial court's finding that the clerk mailed notice to the surety as required by G.S. 15A-544.4. *State v. Belton*, 169 N.C. App. 350, 610 S.E.2d 283, 2005 N.C. App. LEXIS 618 (2005).

#### **Motion for Relief from Forfeiture. —**

When a surety moved for relief from the forfeiture of a bond it posted in a criminal case,

claiming it did not received notice of the forfeiture within 30 days of its entry, as required by G.S. 15A-544.4(e), this was not one of the exclusive grounds for relief from forfeiture stated in G.S. 15A-544.5, so the trial court lacked the authority to grant the surety's motion. *State v. Sanchez*, — N.C. App. —, 623 S.E.2d 780, 2005 N.C. App. LEXIS 2705 (2005).

**Surety was required to pay a bond forfeiture judgment because a presumption of regularity arose** where a county clerk of court followed the procedures in G.S. 15A-544.4 by mailing notice to the surety. *State v. Ferrer*, 170 N.C. App. 131, 611 S.E.2d 881, 2005 N.C. App. LEXIS 892 (2005).

Insurer was not entitled to have the judgment, in which it was found that a forfeiture of the bond posted by the insurer had occurred, vacated, and the trial court did not abuse its discretion under G.S. 15A-544.8(b) in refusing to vacate the judgment; the State submitted sufficient evidence, in the form of the bond forfeiture notice with the certificate of mailing, to support the trial court's determination that the insurer received notice under G.S. 15A-544.4. *State v. Lopez*, 169 N.C. App. 816, 611 S.E.2d 197, 2005 N.C. App. LEXIS 806 (2005).

## § 15A-544.5. Setting aside forfeiture.

### CASE NOTES

**Exclusive Grounds for Relief. —** Exclusive avenue for relief from forfeiture of an appearance bond (where the forfeiture has not yet become a final judgment) is provided in G.S. 15A-544.5. *State v. Sanchez*, — N.C. App. —, 623 S.E.2d 780, 2005 N.C. App. LEXIS 2705 (2005).

**"Final Order."** — When a surety appealed the denial of its motion for relief from a forfeiture of a bond it posted, no party addressed whether the trial court's order was interlocutory or, alternatively, a "final order" within the meaning of G.S. 15A-544.5(h). *State v. Sanchez*, — N.C. App. —, 623 S.E.2d 780, 2005 N.C. App. LEXIS 2705 (2005).

#### **Extraordinary Cause. —**

Surrender of an accused by a surety does not constitute extraordinary circumstances under G.S. 15A-544.8 as a matter of law. *State v. Edwards*, 172 N.C. App. 821, 616 S.E.2d 634, 2005 N.C. App. LEXIS 1766 (2005), cert. denied, 360 N.C. 69, 623 S.E.2d 776 (2005).

#### **Court's Discretion Not Abused. —**

Trial court's denial of a surety's motion to set aside the judgment of forfeiture with regard to

a bond was upheld on appeal because the surety failed to present any evidence that it tried to apprehend defendant for a court date that defendant failed to appear at and, instead, presented evidence of efforts to apprehend defendant only after notice of the forfeiture was made; as such, no extraordinary circumstances under G.S. 15A-544.5(b)(3) existed. *State v. Edwards*, 172 N.C. App. 821, 616 S.E.2d 634, 2005 N.C. App. LEXIS 1766 (2005), cert. denied, 360 N.C. 69, 623 S.E.2d 776 (2005).

**Appeals. —** When a surety appealed the denial of its motion for relief from a forfeiture of a bond it posted, because it allegedly did not receive notice of the forfeiture within 30 days of its entry, the appeal was not based on any of the "Reasons for Set Aside" in G.S. 15A-544.5(b). *State v. Sanchez*, — N.C. App. —, 623 S.E.2d 780, 2005 N.C. App. LEXIS 2705 (2005).

**Cited in** *State v. Gonzalez-Fernandez*, 170 N.C. App. 45, 612 S.E.2d 148, 2005 N.C. App. LEXIS 900 (2005); *State v. Belton*, 169 N.C. App. 350, 610 S.E.2d 283, 2005 N.C. App. LEXIS 618 (2005).

## § 15A-544.6. Final judgment of forfeiture.

### CASE NOTES

**Cited in** State v. Gonzalez-Fernandez, 170 N.C. App. 45, 612 S.E.2d 148, 2005 N.C. App. LEXIS 900 (2005).

## § 15A-544.7. Docketing and enforcement of final judgment of forfeiture.

(a) **Final Judgment Docketed As Civil Judgment.** — When a forfeiture has become a final judgment under this Part, the clerk of superior court, under G.S. 1-234, shall docket the judgment as a civil judgment against the defendant and against each surety named in the judgment.

(b) **Judgment Lien.** — When a final judgment of forfeiture is docketed, the judgment shall become a lien on the real property of the defendant and of each surety named in the judgment, as provided in G.S. 1-234.

(c) **Execution; Copy to Commissioner of Insurance.** — After docketing a final judgment under this section, the clerk shall:

- (1) Issue execution on the judgment against the defendant and against each accommodation bondsman and professional bondsman named in the judgment and shall remit the clear proceeds to the county finance officer as provided in G.S. 115C-452.
- (2) If an insurance company or professional bondsman is named in the judgment, send the Commissioner of Insurance a notice of the judgment, showing the date on which the judgment was docketed.

(d) **Sureties May Not Execute Bonds in County.** — After a final judgment is docketed as provided in this section, no surety named in the judgment shall become a surety on any bail bond in the county in which the judgment is docketed until the judgment is satisfied in full. (2000-133, s. 6; 2006-188, s. 2.)

**Effect of Amendments.** — Session Laws 2006-188, s. 2, effective August 3, 2006, substituted “notice” for “copy” in subdivision (c)(2).

## § 15A-544.8. Relief from final judgment of forfeiture.

### CASE NOTES

#### **Extraordinary Cause Standard.** —

Surrender of an accused by a surety does not constitute extraordinary circumstances under G.S. 15A-544.8 as a matter of law. State v. Edwards, 172 N.C. App. 821, 616 S.E.2d 634, 2005 N.C. App. LEXIS 1766 (2005), cert. denied, 360 N.C. 69, 623 S.E.2d 776 (2005).

#### **Petition for Relief After Final Judgment.** —

Insurer was not entitled to have the judgment, in which it was found that a forfeiture of the bond posted by the insurer had occurred, vacated, and the trial court did not abuse its discretion under G.S. 15A-544.8(b) in refusing to vacate the judgment; the State submitted sufficient evidence, in the form of the bond forfeiture notice with the certificate of mailing,

to support the trial court’s determination that the insurer received notice under G.S. 15A-544.4. State v. Lopez, 169 N.C. App. 816, 611 S.E.2d 197, 2005 N.C. App. LEXIS 806 (2005).

#### **When Remission Authorized.** —

Under G.S. 15A-544.8, relief from a forfeiture judgment could not be granted except as provided under the statute for, inter alia, lack of notice, under G.S. 15A-544.4, or other extraordinary circumstances that the trial court determined warranted relief. State v. Sanchez, — N.C. App. —, 623 S.E.2d 780, 2005 N.C. App. LEXIS 2705 (2005).

Sureties are not without recourse where notices of forfeiture are not in compliance with G.S. 15A-544.4, pursuant to G.S. 15A-544.8(b)(1), but the fact that the general assem-



bly specifically made allowance for relief from final judgment of forfeiture for faulty notice, and omitted the same as a ground for relief from an entry of forfeiture, suggested the legislature made a conscious choice in this regard. *State v. Sanchez*, — N.C. App. —, 623 S.E.2d 780, 2005 N.C. App. LEXIS 2705 (2005).

**“Extraordinary Cause” Shown. —**

Defendant’s federal incarceration was not evidence of extraordinary cause meriting bond company relief from liability under the bond when defendant failed to appear for scheduled court date; thus bond company failed to demonstrate extraordinary circumstances or efforts sufficient to set aside the bond forfeiture pursuant to G.S. 15A-544.8. *State v. Gonzalez-Fernandez*, 170 N.C. App. 45, 612 S.E.2d 148, 2005 N.C. App. LEXIS 900 (2005).

**Extraordinary Cause Not Shown. —** Trial court’s denial of a surety’s motion to set aside the judgment of forfeiture with regard to a bond was upheld on appeal because the surety failed to present any evidence that it tried to apprehend defendant for a court date that defendant failed to appear at and, instead, presented

evidence of efforts to apprehend defendant only after notice of the forfeiture was made; as such, no extraordinary circumstances under G.S. 15A-544.5(b)(3) existed. *State v. Edwards*, 172 N.C. App. 821, 616 S.E.2d 634, 2005 N.C. App. LEXIS 1766 (2005), cert. denied, 360 N.C. 69, 623 S.E.2d 776 (2005).

**Surety was required to pay a bond forfeiture judgment because a presumption of regularity arose** where a county clerk of court followed the procedures in G.S. 15A-544.4 by mailing notice to the surety. *State v. Ferrer*, 170 N.C. App. 131, 611 S.E.2d 881, 2005 N.C. App. LEXIS 892 (2005).

**Relief from Forfeiture Denied. —** Trial court properly denied a surety’s motion under G.S. 15A-544.8 to set aside a bond forfeiture; while the surety presented evidence that it had not received notice of forfeiture, an assistant clerk’s testimony as to her actions and her office’s procedures was sufficient to support the trial court’s finding that the clerk mailed notice to the surety as required by G.S. 15A-544.4. *State v. Belton*, 169 N.C. App. 350, 610 S.E.2d 283, 2005 N.C. App. LEXIS 618 (2005).

## SUBCHAPTER VI. PRELIMINARY PROCEEDINGS.

### ARTICLE 29.

#### *First Appearance Before District Court Judge.*

**§ 15A-601. First appearance before a district court judge; right in felony and other cases in original jurisdiction of superior court; consolidation of first appearance before magistrate and before district court judge; first appearance before clerk of superior court; use of two-way audio and video transmission.**

#### CASE NOTES

**Cited in** *State v. Lewis*, 360 N.C. 1, 619 S.E.2d 830, 2005 N.C. LEXIS 1000 (2005).

**§ 15A-606. Demand or waiver of probable-cause hearing.**

#### CASE NOTES

**Cited in** *State v. Lewis*, 360 N.C. 1, 619 S.E.2d 830, 2005 N.C. LEXIS 1000 (2005).

## ARTICLE 30.

*Probable-Cause Hearing.***§ 15A-611. Probable-cause hearing procedure.**

## CASE NOTES

**Cited in** State v. Lewis, 360 N.C. 1, 619 S.E.2d 830, 2005 N.C. LEXIS 1000 (2005).

**§ 15A-615. Testing of certain persons for sexually transmitted infections.**

(a) After a finding of probable cause pursuant to the provisions of Article 30 of Chapter 15A of the General Statutes or indictment for an offense that involves nonconsensual vaginal, anal, or oral intercourse; an offense that involves vaginal, anal, or oral intercourse with a child 12 years old or less; or an offense under G.S. 14-202.1 that involves vaginal, anal, or oral intercourse with a child less than 16 years old; the victim or the parent, guardian, or guardian ad litem of a minor victim may request that a defendant be tested for the following sexually transmitted infections:

- (1) Chlamydia;
- (2) Gonorrhea;
- (3) Hepatitis B;
- (3a) Herpes;
- (4) HIV; and
- (5) Syphilis.

In the case of herpes, the defendant, pursuant to the provisions of this section, shall be examined for oral and genital herpetic lesions and, if a suggestive but nondiagnostic lesion is present, a culture for herpes shall be performed.

(b) Upon a request under subsection (a) of this section, the district attorney shall petition the court on behalf of the victim for an order requiring the defendant to be tested. Upon finding that there is probable cause to believe that the alleged sexual contact involved in the offense would pose a significant risk of transmission of a sexually transmitted infection listed in subsection (a) of this section, the court shall order the defendant to submit to testing for these infections.

(c) If the defendant is in the custody of the Department of Correction, the defendant shall be tested by the Department of Correction. If the defendant is not in the custody of the Department of Correction, the defendant shall be tested by the local health department. The Department of Correction shall inform the local health director of all test results. The local health director shall ensure that the victim is informed of the results of the tests and counseled appropriately. The agency conducting the tests shall inform the defendant of the results of the tests and ensure that the defendant is counseled appropriately. The results of the tests shall not be admissible as evidence in any criminal proceeding. (1993, c. 489, s. 1; 1994, Ex. Sess., c. 8, s. 1; 2006-226, s. 10; 2006-264, s. 33(a).)

**Editor's Note.** — Session Laws 2006-264, s. 33(a), which amended subsection (a) of this section, was repealed by Session Laws 2006-264, s. 33(b), which provided that: "If Senate Bill 1479, 2005 Regular Session [2006-226],

becomes law, this section is repealed."

**Effect of Amendments.** — Session Laws 2006-226, s. 10, effective August 10, 2006, made minor punctuation changes in the introductory language of subsection (a).

## ARTICLE 31.

*The Grand Jury and Its Proceedings.***§ 15A-623. Grand jury proceedings and operation in general.**

## CASE NOTES

**Cited in** State v. Lewis, 360 N.C. 1, 619 S.E.2d 830, 2005 N.C. LEXIS 1000 (2005).

**§ 15A-627. Submission of bill of indictment to grand jury by prosecutor.**

## CASE NOTES

**Cited in** State v. Lewis, 360 N.C. 1, 619 S.E.2d 830, 2005 N.C. LEXIS 1000 (2005).

## ARTICLE 32.

*Indictment and Related Instruments.***§ 15A-646. Superseding indictments and informations.**

## CASE NOTES

**No Fatal Variance Occurred.** — Fact that the state presented evidence tending to show that defendant committed indecent liberties as a principal as well as an aider and abettor did not mean the state offered evidence of commission of an offense not charged in the indictment; therefore, no fatal variance occurred and

the trial judge did not err in instructing the jury that it could convict defendant of indecent liberties under either a principal or aiding and abetting theory. State v. Fuller, — N.C. App. —, 632 S.E.2d 509, 2006 N.C. App. LEXIS 1674 (2006).

## SUBCHAPTER VII. SPEEDY TRIAL; ATTENDANCE OF DEFENDANTS.

## ARTICLE 38.

*Interstate Agreement on Detainers.***§ 15A-761. Agreement on Detainers entered into; form and contents.**

## CASE NOTES

**When Agreement on Detainers Inapplicable.** —

Order for arrest served on defendant while in the county jail was not a detainer and the

provisions of the Interstate Agreement on Detainers, G.S. 15A-761, were not applicable to defendant because, although defendant did have an untried indictment in that county



when he was served with the order while in federal custody, (1) there was nothing in the record to suggest that the order for arrest was ever filed with the Federal Bureau of Prisons, or any institution; and (2) there was nothing in the record to suggest that the State requested federal officials to hold defendant at the end of

his federal sentence or notify it prior to defendant's release from federal custody. State v. Prentice, 170 N.C. App. 593, 613 S.E.2d 498, 2005 N.C. App. LEXIS 1086 (2005), cert. denied, appeal dismissed, — N.C. —, 622 S.E.2d 628 (2005).

## SUBCHAPTER VIII-A. RIGHTS OF CRIME VICTIMS AND WITNESSES.

### ARTICLE 46.

#### *Crime Victims' Rights Act.*

### § 15A-830. Definitions.

(a) The following definitions apply in this Article:

- (1) Accused. — A person who has been arrested and charged with committing a crime covered by this Article.
- (2) Arresting law enforcement agency. — The law enforcement agency that makes the arrest of an accused.
- (3) Custodial agency. — The agency that has legal custody of an accused or defendant arising from a charge or conviction of a crime covered by this Article including, but not limited to, local jails or detention facilities, regional jails or detention facilities, facilities designated under G.S. 122C-252 for the custody and treatment of involuntary clients, or the Department of Correction.
- (4) Investigating law enforcement agency. — The law enforcement agency with primary responsibility for investigating the crime committed against the victim.
- (5) Law enforcement agency. — An arresting law enforcement agency, a custodial agency, or an investigating law enforcement agency.
- (6) Next of kin. — The victim's spouse, children, parents, siblings, or grandparents. The term does not include the accused unless the charges are dismissed or the person is found not guilty.
- (7) Victim. — A person against whom there is probable cause to believe one of the following crimes was committed:
  - a. A Class A, B1, B2, C, D, or E felony.
  - b. A Class F felony if it is a violation of one of the following: G.S. 14-16.6(b); 14-16.6(c); 14-18; 14-32.1(e); 14-32.2(b)(3); 14-32.3(a); 14-32.4; 14-34.2; 14-34.6(c); 14-41; 14-43.6; 14-43.3; 14-190.17; 14-190.19; 14-202.1; 14-277.3; 14-288.9; or 20-138.5.
  - c. A Class G felony if it is a violation of one of the following: G.S. 14-32.3(b); 14-51; 14-58; 14-87.1; or 20-141.4.
  - d. A Class H felony if it is a violation of one of the following: G.S. 14-32.3(a); 14-32.3(c); 14-33.2, or 14-277.3.
  - e. A Class I felony if it is a violation of one of the following: G.S. 14-32.3(b); 14-34.6(b); or 14-190.17A.
  - f. An attempt of any of the felonies listed in this subdivision if the attempted felony is punishable as a felony.
  - g. Any of the following misdemeanor offenses when the offense is committed between persons who have a personal relationship as defined in G.S. 50B-1(b): G.S. 14-33(c)(1); 14-33(c)(2); 14-33(a); 14-34; 14-134.3; or 14-277.3.

(b) If the victim is deceased, then the next of kin, in the order set forth in the definition contained in this section, is entitled to the victim's rights under this Article. However, the right contained in G.S. 15A-834 may only be exercised by the personal representative of the victim's estate. An individual entitled to exercise the victim's rights as a member of the class of next of kin may designate anyone in the class to act on behalf of the class. (1998-212, s. 19.4(c); 2001-433, s. 1; 2001-487, s. 120; 2001-518, s. 2A; 2006-247, s. 20(e).)

**Editor's Note. —**

Session Laws 2006-247, s. 1(a), provides that: "This act shall be known as 'An Act To Protect North Carolina's Children/Sex Offender Law Changes'."

Session Laws 2006-247, s. 21, is a severability clause.

Session Laws 2006-247, s. 22, provides, in part: "Prosecutions for offenses committed be-

fore the effective date of this act are not abated or affected by this act, and the statutes that would be applicable but for this act remain applicable to those prosecutions."

**Effect of Amendments. —** Session Laws 2006-247, s. 20(e), effective December 1, 2006, and applicable to offenses committed on or after that date, substituted "14-43.6" for "14-43.2" in subdivision (a)(7)b.

## SUBCHAPTER IX. PRETRIAL PROCEDURE.

### ARTICLE 48.

#### *Discovery in the Superior Court.*

### § 15A-902. Discovery procedure.

#### CASE NOTES

**Applied** in *State v. Brown*, — N.C. App. —, 628 S.E.2d 787, 2006 N.C. App. LEXIS 882 (2006).

**Cited** in *State v. Blankenship*, — N.C. App. —, 631 S.E.2d 208, 2006 N.C. App. LEXIS 1412 (2006).

### § 15A-903. Disclosure of evidence by the State — Information subject to disclosure.

#### CASE NOTES

- II. Statement of Defendant.
- IV. Statements of Witnesses.
- V. State Witnesses.
- VI. Documents, Tangible Objects, and Reports.

#### II. STATEMENT OF DEFENDANT.

##### **Duty of State to Disclose. —**

State fulfilled its duty to disclose defendant's statement, pursuant to G.S. 15A-903(a)(2), where both the testimony received at trial and the statement contained in the report that was given to defendant conveyed that defendant had told his daughter, the victim of his unlawful sexual conduct, not to tell anyone about the sexual assault. *State v. Dorton*, 172 N.C. App. 759, 617 S.E.2d 97, 2005 N.C. App. LEXIS 1794 (2005), cert. denied, 360 N.C. 69, 623 S.E.2d 775 (2005).

#### IV. STATEMENTS OF WITNESSES.

##### **Testimony Properly Allowed. —**

There was no error in the admission of testimony by a witness not included on the State's witness list where neither defendant made a motion requesting the trial court to order that the State provide such a list and the trial court strictly limited the testimony to corroboration. *State v. Brown*, — N.C. App. —, 628 S.E.2d 787, 2006 N.C. App. LEXIS 882 (2006).

**Where Witness Had Not Made a Specific Statement Prior to His Testimony. —** During discovery, a victim testified that he had

never revealed the contents of his telephone conversation with defendant to the State; defendant opened the door on cross-examination by asking the victim about later conversations between defendant and the victim. Defendant knew that the State had evidence that he had attempted to bribe a witness and should not have been surprised when the victim testified defendant had attempted to bribe him; defendant could not now reasonably complain that the victim's testimony amounted to unfair surprise. *State v. Farmer*, — N.C. App. —, 630 S.E.2d 244, 2006 N.C. App. LEXIS 1201 (2006).

#### V. STATE WITNESSES.

##### **State has no initial duty to disclose the names of witnesses, etc. —**

Manager of cellular telephone store was properly permitted to testify as a "surprise" witness where the state did disclose it would call the "Custodian of Nextel Phone Records" and provided the manager's name to defendant as listed in the detective's file. *State v. Taylor*, — N.C. App. —, 632 S.E.2d 218, 2006 N.C. App. LEXIS 1575 (2006).

##### **Interviews of State Witnesses. —**

Pursuant to G.S. 15A-903(a)(1), the detective was not required to submit to a pretrial interview with defense counsel against the detective's wishes. *State v. Taylor*, — N.C. App. —, 632 S.E.2d 218, 2006 N.C. App. LEXIS 1575 (2006).

**State Special Agent's Testimony Must Comply With Section. —** Trial court abused its discretion in allowing a State Bureau of Investigation special agent to testify without requiring the state to comply with the discovery requirements of G.S. 15A-903; although the state may not have known the specific witness it would be calling, the state did know it would be calling someone to testify concerning the process of manufacturing methamphetamine. *State v. Blankenship*, — N.C. App. —, 631 S.E.2d 208, 2006 N.C. App. LEXIS 1412 (2006).

## § 15A-907. Continuing duty to disclose.

#### CASE NOTES

**Cited in** *State v. Blankenship*, — N.C. App. —, 631 S.E.2d 208, 2006 N.C. App. LEXIS 1412 (2006).

## § 15A-910. Regulation of discovery — Failure to comply.

#### CASE NOTES

##### **Failure to Impose Sanctions Not Improper. —**

During discovery, a victim testified that he

## VI. DOCUMENTS, TANGIBLE OBJECTS, AND REPORTS.

##### **Denial of Discovery Held Harmless Error. —**

While the trial court erred by denying defendant's motion under former G.S. 15A-903(e) (repealed by 2004 N.C. Sess. Laws 154 § 4, at 517-520) for the production of the laboratory protocols associated with DNA testing, the error was harmless because defendant's identity was not at issue during trial as the defense focused on defendant's mental state. Therefore, the State did not need the DNA evidence to link defendant to the crimes, including a rape. *State v. Edwards*, — N.C. App. —, 621 S.E.2d 333, 2005 N.C. App. LEXIS 2487 (2005).

##### **Destruction of Cartridge Casings Not Error Where Discovery Request Not Filed.**

— Court properly allowed a police officer to testify concerning the type of pistol used in assault as the officer's testimony regarding the location of shell casings when a bullet was fired from two different weapons was based not upon any specialized expertise or training, but merely upon his own personal experience and observations in firing different kinds of weapons; defendant's due process rights were not violated by the destruction of the shell casings as the police had no duty to preserve the casings when defendant did not file a discovery request for the casings. *State v. Fisher*, 171 N.C. App. 201, 614 S.E.2d 428, 2005 N.C. App. LEXIS 1214 (2005).

**Trial court did not err by denying defendant's motion to continue after the State produced discovery notes on the morning of trial** where the notes, which originated from the Department of Social Services (DSS), were not part of the prosecution file, and nothing suggested that DSS acted as a prosecutorial agency. *State v. Pendleton*, — N.C. App. —, 622 S.E.2d 708, 2005 N.C. App. LEXIS 2743 (2005).



examination by asking the victim about later conversations between defendant and the victim. Defendant knew that the State had evidence that he had attempted to bribe a witness and should not have been surprised when the victim testified defendant had attempted to bribe him; defendant could not now reasonably

complain that the victim's testimony amounted to unfair surprise. *State v. Farmer*, — N.C. App. —, 630 S.E.2d 244, 2006 N.C. App. LEXIS 1201 (2006).

**Cited in** *State v. Hocutt*, — N.C. App. —, 628 S.E.2d 832, 2006 N.C. App. LEXIS 966 (2006).

## ARTICLE 49.

### *Pleadings and Joinder.*

## § 15A-923. Use of pleadings in felony cases and misdemeanor cases initiated in the superior court division.

### CASE NOTES

#### **Amendment of Indictment Permitted. —**

Because a showing of a taking is not a necessary element of the crime of robbery with a dangerous weapon, the amendment of the indictment against defendant from attempted robbery with a dangerous weapon to robbery with a dangerous weapon sufficiently apprised defendant of the charge against him with enough certainty to have enabled him to prepare his defense and was not in error; further, since the classifications and punishments of the crimes of attempted robbery with a dangerous weapon and robbery with a dangerous weapon are identical, the amendment to defendant's indictment did not deprive the trial court of knowledge as to the judgment to pronounce in the event of conviction since the amendment did not substantially alter the charge. *State v. Van Trusell*, 170 N.C. App. 33, 612 S.E.2d 195, 2005 N.C. App. LEXIS 886 (2005), cert. denied, — N.C. —, 620 S.E.2d 196 (2005).

**Amendment of Indictment Not Permitted. —**

When the prosecution amended an indictment for felonious breaking and entering in such a manner that the defendant could no longer rely upon its statement of the felony defendant allegedly intended, such an amendment was a substantial alteration and was prohibited by G.S. 15A-923(e), as to allow such practice would enable the state to thwart the very purpose of an indictment, which was to enable the accused to prepare for trial. *State v. Farrar*, — N.C. App. —, 634 S.E.2d 253, 2006 N.C. App. LEXIS 1966 (2006).

**Felonious Breaking or Entering Indictment. —** There is no requirement that an indictment for felonious breaking or entering contain specific allegations of the intended felony, and *State v. Vick*, 70 N.C. App. 338, 319 S.E.2d 327 (N.C. Ct. App. 1984), is overruled insofar as it is inconsistent with this; however, if an indictment does specifically allege the intended felony, G.S. 15A-923(e) mandates such allegations may not be amended. *State v. Silas*, 360 N.C. 377, 627 S.E.2d 604, 2006 N.C. LEXIS 26 (2006).

## § 15A-924. Contents of pleadings; duplicity; alleging and proving previous convictions; failure to charge crime; surplusage.

### CASE NOTES

#### I. General Consideration.

#### **I. GENERAL CONSIDERATION.**

#### **Specifying Felony in Indictment. —**

Since a superseding indictment sufficiently described the false pretense incident as the defendant representing to the store employee that he was entitled to a cash refund for a

watch band, when in truth and in fact, he knew that he had unlawfully taken the watch band and was not entitled to a refund, the indictment gave him proper notice and was properly not dismissed. *State v. Ledwell*, 171 N.C. App. 314, 614 S.E.2d 562, 2005 N.C. App. LEXIS 1212 (2005).

Since the indictment alleged the defendant sought to exchange the watch band that he had taken from the store for cash, the indictment did not have to allege the exact amount of cash that the defendant had tried to obtain by false pretenses. *State v. Ledwell*, 171 N.C. App. 314, 614 S.E.2d 562, 2005 N.C. App. LEXIS 1212 (2005).

#### **Indictment Held Sufficient. —**

Indictments against defendant for first-degree murder and first-degree burglary complied with the statutory and caselaw requirements for charging those crimes; therefore, the State's use of the short-form indictments was proper as

the indictments did not have to state each element of the offenses charged. *State v. Byers*, — N.C. App. —, 623 S.E.2d 357, 2006 N.C. App. LEXIS 59 (2006).

Since no conclusion could be reached by reading the indictment other than that defendant was in custody at the time he allegedly committed malicious conduct by a prisoner, the trial court had jurisdiction over his case, as the State adequately alleged the offense such that defendant was notified of the offense against which he was called to defend. *State v. Artis*, — N.C. App. —, 622 S.E.2d 204, 2005 N.C. App. LEXIS 2610 (2005).

## **§ 15A-926. Joinder of offenses and defendants.**

### **CASE NOTES**

- I. General Consideration.
- II. Joinder of Offenses.
  - A. In General.
- III. Joinder of Defendants.
  - B. Illustrative Cases.

#### **I. GENERAL CONSIDERATION.**

**Cited** in *State v. Bowden*, — N.C. App. —, 630 S.E.2d 208, 2006 N.C. App. LEXIS 1218 (2006); *State v. Hill*, — N.C. App. —, 632 S.E.2d 777, 2006 N.C. App. LEXIS 1636 (2006).

#### **II. JOINDER OF OFFENSES.**

##### **A. In General.**

##### **Joinder Ruled Proper. —**

Joinder under G.S. 15A-926(a) of the charges against defendant of assault with a deadly weapon with intent to kill inflicting serious injury and possession of a firearm by a felon did not unjustly or prejudicially hinder defendant's ability to defend himself or to receive a fair hearing. In addition, the evidence was not complicated and the trial court's instruction to the jury clearly separated the two offenses. *State v. Cromartie*, — N.C. App. —, 627 S.E.2d 677, 2006 N.C. App. LEXIS 701 (2006).

#### **III. JOINDER OF DEFENDANTS.**

##### **B. Illustrative Cases.**

##### **Joinder was upheld, etc. —**

Denial of defendants' motions to sever was proper because very minimal conflict in defendants' respective positions at trial existed in as much as neither was claiming that the other was the guilty party with regard to the armed robbery of a fast food restaurant. *State v. Bellamy*, 172 N.C. App. 649, 617 S.E.2d 81, 2005 N.C. App. LEXIS 1793 (2005).

Trial court did not abuse its discretion in joining defendants' cases for trial because the State of North Carolina sought to hold defendants accountable for the same crimes that arose at the same time, and the State's evidence was sufficient to show that defendants were involved in a common scheme to distribute marijuana. *State v. Harrington*, 171 N.C. App. 17, 614 S.E.2d 337, 2005 N.C. App. LEXIS 1189 (2005), cert. denied, sub nom. *State v. Rattis*, 360 N.C. 70, 623 S.E.2d 36 (2005).

## **§ 15A-927. Severance of offenses; objection to joinder of defendants for trial.**

### **CASE NOTES**

#### **Test Is Whether Conflict Deprived Defendants of Fair Trial. —**

Denial of defendants' motions to sever was proper because very minimal conflict in defendants' respective positions at trial existed in as

much as neither was claiming that the other was the guilty party with regard to the armed robbery of a fast food restaurant. *State v. Bellamy*, 172 N.C. App. 649, 617 S.E.2d 81, 2005 N.C. App. LEXIS 1793 (2005).

### **Defendants Charged with Same Crime.**

— Trial court did not abuse its discretion in joining defendants' cases for trial because the State of North Carolina sought to hold defendants accountable for the same crimes that arose at the same time, and the State's evidence was sufficient to show that defendants

were involved in a common scheme to distribute marijuana. *State v. Harrington*, 171 N.C. App. 17, 614 S.E.2d 337, 2005 N.C. App. LEXIS 1189 (2005), cert. denied, sub nom. *State v. Rattis*, 360 N.C. 70, 623 S.E.2d 36 (2005).

**Cited in** *State v. Cromartie*, — N.C. App. —, 627 S.E.2d 677, 2006 N.C. App. LEXIS 701 (2006).

## **§ 15A-928. Allegation and proof of previous convictions in superior court.**

### **CASE NOTES**

- I. General Consideration.
- II. Stipulation of Previous Convictions.

#### **I. GENERAL CONSIDERATION.**

**Court Erroneously Dismissed Habitual Felon Indictment.** — Defendant was not subjected to a second prosecution for the same substantive offense as he claimed, rather the trial court erroneously determined that G.S. 15A-928 required the habitual felon indictment be dismissed due to its belief that defendant had not been properly arraigned regarding the habitual felon charge; the case was remanded for habitual felon proceedings. *State v. Marshburn*, 173 N.C. App. 749, 620 S.E.2d 282, 2005 N.C. App. LEXIS 2254 (2005).

**Cited in** *State v. Highsmith*, 173 N.C. App. 600, 619 S.E.2d 586, 2005 N.C. App. LEXIS 2123 (2005).

#### **II. STIPULATION OF PREVIOUS CONVICTIONS.**

**Defendant may stipulate the previous convictions, etc. —**

Defendant's conviction for habitual misdemeanor assault was proper where the stipulation by defense counsel that defendant had been convicted of the prior misdemeanors alleged in the indictment charging him with habitual misdemeanor assault was sufficient to establish the prior conviction element of that charge without submission of that element for determination by the jury. *State v. Artis*, — N.C. App. —, 622 S.E.2d 204, 2005 N.C. App. LEXIS 2610 (2005).

### **ARTICLE 51.**

#### ***Arraignment.***

## **§ 15A-941. Arraignment before judge only upon written request; use of two-way audio and video transmission; entry of not guilty plea if not arraigned.**

### **CASE NOTES**

**No Need to Request Arraignment on Appeal De Novo From District to Superior Court.** — By immediately proceeding to trial without defendant's consent on an appeal de novo from a district court, a superior court violated G.S. 15A-943(b), which defendant adequately invoked; as the superior court was not

the court of original jurisdiction, the prosecutor never submitted a bill of indictment for defendant nor was defendant indicted, so there was no 21-day period from which defendant needed to file a written request for an arraignment. *State v. Vereen*, — N.C. App. —, 628 S.E.2d 408, 2006 N.C. App. LEXIS 847 (2006).



## § 15A-943. Arraignment in superior court — Required calendaring.

### CASE NOTES

#### I. General Consideration.

##### I. GENERAL CONSIDERATION.

**Proceeding to Trial Immediately After Arraignment Was Reversible Error.** — Trial court committed reversible error by beginning defendant's trial without his consent on the same day on which he was formally arraigned; defendant sought a continuance to obtain evidence in preparation for trial, but the trial court, by immediately proceeding to trial, violated G.S. 15A-943(b), which defendant adequately invoked. *State v. Vereen*, — N.C. App. —, — S.E.2d —, 2005 N.C. App. LEXIS 2242 (Oct. 18, 2005).

**Defendant Did Not Need to File Written Request for Arraignment.** — By immediately proceeding to trial without defendant's consent on an appeal de novo from a district court, a superior court violated G.S. 15A-943(b), which defendant adequately invoked, where defendant sought a continuance to obtain additional evidence for trial; there was no indictment, so there was no 21-day period from which defendant needed to file a written request for an arraignment. *State v. Vereen*, — N.C. App. —, 628 S.E.2d 408, 2006 N.C. App. LEXIS 847 (2006).

### ARTICLE 52.

#### *Motions Practice.*

## § 15A-952. Pretrial motions; time for filing; sanction for failure to file; motion hearing date.

### CASE NOTES

- I. General Consideration.
- II. Motions to Continue.

##### I. GENERAL CONSIDERATION.

**Cited** in *State v. Lewis*, 360 N.C. 1, 619 S.E.2d 830, 2005 N.C. LEXIS 1000 (2005).

##### II. MOTIONS TO CONTINUE.

###### **Denial of Motion Held Proper.** —

When defendant had not shown how additional time would have helped him to better

prepare had a continuance been granted, his motion for a continuance was properly denied; moreover, because of the overwhelming evidence of defendant's guilt, he was not materially prejudiced by the denial. *State v. Smith*, — N.C. App. —, 631 S.E.2d 34, 2006 N.C. App. LEXIS 1290 (2006).

## § 15A-954. Motion to dismiss — Grounds applicable to all criminal pleadings; dismissal of proceedings upon death of defendant.

### CASE NOTES

- I. General Consideration.
- V. Double Jeopardy.

##### I. GENERAL CONSIDERATION.

###### **Sufficiency of the Evidence.** —

Trial court properly denied defendant's motion to dismiss, pursuant to G.S. 15A-954, with respect to sexual offense charges against him

which he allegedly committed against his 16-year-old daughter, as the evidence was sufficient to support the jury verdict, finding defendant guilty of second-degree sexual offense in violation of G.S. 14-27.5, where he physically

and sexually attacked her; defendant's claim that there were inconsistencies in the testimony and a lack of physical evidence to bolster the victim's testimony lacked merit, as there was no physical evidence bolstering requirement, and inconsistencies were for the jury to resolve. *State v. Dorton*, 172 N.C. App. 759, 617 S.E.2d 97, 2005 N.C. App. LEXIS 1794 (2005), cert. denied, 360 N.C. 69, 623 S.E.2d 775 (2005).

Trial court's denial of defendant's motion to dismiss, as well as the denial of his post-trial motion to set aside the verdict, was proper where there was sufficient evidence to support an inference of constructive possession for purposes of defendant's possession of cocaine charge, as a police investigator saw defendant at a suspected drug dealer's home, he saw defendant drive away with a known drug runner from the home, and the runner informed the investigator where to find drugs in the vehicle; defendant was the driver of the vehicle where the cocaine was found and all reasonable inferences provided support for the conviction. *State v. Baublitz*, 172 N.C. App. 801, 616 S.E.2d 615, 2005 N.C. App. LEXIS 1778 (2005).

Evidence of scales and plastic bags with marijuana found in defendants' residence was sufficient evidence for the issue of manufacturing to be submitted to a jury; moreover, a co-defendant testified that one defendant used the scale and vacuum sealer found in the kitchen to weigh and package marijuana for distribution. *State v. Harrington*, 171 N.C. App. 17, 614 S.E.2d 337, 2005 N.C. App. LEXIS 1189 (2005), cert. denied, sub nom. *State v. Rattis*, 360 N.C. 70, 623 S.E.2d 36 (2005).

Testimony by a co-defendant that defendants stored marijuana in a house where they resided and sold marijuana from an apartment was insufficient to support the charge of trafficking by transportation because no one testified to observing defendants personally or actively moving or carrying any controlled substance. *State v. Harrington*, 171 N.C. App. 17, 614 S.E.2d 337, 2005 N.C. App. LEXIS 1189 (2005), cert. denied, sub nom. *State v. Rattis*, 360 N.C. 70, 623 S.E.2d 36 (2005).

Because substantial evidence of each element of an offense charged had to be shown to exist when a court ruled on a motion to dismiss, an adjudication finding that respondent, a juvenile, was delinquent for having the felonious possession of his mother's stolen car had to be reversed; the State introduced substantial evidence that he had possession of the stolen car, but the State failed to introduce any evidence as to the car's condition or that it was worth more than \$1,000, as G.S. 14-71.1 required. Thus, a trial court erroneously denied respondent's motion to dismiss the charge against him. *In re J.H.*, — N.C. App. —, 630 S.E.2d 457, 2006 N.C. App. LEXIS 1223 (2006).

#### **Refusal to Dismiss Was Proper. —**

Trial court did not err in denying defendants'

motions to dismiss conspiracy charge because substantial evidence existed, in that: (1) a co-defendant testified that defendants had agreed to distribute marijuana, were engaged in distributing marijuana, and stored marijuana in the house where defendants lived and sold marijuana from an apartment; (2) defendants each had access to the marijuana found in a garage; (3) one defendant was at the apartment when a law enforcement agent made a controlled delivery of a package containing marijuana; and (4) marijuana, scales, packaging materials, and weapons were found at both the apartment and in the bedrooms and public areas of the house. *State v. Harrington*, 171 N.C. App. 17, 614 S.E.2d 337, 2005 N.C. App. LEXIS 1189 (2005), cert. denied, sub nom. *State v. Rattis*, 360 N.C. 70, 623 S.E.2d 36 (2005).

Evidence from a co-defendant that defendant had access to a garage at their residence where one to two thousand dime bags were found, that defendant had access to the kitchen where a scale and vacuum sealer were found, and that defendant used bags found in the garage to distribute marijuana, when coupled with evidence that the police found, which included among other things, a set of scales and plastic bags containing marijuana residue in defendants bedroom, was sufficient to submit to the jury the issue of whether defendant was trafficking in marijuana by manufacture. *State v. Harrington*, 171 N.C. App. 17, 614 S.E.2d 337, 2005 N.C. App. LEXIS 1189 (2005), cert. denied, sub nom. *State v. Rattis*, 360 N.C. 70, 623 S.E.2d 36 (2005).

Motion to dismiss the charge of possession with intent to manufacture, sell, and deliver methamphetamine was properly denied where defendant testified to knowingly assisting her husband in manufacturing methamphetamine by ordering chemistry ware for him; her testimony that 2.9 grams of methamphetamine found at her residence was for personal use was contradicted by expert testimony that indicated the items found were consistent with materials used in manufacturing methamphetamine and packaging controlled substances and that plastic bags such as those found at defendant's residence could be used to package controlled substances into smaller amounts for sale. *State v. Alderson*, 173 N.C. App. 344, 618 S.E.2d 844, 2005 N.C. App. LEXIS 2033 (2005).

Trial court properly denied defendant's motion to dismiss charge of manufacturing methamphetamine within 300 feet of a school where the State presented physical evidence seized from inside and around defendant's residence that was consistent with methamphetamine manufacturing from which a reasonable juror could find that defendant manufactured methamphetamine within 300 feet of an elementary school. *State v. Alderson*, 173 N.C. App. 344,



618 S.E.2d 844, 2005 N.C. App. LEXIS 2033 (2005).

**Motion to Dismiss on Basis of Insufficient Evidence Properly Denied. —**

In a possession with intent to sell or deliver case, the trial court did not err in denying defendant's motion to dismiss based on insufficiency of the evidence because the evidence showed that: (1) the undercover officers approached defendant and asked if they could get drugs; (2) defendant advised the undercover officers that he could get them marijuana or cocaine if they gave him money first; (3) the officers gave defendant money, and he returned with two bags of marijuana and one bag of cocaine; (4) a special agent testified that the substance submitted for testing was cocaine; and (5) any conflicting testimony about the color of the baggie containing the cocaine defendant sold to the undercover officers was a discrepancy in the state's evidence, properly considered by the jury in weighing the reliability of the evidence. *State v. Bunn*, 173 N.C. App. 729, 619 S.E.2d 918, 2005 N.C. App. LEXIS 2301 (2005).

**Denial of Motion Held Appropriate. —**

Evidence of drug paraphernalia found in various areas of the house where both defendants resided, and the testimony of a co-defendant that both defendants were engaged in the sale of marijuana and both had access to the garage where marijuana was found, were sufficient for the issue of possession to survive a motion to dismiss. *State v. Harrington*, 171 N.C. App. 17, 614 S.E.2d 337, 2005 N.C. App. LEXIS 1189 (2005), cert. denied, sub nom. *State v. Rattis*, 360 N.C. 70, 623 S.E.2d 36 (2005).

**V. DOUBLE JEOPARDY.**

**Revocation of License Did Not Place Defendant in Prior Jeopardy. —** Double jeopardy principles did not mandate dismissal of a driving while intoxicated charge because the confiscation and retention of defendant's South Dakota driver's license and imposition of a fee were not punishment and, therefore, did not place defendant in prior jeopardy for the offense. *State v. Streckfuss*, 171 N.C. App. 81, 614 S.E.2d 323, 2005 N.C. App. LEXIS 1190 (2005).

**§ 15A-955. Motion to dismiss — Grounds applicable to indictments.**

**CASE NOTES**

**Sufficiency of the Evidence. —**

Superior court did not err in denying defendant's motion to dismiss misdemeanor charge of failure to work after being paid, as a conflict in the evidence presented created a question for the jury to resolve; moreover, even though the \$100 defendant received was intended for pur-

chasing materials, his conviction was supported by the evidence presented, as he still obtained an advance of money, provisions, goods, wares or merchandise on the false promise of completing the work. *State v. Octetree*, 173 N.C. App. 228, 617 S.E.2d 356, 2005 N.C. App. LEXIS 1923 (2005).

**§ 15A-957. Motion for change of venue.**

**CASE NOTES**

**Pretrial Publicity. —**

Trial court did not abuse its discretion by determining that a reasonable likelihood existed that prejudicial pretrial publicity would prevent a fair trial the third time and, therefore, ordering a venire with regard to defendant's felonious breaking and entering trial, because the county had a very small population

and massive publicity was generated surrounding defendant's two previous mistrials; also, during the second trial, the trial court had heard testimony that the victim and her husband owned a mini-mart frequented by many residents in the community. *State v. Carmon*, 169 N.C. App. 750, 611 S.E.2d 211, 2005 N.C. App. LEXIS 794 (2005).

**§ 15A-958. Motion for a special venire from another county.**

**CASE NOTES**

**Discretion of Trial Judge. —**

Trial court did not abuse its discretion by determining that a reasonable likelihood ex-

isted that prejudicial pretrial publicity would prevent a fair trial the third time and, therefore, ordering a venire with regard to defen-



dant's felonious breaking and entering trial, because the county had a very small population and massive publicity was generated surrounding defendant's two previous mistrials; also, during the second trial, the trial court had

heard testimony that the victim and her husband owned a mini-mart frequented by many residents in the community. *State v. Carmon*, 169 N.C. App. 750, 611 S.E.2d 211, 2005 N.C. App. LEXIS 794 (2005).

## § 15A-959. Notice of defense of insanity; pretrial determination of insanity.

### CASE NOTES

**Cross-Examination of Expert Using Testimony from Pretrial Insanity Hearing Improper.** — Trial court erred in allowing the State to cross-examine experts using testimony from defendant's pretrial insanity hearing as G.S. 15A-959(c) did not limit the bar on using hearsay testimony to "substantive evidence," but stated a blanket prohibition; the error was

not harmless as the only issue at trial was defendant's sanity at the time of the murder, and substantial evidence including the testimony of all three expert witnesses tended to show that defendant was insane. *State v. Durham*, — N.C. App. —, 623 S.E.2d 63, 2005 N.C. App. LEXIS 2752 (2005).

### ARTICLE 53.

#### *Motion to Suppress Evidence.*

## § 15A-971. Definitions.

### CASE NOTES

**Trial Court's Change of Decision from Pretrial Grant.** — Trial court did not err by changing its decision with regard to defendant's motion to suppress and subsequently allowing drug-related evidence seized from the shrubbery around defendant's mobile home at trial, because a ruling on such a motion was preliminary in nature, which did not automatically

cause exclusion pursuant to G.S. 15A-979(a). Since the trial court's ruling on the motion to suppress was not final, it was well within the trial court's authority to reverse its decision at trial. *State v. McNeill*, 170 N.C. App. 574, 613 S.E.2d 43, 2005 N.C. App. LEXIS 1068 (2005), cert. denied, 360 N.C. 73, 622 S.E.2d 626 (2005).

## § 15A-972. Motion to suppress evidence before trial in superior court in general.

### CASE NOTES

**Motion to Suppress Properly Denied.** — Despite a juvenile's contention that his aunt was his guardian, his suppression motion was properly denied, as she was not considered a "party listed" under G.S. 7B-2101, and the aunt never lived with the juvenile, did not have custody of him, nor acted on his behalf as a parent or his guardian. *State v. Oglesby*, — N.C. App. —, 622 S.E.2d 152, 2005 N.C. App. LEXIS 2624 (2005).

**Suppression of Evidence Discovered During Checkpoint Search Erroneously**

**Denied.** — Trial court erred in denying defendant's motion to suppress evidence, pursuant to G.S. 15A-972, which was uncovered during a checkpoint stop; the trial court failed to make required findings as to the primary programmatic purpose of the checkpoint, and as to whether the checkpoint was tailored to meet that programmatic purpose. *State v. Rose*, 170 N.C. App. 284, 612 S.E.2d 336, 2005 N.C. App. LEXIS 1015 (2005).

**Cited in** *State v. Lewis*, 360 N.C. 1, 619 S.E.2d 830, 2005 N.C. LEXIS 1000 (2005).

## § 15A-974. Exclusion or suppression of unlawfully obtained evidence.

### CASE NOTES

- I. General Consideration.
- III. Substantial Violation of Chapter.

#### I. GENERAL CONSIDERATION.

**Trial Court's Change of Decision from Pretrial Grant.** — Trial court did not err by changing its decision with regard to defendant's motion to suppress and subsequently allowing drug-related evidence seized from the shrubbery around defendant's mobile home at trial, because a ruling on such a motion was preliminary in nature, which did not automatically cause exclusion pursuant to G.S. 15A-979(a). Since the trial court's ruling on the motion to suppress was not final, it was well within the trial court's authority to reverse its decision at trial. *State v. McNeill*, 170 N.C. App. 574, 613 S.E.2d 43, 2005 N.C. App. LEXIS 1068 (2005), cert. denied, 360 N.C. 73, 622 S.E.2d 626 (2005).

#### III. SUBSTANTIAL VIOLATION OF CHAPTER.

**Motion Denied Out of Term and Out of Session.** — Since the trial court's ruling and written order denying defendant's motions to suppress were entered out of term and out of session, the ruling and order were null and void, and of no legal effect; accordingly, defendant was entitled to have his judgment of conviction vacated and to a new trial, and that conclusion was true even though he had not objected and might not be able to show he was prejudiced. *State v. Trent*, 359 N.C. 583, 614 S.E.2d 498, 2005 N.C. LEXIS 641 (2005).

## § 15A-977. Motion to suppress evidence in superior court; procedure.

### CASE NOTES

- I. General Consideration.
- II. Findings of Fact.

#### I. GENERAL CONSIDERATION.

**Cited** in *State v. McKinney*, 174 N.C. App. 138, 619 S.E.2d 901, 2005 N.C. App. LEXIS 2307 (2005).

#### II. FINDINGS OF FACT.

**If there is no material conflict in the evidence on voir dire, etc. —**

Second interrogation of a defendant was not unconstitutional under the facts of the case, and the trial court did not err by admitting the statement obtained by law enforcement officials during that second interrogation because uncontradicted evidence introduced during the suppression hearing supported the conclusion that the law enforcement officials involved in the investigation of one incident honored the defendant's invocation of his right to remain silent regarding another incident, and thereaf-

ter no questioning touched on that other incident and fresh Miranda warnings were given. *State v. Jacobs*, 174 N.C. App. 1, 620 S.E.2d 204, 2005 N.C. App. LEXIS 2279 (2005).

#### **Findings Binding on Appellate Courts.**

Trial court's finding of fact that defendant was not coerced into a confession due to threats made against his wife or suggested by law enforcement officials was supported by competent evidence and, thus, binding on appeal; defendant was aware of his constitutional right to remain silent when he chose to speak and both police officers testified that at no point did they indicate to defendant that his wife would be charged if he did not confess, nor did they promise defendant anything if he offered a confession. *State v. Duff*, 171 N.C. App. 662, 615 S.E.2d 373, 2005 N.C. App. LEXIS 1367 (2005).

## § 15A-979. Motion to suppress evidence in superior and district court; orders of suppression; effects of orders and of failure to make motion.

### CASE NOTES

- I. General Consideration.
- II. Appeal From Denial of Motion.

#### I. GENERAL CONSIDERATION.

**Trial Court's Change of Decision from Pretrial Grant.** — Trial court did not err by changing its decision with regard to defendant's motion to suppress and subsequently allowing drug-related evidence seized from the shrubbery around defendant's mobile home at trial, because a ruling on such a motion was preliminary in nature, which did not automatically cause exclusion pursuant to G.S. 15A-979(a). Since the trial court's ruling on the motion to suppress was not final, it was well within the trial court's authority to reverse its decision at trial. *State v. McNeill*, 170 N.C. App. 574, 613 S.E.2d 43, 2005 N.C. App. LEXIS 1068 (2005), cert. denied, 360 N.C. 73, 622 S.E.2d 626 (2005).

#### **Admission of Statements Given to Police.** —

Defendant's first degree murder conviction was affirmed because the trial court did not err by denying defendant's motion to suppress his written confession as defendant's written waiver of his Miranda rights and his written confession were made understandingly, knowingly, and voluntarily with the assistance of a police officer who acted as defendant's interpreter. *State v. Nguyen*, — N.C. App. —, 632 S.E.2d 197, 2006 N.C. App. LEXIS 1571 (2006).

**Detention of Passenger of Vehicle at a Traffic Stop was Justified.** — Defendant's motion to suppress was properly denied where defendant was a passenger in a car that was stopped for a valid traffic infraction and defendant's suspicious behavior and the discovery of drugs in the car gave officers a reasonable articulable suspicion to detain defendant. *State*

*v. Brewington*, 170 N.C. App. 264, 612 S.E.2d 648, 2005 N.C. App. LEXIS 1011 (2005), cert. denied, 360 N.C. 67, 621 S.E.2d 881 (2005).

**Cited in** *State v. Johnson*, — N.C. App. —, 627 S.E.2d 488, 2006 N.C. App. LEXIS 695 (2006); *State v. Branch*, — N.C. App. —, 627 S.E.2d 506, 2006 N.C. App. LEXIS 713 (2006).

#### II. APPEAL FROM DENIAL OF MOTION.

#### **Defendant Properly Notified Prosecution in Text of Motion to Suppress.** —

Where defendant entered a guilty plea to the offense, defendant was permitted to appeal the denial of the motion to suppress pursuant to G.S. 15A-979(b), as defendant, in the text of the motion to suppress, notified the prosecution of defendant's reservation of the right to appeal the issue. *State v. Hernandez*, 170 N.C. App. 299, 612 S.E.2d 420, 2005 N.C. App. LEXIS 1006 (2005).

#### **Motion Properly Denied.** —

Defendant's arrest and subsequent search conducted by a police officer were permissible under U.S. Const. amend. IV because the officer had sufficient probable cause, pursuant to G.S. 15A-401(b)(1) and (b)(2)(a), to believe that defendant was committing, or had committed, a felony in light of information provided by a confidential informant, to the effect that a black male matching defendant's description was selling drugs outside a local store in violation of G.S. 90-95(a)(1) and (b)(1); the informant's 14 years of personal dealings with the officer resulting in over 100 arrests and numerous convictions allowed the conclusion that the informant was reliable. *State v. Stanley*, — N.C. App. —, 622 S.E.2d 680, 2005 N.C. App. LEXIS 2707 (2005).

## § 15A-980. Right to suppress use of certain prior convictions obtained in violation of right to counsel.

### CASE NOTES

#### **Denial of Motion Upheld.** —

Where the trial court relied in part on two prior convictions to calculate defendant's prior record level for sentencing purposes, suppression of those convictions under G.S. 15A-980(c) for violation of the right to counsel was not

required; defendant did not sustain his burden of proof, as he did not provide a supporting affidavit with the motion. *State v. Frady*, — N.C. App. —, 623 S.E.2d 346, 2006 N.C. App. LEXIS 53 (2006).

Defendant failed to prove that his prior con-



victions were obtained in violation of his right to counsel and thus, suppression under G.S. 15A-980 was properly denied. *State v. Jordan*, — N.C. App. —, 621 S.E.2d 229, 2005 N.C. App. LEXIS 2481 (2005).

**Applied** in *State v. Hadden*, — N.C. App. —, 624 S.E.2d 417, 2006 N.C. App. LEXIS 190 (2006).

## SUBCHAPTER X. GENERAL TRIAL PROCEDURE.

### ARTICLE 56.

#### *Incapacity to Proceed.*

### § 15A-1001. No proceedings when defendant mentally incapacitated; exception.

#### CASE NOTES

**Relationship Between Mental Retardation, Competency to Stand Trial, and Forming Requisite Intent to Kill.** — Murder defendant was mentally retarded so he was not sentenced to death under G.S. 15A-2005(a)(1); but (1) experts testified he was competent under G.S. 15A-1001(a) to stand trial; and (2) evidence and his girlfriend's opinion testimony under G.S. 8C-1, N.C. R. Evid. 701, that he was "fine" and "not mentally retarded," indicated he was able to form the requisite "deliberation" and "cool state of blood" (as defined *State v. Ruof* jury instructions and which were properly given to the jury in response to a deliberation question under G.S. 15A-1234(a)(1)) when he shot a coworker who teased him about being

mentally retarded. *State v. McClain*, 169 N.C. App. 657, 610 S.E.2d 783, 2005 N.C. App. LEXIS 804 (2005).

**Trial court did not err by not holding a competency hearing sua sponte, etc.** —

Defendant's conviction of first-degree felony murder was affirmed; the trial court was not required by G.S. 15A-1001(a) and G.S. 15A-1002(a) to sua sponte order a competency hearing for defendant, as the trial court conducted a colloquy, and defendant's replies were lucid and displayed his understanding of the consequences of testifying. *State v. Staten*, 172 N.C. App. 673, 616 S.E.2d 650, 2005 N.C. App. LEXIS 1777 (2005).

### § 15A-1002. Determination of incapacity to proceed; evidence; temporary commitment; temporary orders.

#### CASE NOTES

- I. General Consideration.
- II. Hearing.

#### I. GENERAL CONSIDERATION.

**Trial court properly held a retrospective competency hearing after defendant's robbery trial and before his habitual felon trial;** where an evaluation found defendant competent and noted that he had not been hearing voices nor had suicidal thoughts as stated in the original motion, and where defense counsel testified that defendant was competent during the robbery trial, the trial court's finding that defendant had the capacity to proceed was supported by competent evidence. *State v. Blancher*, 170 N.C. App. 171, 611 S.E.2d 445, 2005 N.C. App. LEXIS 909 (2005),

cert. denied, 360 N.C. 67, 621 S.E.2d 880 (2005).

#### II. HEARING.

**Trial court did not err by not holding a competency hearing sua sponte, etc.** —

Defendant's conviction of first-degree felony murder was affirmed; the trial court was not required by G.S. 15A-1001(a) and G.S. 15A-1002(a) to sua sponte order a competency hearing for defendant, as the trial court conducted a colloquy, and defendant's replies were lucid and displayed his understanding of the consequences of testifying. *State v. Staten*, 172 N.C.

App. 673, 616 S.E.2d 650, 2005 N.C. App. LEXIS 1777 (2005).

**Waiver of Hearing Right. —**

By his failure to challenge the trial court's ruling that he was competent to stand trial,

defendant waived his right to a competency hearing under G.S. 15A-1002(b). *State v. Hoover*, — N.C. App. —, 621 S.E.2d 303, 2005 N.C. App. LEXIS 2467 (2005).

ARTICLE 58.

*Procedures Relating to Guilty Pleas in Superior Court.*

**§ 15A-1022. Advising defendant of consequences of guilty plea; informed choice; factual basis for plea; admission of guilt not required.**

CASE NOTES

**Adjudication as Habitual Felon. —**

Trial court erred in finding defendant to have the status of a habitual felon, as the trial court did not inform defendant of the nature of the charges and consequences of pleading guilty to such a status, as required by G.S. 15A-1022(a)(1)-(4), and defendant could raise the failure to so inform him on appeal even though he had not objected at trial and had apparently pled guilty to habitual felon status. *State v. Artis*, — N.C. App. —, 622 S.E.2d 204, 2005 N.C. App. LEXIS 2610 (2005).

**Arresting officer's testimony established a sufficient factual basis** to support defendant's guilty plea to breaking and entering; the officer testified that he found defendant's truck near a burglarized residence, that he saw jewelry and boxes in the truck, that footprints in the snow led up to the residence where a window was broken, and that, during a search of the residence, the officer found defendant underneath a bed with a stolen rifle laying next to him. *State v. Poore*, 172 N.C. App. 839, 616 S.E.2d 639, 2005 N.C. App. LEXIS 1774 (2005).

ARTICLE 59.

*Maintenance of Order in the Courtroom.*

**§ 15A-1031. Custody and restraint of defendant and witnesses.**

CASE NOTES

**When Defendant May Be Restrained During Trial. —**

Trial court did not abuse its discretion in ordering a juvenile defendant to be restrained with leg shackles, as the bailiff had requested the same out of concern about the juvenile's desire to run, and especially where the shackles could not be seen and there was no evidence that the jury was affected by, or even aware of, the restraints. *State v. Oglesby*, — N.C. App. —, 622 S.E.2d 152, 2005 N.C. App. LEXIS 2624 (2005).

**The court's failure to comply with the**

**requirements of G.S. 15A-1032(b)(1) was not reversible error** in the defendant's murder trial after the defendant was both physically restrained under G.S. 15A-1031 and was removed for disruptive behavior since the defendant's counsel waived the instruction under G.S. 15A-1032(b)(1) because they felt it would just call more attention to the fact that the defendant was not in the courtroom. *State v. Ash*, 169 N.C. App. 715, 611 S.E.2d 855, 2005 N.C. App. LEXIS 809 (2005), cert. denied, appeal dismissed, 360 N.C. 66, 621 S.E.2d 878 (2005).

## § 15A-1032. Removal of disruptive defendant.

### CASE NOTES

**The court's failure to comply with the requirements of this section was not reversible error, etc. —**

The court's failure to comply with the requirements of this section was not reversible error in the defendant's murder trial after the defendant was both physically restrained under G.S. 15A-1031 and was removed for disruptive

behavior since the defendant's counsel waived the instruction under G.S. 15A-1032(b)(1) because they felt it would just call more attention to the fact that the defendant was not in the courtroom. *State v. Ash*, 169 N.C. App. 715, 611 S.E.2d 855, 2005 N.C. App. LEXIS 809 (2005), cert. denied, appeal dismissed, 360 N.C. 66, 621 S.E.2d 878 (2005).

### ARTICLE 61.

#### *Granting of Immunity to Witnesses.*

## § 15A-1054. Charge reductions or sentence concessions in consideration of truthful testimony.

### CASE NOTES

**Cited** in *State v. Howell*, 169 N.C. App. 741, 611 S.E.2d 200, 2005 N.C. App. LEXIS 795 (2005), cert. denied, 360 N.C. 71, 622 S.E.2d 500 (2005).

### ARTICLE 62.

#### *Mistrial.*

## § 15A-1061. Mistrial for prejudice to defendant.

### CASE NOTES

#### **Remarks of Prosecutor. —**

Denial of defendants' motion for a mistrial was not an abuse of discretion, as, even assuming it was error for the State to refer to a conviction for the lesser-included offense of assault inflicting serious injury as a misdemeanor amounting to a slap on the writ, the evidence was sufficient to support first defendant's conviction for assault inflicting serious bodily injury. *State v. Brown*, — N.C. App. —, 628 S.E.2d 787, 2006 N.C. App. LEXIS 882 (2006).

#### **Mistrial Properly Denied. —**

Since the evidence supported the trial court's finding that none of the 12 jurors selected for the sitting panel were in the jury room by the time a newspaper article regarding the trial appeared there, defendant did not show the substantial and irreparable harm required by G.S. 15A-1061 for declaring a mistrial. *State v. Hurst*, 360 N.C. 181, 624 S.E.2d 309, 2006 N.C. LEXIS 7 (2006).

**Cited** in *State v. Bethea*, 173 N.C. App. 43, 617 S.E.2d 687, 2005 N.C. App. LEXIS 1907 (2005).

## § 15A-1063. Mistrial for impossibility of proceeding.

### CASE NOTES

**Denial of Mistrial Upheld. —** Defendant was not entitled to a mistrial based on a supplemental instruction to the deadlocked jury which did not threaten to require the jury to

deliberate for an unreasonable length of time or for unreasonable intervals. *State v. Hagans*, — N.C. App. —, 628 S.E.2d 776, 2006 N.C. App. LEXIS 719 (2006).



## SUBCHAPTER XII. TRIAL PROCEDURE IN SUPERIOR COURT.

### ARTICLE 71.

#### *Right to Trial by Jury.*

#### § 15A-1201. Right to trial by jury.

##### CASE NOTES

##### **Unanimous Verdict.** —

Trial court did not err by allowing defendant to be convicted with fewer than 12 jurors finding him guilty because the trial court's use of the term "consensus" in an instruction did not violate the verdict unanimity requirement, as the trial judge twice repeated that the jury had to unanimously agree on a verdict. *State v. Flemming*, 171 N.C. App. 413, 615 S.E.2d 310,

2005 N.C. App. LEXIS 1260 (2005).

Defendant's right to an unanimous verdict under N.C. Const. art. I, § 24, G.S. 15A-1201, and G.S. 15A-1237(b) was not violated by generic testimony, or evidence of more incidents than there were criminal charges. *State v. Bullock*, — N.C. App. —, 631 S.E.2d 868, 2006 N.C. App. LEXIS 1572 (2006).

### ARTICLE 72.

#### *Selecting and Impaneling the Jury.*

#### § 15A-1211. Selection procedure generally; role of judge; challenge to the panel; authority of judge to excuse jurors.

##### CASE NOTES

**Knowing State's Witness Was Not Ground for Dismissal.** — Defendant's challenge of a juror based on the fact that she admitted, during trial, to knowing one of the State's witnesses failed because the juror stated that she could continue to be fair and

impartial, and defendant failed to show either an abuse of discretion or that he suffered any prejudice due to the continued service of the juror. *State v. Bates*, 172 N.C. App. 27, 616 S.E.2d 280, 2005 N.C. App. LEXIS 1585 (2005).

#### § 15A-1212. Grounds for challenge for cause.

##### CASE NOTES

##### I. General Consideration.

##### IV. Inability to Render Verdict in Accordance with Law.

##### I. GENERAL CONSIDERATION.

**Knowing State's Witness Was Not Ground for Dismissal.** — Defendant's challenge of a juror based on the fact that she admitted, during trial, to knowing one of the State's witnesses failed because the juror stated that she could continue to be fair and impartial. *State v. Bates*, 172 N.C. App. 27, 616 S.E.2d 280, 2005 N.C. App. LEXIS 1585 (2005).

**Applied** in *Conaway v. Polk*, 453 F.3d 567, 2006 U.S. App. LEXIS 17304 (4th Cir. 2006).

##### IV. INABILITY TO RENDER VERDICT IN ACCORDANCE WITH LAW.

**The trial court acted within its discretion in refusing to remove a juror for cause, etc.** —

Defendant failed to show an abuse of the trial court's discretion in granting a challenge for

cause as to a prospective juror, as the juror lived down the road from the victim, had known the victim his entire life, had been in the victim's home, and had attended the victim's

funeral. The victim called the prosecutive juror shortly before the murder to request a ride to get his car serviced. *State v. Campbell*, 359 N.C. 644, 617 S.E.2d 1, 2005 N.C. LEXIS 842 (2005).

## § 15A-1214. Selection of jurors; procedure.

### CASE NOTES

#### III. Questioning of Prospective Jurors.

##### III. QUESTIONING OF PROSPECTIVE JURORS.

###### **Prejudice Not Shown. —**

Although the trial court violated the mandatory statutory procedure for jury selection in G.S. 15A-1214, defendants failed to show any prejudice resulting therefrom; defendants

failed to show jury bias, the inability to question prospective jurors, inability to assert peremptory challenges, nor any other defect which had the likelihood to affect the outcome of the trial. *State v. Love*, — N.C. App. —, 630 S.E.2d 234, 2006 N.C. App. LEXIS 1189 (2006).

### ARTICLE 73.

#### *Criminal Jury Trial in Superior Court.*

## § 15A-1222. Expression of opinion prohibited.

### CASE NOTES

- I. General Consideration.
- III. Statement of Parties' Contentions.

#### I. GENERAL CONSIDERATION.

##### **Instructions by Trial Court Not Improper. —**

Instructing the jury that the knife allegedly used to commit the assault was a deadly weapon was not error where the evidence presented led to only one conclusion, that the knife was a deadly weapon. *State v. Caudle*, 172 N.C. App. 261, 616 S.E.2d 8, 2005 N.C. App. LEXIS 1430 (2005).

**Applied** in *State v. Stokes*, — N.C. App. —, 621 S.E.2d 311, 2005 N.C. App. LEXIS 2495 (2005).

#### III. STATEMENT OF PARTIES' CONTENTIONS.

**No Reversible Error Found. —** Defendant's unpreserved argument was that the prosecutor's closing statement to the jury indicated that the court had decided that the defendant acted with deliberation such that the court should have corrected the statement *ex mero motu*; however, the statement was not reversible error since (1) it did not directly and unambiguously tell the jury the court formed an opinion on the evidence; (2) because there was no objection, and therefore no overruling

by the court of the defendant's objection, the idea was not solidified in the jurors' minds; (3) the statement did not travel outside the record as prohibited by G.S. 15A-1230(a); (4) so that it would not violate G.S. 15A-1222 and G.S. 15A-1232, the court instructed the jury that the court was impartial and that the jury would be mistaken to believe otherwise; and (5) the court instructed the jury it "may" find premeditation and deliberation, and instructed on what basis the jury could make such a finding. *State v. Duke*, 360 N.C. 110, 623 S.E.2d 11, 2005 N.C. LEXIS 1314 (2005).

An instruction by the trial court stating that the evidence tended to show the existence of a confession to the crime charged was not an impermissible comment invading the province of the jury and its fact-finding function; considering defendant's admissions which tended to show premeditation and deliberation — such as the sheer number of blows with the fire extinguisher, the time between each blow, and the dragging of one victim back into the apartment — the statement did support inclusion of the confession instruction, and the instruction given by the trial court left it to the jury to conclude whether the confession occurred and what weight to give it. *State v. Duke*, 360 N.C.

110, 623 S.E.2d 11, 2005 N.C. LEXIS 1314 (2005).

## § 15A-1223. Disqualification of judge.

### CASE NOTES

**Cited** in *State v. Love*, — N.C. App. —, 630 S.E.2d 234, 2006 N.C. App. LEXIS 1189 (2006).

## § 15A-1226. Rebuttal evidence; additional evidence.

### CASE NOTES

**Discretion Not Abused in Reopening Case.** — Trial court did not abuse its discretion by allowing the state to reopen its case and to present additional evidence of defendant's release date after the parties had rested, but before the case was presented to the jury, pursuant to G.S. 15A-1226(b). *State v. Wise*, — N.C. App. —, 630 S.E.2d 732, 2006 N.C. App. LEXIS 1293 (2006).

#### **Refusal to Reopen Case Held Not Error.**

Where defendant, after resting defendant's case, moved to reopen the evidence to allow a child witness to rebut defendant's son's testimony that the victim had a bad bicycle wreck, corroborating defendant's story as to why the victim's buttocks were bruised, the trial court did not abuse its discretion under G.S. 15A-1226(b) in denying the motion; the trial court was permitted to exclude the testimony on grounds of undue delay, waste of time, or needless presentation of cumulative evidence under G.S. 8C-1-403, as defendant could have asked

defendant's son before trial whether anyone else had seen the victim wreck on the bicycle and could have cross-examined the son about this, and the child's testimony was cumulative and would have only possibly served to corroborate defendant's testimony or facts brought to the jury's attention during the son's cross-examination. *State v. Phillips*, 171 N.C. App. 622, 615 S.E.2d 382, 2005 N.C. App. LEXIS 1369 (2005), cert. denied, appeal dismissed, — N.C. —, 622 S.E.2d 628 (2005).

In a prosecution of defendant for first-degree statutory rape, the trial court did not abuse its discretion by refusing to reopen the trial to permit defendant to introduce additional evidence; because evidence about defendant's work schedule had already been admitted, defendant failed to show how he was prejudiced by the trial court's refusal to allow a witness to testify about driving defendant to and from work. *State v. Hoover*, — N.C. App. —, 621 S.E.2d 303, 2005 N.C. App. LEXIS 2467 (2005).

## § 15A-1227. Motion for dismissal.

### CASE NOTES

#### III. Evidence on Motion.

##### A. In General.

##### B. Substantial Evidence.

### III. EVIDENCE ON MOTION.

#### A. In General.

#### **Suspicion Insufficient to Withstand Motion.** —

While evidence presented by the State raised a strong suspicion of guilt it did not permit a reasonable inference that defendants were responsible for victim's death, but merely that they had the opportunity to commit the crime, and the trial court did not err in granting defendants' motion to dismiss. *State v. Myers*,

— N.C. App. —, 621 S.E.2d 329, 2005 N.C. App. LEXIS 2485 (2005).

#### B. Substantial Evidence.

#### **Substantial Evidence Established.** —

Motion to dismiss was properly denied where the evidence showed that defendant drove through an apartment complex in a borrowed car with victim's brother, exited the vehicle in a certain area and returned to the vehicle after gunshots, and the brother fabricated a story to police to avoid identification, there was sufficient evidence to support a finding of conspiracy



to commit murder. *State v. Brewton*, 173 N.C. App. 323, 618 S.E.2d 850, 2005 N.C. App. LEXIS 2027 (2005).

Trial court did not err in denying a juvenile's motion to dismiss a charge that he committed a violation of North Carolina's Ethnic Intimidation Statute, G.S. 14-401.14 at the close of all the evidence, as the State presented sufficient evidence that he: (1) sent an E-mail to the African-American victim, which contained ra-

cial slurs and was signed "KKK," and directly communicated an intent to harm her; and (2) testified that he sent the E-mail to the victim in protest of her alleged differing treatment against him as compared with others who were African-American. Thus, the State met its burden in showing that the E-mail was sent to the victim for racially motivated reasons. *In re B.C.D.*, — N.C. App. —, 629 S.E.2d 617, 2006 N.C. App. LEXIS 1073 (2006).

## § 15A-1230. Limitations on argument to the jury.

### CASE NOTES

**Trial Counsel Is Allowed Wide Latitude.** — Defendant's Eighth Amendment rights were not violated when the trial court allowed the prosecutor to argue that an aggravating circumstance of two of defendant's murders, of an elderly husband and his blind, elderly wife, was the fact that the murders were especially heinous, atrocious, and cruel. Under G.S. 15A-1230(a), the prosecutor had a right to argue on the basis of his analysis of the evidence any conclusion or position as long as the record contained sufficient evidence from which the scenario was reasonably inferred. *State v. Forte*, 360 N.C. 427, 629 S.E.2d 137, 2006 N.C. LEXIS 45 (2006).

**Remarks Held Not to Necessitate Ex Mero Motu Correction.** —

Prosecutor's closing argument regarding the credibility of the State's witnesses versus the defense witnesses was proper and did not require ex mero motu correction by the trial court. *State v. Augustine*, 359 N.C. 709, 616 S.E.2d 515, 2005 N.C. LEXIS 836 (2005).

An instruction by the trial court stating that the evidence tended to show the existence of a confession to the crime charged was not an impermissible comment invading the province of the jury and its fact-finding function; considering defendant's admissions which tended to show premeditation and deliberation — such as the sheer number of blows with the fire extinguisher, the time between each blow, and the dragging of one victim back into the apartment — the statement did support inclusion of the confession instruction, and the instruction given by the trial court left it to the jury to conclude whether the confession occurred and what weight to give it. *State v. Duke*, 360 N.C. 110, 623 S.E.2d 11, 2005 N.C. LEXIS 1314 (2005).

Defendant's unpreserved argument was that the prosecutor's closing statement to the jury indicated that the court had decided that the defendant acted with deliberation such that the court should have corrected the statement ex mero motu. However, the statement was not

reversible error since (1) it did not directly and unambiguously tell the jury the court formed an opinion on the evidence; (2) because there was no objection, and therefore no overruling by the court of the defendant's objection, the idea was not solidified in the jurors' minds; (3) the statement did not travel outside the record as prohibited by G.S. 15A-1230(a); (4) so that it would not violate G.S. 15A-1222 and G.S. 15A-1232, the court instructed the jury that the court was impartial and that the jury would be mistaken to believe otherwise; and (5) the court instructed the jury it "may" find premeditation and deliberation, and instructed on what basis the jury could make such a finding. *State v. Duke*, 360 N.C. 110, 623 S.E.2d 11, 2005 N.C. LEXIS 1314 (2005).

Remarks made by a prosecutor during closing arguments of defendant's murder trial did not violate the standards of G.S. 15A-1230(a), as the prosecutor's remarks on defendant's alleged actions in the killing of his girlfriend were inferences that reasonably could be drawn from the evidence presented, and the prosecutor's expression of opinion on defendant's possible theory of the case was harmless error. *State v. Anderson*, — N.C. App. —, 624 S.E.2d 393, 2006 N.C. App. LEXIS 191 (2006).

**Defendant Must Show Prejudice for New Trial.** —

Even though the information shown on panels during the State's closing argument was outside of the record, the trial court did not abuse its discretion by denying defendant's motion for a mistrial because defendant failed to show how the error prejudiced the result of the trial; nor did the trial court abuse its discretion by denying defendant the lesser remedy of a curative instruction. *State v. Rashidi*, 172 N.C. App. 628, 617 S.E.2d 68, 2005 N.C. App. LEXIS 1790 (2005), *aff'd*, 360 N.C. 166, 622 S.E.2d 493 (2005).

**Argument Held Improper.** — Defendant, who alleged an insanity defense following shootings, was entitled to a new trial, pursuant to G.S. 15A-1443, because the appellate court

could not say beyond a reasonable doubt that the prosecutor's argument, which was improper and prejudicial because of misleading characterizations and improper inferences, did not contribute to defendant's conviction. *State v. Millsaps*, 169 N.C. App. 340, 610 S.E.2d 437, 2005 N.C. App. LEXIS 617 (2005).

**Argument Held Not Improper. —**

Prosecutor's recitation of only a portion of the

especially heinous, atrocious, or cruel (HAC) aggravating circumstance pattern jury instruction during closing arguments did not constitute gross error but aided the jury in understanding what had been held to be the types of murders in which HAC could be found and thus, was not erroneous. *State v. McNeill*, 360 N.C. 231, 624 S.E.2d 329, 2006 N.C. LEXIS 1 (2006).

## § 15A-1231. Jury instructions.

### CASE NOTES

**Requests for special instructions, etc. —**

When defendant orally requested an instruction that it was legal to possess a controlled substance pursuant to a prescription, his claim on appeal that the trial court did not give this instruction could not be considered because the instruction was not submitted to the trial court

in writing, as required by G.S. 15A-1231(a), and the substance of the proposed instruction was not contained in the appellate record. *State v. Sanders*, 171 N.C. App. 46, 613 S.E.2d 708, 2005 N.C. App. LEXIS 1158 (2005), *aff'd*, 360 N.C. 170, 622 S.E.2d 492 (2005).

## § 15A-1232. Jury instructions; explanation of law; opinion prohibited.

### CASE NOTES

- I. General Consideration.
- II. Expression of Opinion.
  - G. Weight and Credibility of Testimony, etc.
- III. Jury Instructions.
  - F. Instructions as to Particular Offenses.
  - G. Miscellaneous Instructions.

#### I. GENERAL CONSIDERATION.

**Applied** in *State v. Brewington*, 170 N.C. App. 264, 612 S.E.2d 648, 2005 N.C. App. LEXIS 1011 (2005), *cert. denied*, 360 N.C. 67, 621 S.E.2d 881 (2005).

**Cited** in *State v. McHone*, 174 N.C. App. 289, 620 S.E.2d 903, 2005 N.C. App. LEXIS 2391 (2005).

#### II. EXPRESSION OF OPINION.

##### G. Weight and Credibility of Testimony, etc.

##### Opinion as to Weight of Evidence Prohibited. —

An instruction by the trial court stating that the evidence tended to show the existence of a confession to the crime charged was not an impermissible comment invading the province of the jury and its fact-finding function; considering defendant's admissions which tended to show premeditation and deliberation — such as the sheer number of blows with the fire extinguisher, the time between each blow, and the

dragging of one victim back into the apartment — the statement did support inclusion of the confession instruction, and the instruction given by the trial court left it to the jury to conclude whether the confession occurred and what weight to give it. *State v. Duke*, 360 N.C. 110, 623 S.E.2d 11, 2005 N.C. LEXIS 1314 (2005).

Defendant's unpreserved argument was that the prosecutor's closing statement to the jury indicated that the court had decided that the defendant acted with deliberation such that the court should have corrected the statement *ex mero motu*; however, the statement was not reversible error since (1) it did not directly and unambiguously tell the jury the court formed an opinion on the evidence; (2) because there was no objection, and therefore no overruling by the court of the defendant's objection, the idea was not solidified in the jurors' minds; (3) the statement did not travel outside the record as prohibited by G.S. 15A-1230(a); (4) so that it would not violate G.S. 15A-1222 and G.S. 15A-1232, the court instructed the jury that the court was impartial and that the jury would be



mistaken to believe otherwise; and (5) the court instructed the jury it “may” find premeditation and deliberation, and instructed on what basis the jury could make such a finding. *State v. Duke*, 360 N.C. 110, 623 S.E.2d 11, 2005 N.C. LEXIS 1314 (2005).

### III. JURY INSTRUCTIONS.

#### F. Instructions as to Particular Offenses.

**Driving While Intoxicated.** — When a driving-while-impaired defendant requested that the trial court instruct the jury on the expiration date of the vials used to collect blood samples, the trial court properly refused to give the instruction. The requested instruction was

defendant’s version of the evidence in the guise of a jury instruction; had the trial court given it, it would have violated its duty not to express an opinion on the evidence. *State v. Turner*, — N.C. App. —, 628 S.E.2d 464, 2006 N.C. App. LEXIS 979 (2006).

#### G. Miscellaneous Instructions.

**Instruction that Knife Was Deadly Weapon.** — Instructing the jury that the knife allegedly used to commit the assault was a deadly weapon was not error where the evidence presented led to only one conclusion, that the knife was a deadly weapon. *State v. Caudle*, 172 N.C. App. 261, 616 S.E.2d 8, 2005 N.C. App. LEXIS 1430 (2005).

## § 15A-1233. Review of testimony; use of evidence by the jury.

### CASE NOTES

#### Exercise of Discretion by Trial Court. —

Defendant’s claim that the trial court’s refusal to permit the jury to review deputy’s testimony in attempted murder trial was arbitrary and not the result of a reasoned decision-making process was without merit; the record clearly showed that the trial court reasonably exercised its discretion under G.S. 15A-1233(a) in denying the jury’s request based on its concern that the jury might overemphasize the deputy’s testimony and not properly consider the totality of the evidence before them. *State v. McVay*, 174 N.C. App. 335, 620 S.E.2d 883, 2005

N.C. App. LEXIS 2402 (2005).

#### No Abuse of Discretion Found. —

In a drug case, a trial court did not err by responding to the jury’s question regarding the amount of cocaine in a cooler under G.S. 15A-1233(a) because the record showed that no drugs were found inside; moreover, defendant was not prejudiced because the evidence showed that defendant was acquitted of the charges relating to cocaine. *State v. Cardenas*, 169 N.C. App. 404, 610 S.E.2d 240, 2005 N.C. App. LEXIS 681 (2005).

## § 15A-1234. Additional instructions.

### CASE NOTES

**Clarification of “Deliberation” and “Cool State of Blood”.** — Murder defendant was mentally retarded so he was not sentenced to death under G.S. 15A-2005(a)(1); but (1) experts testified he was competent under G.S. 15A-1001(a) to stand trial; and (2) evidence and his girlfriend’s opinion testimony under G.S. 8C-1, N.C. R. Evid. 701, that he was “fine” and “not mentally retarded,” indicated he was able

to form the requisite “deliberation” and “cool state of blood” (as defined *State v. Ruof* jury instructions and which were properly given to the jury in response to a deliberation question under G.S. 15A-1234(a)(1)) when he shot a coworker who teased him about being mentally retarded. *State v. McClain*, 169 N.C. App. 657, 610 S.E.2d 783, 2005 N.C. App. LEXIS 804 (2005).

## § 15A-1235. Length of deliberations; deadlocked jury.

### CASE NOTES

#### I. General Consideration.



## I. GENERAL CONSIDERATION.

**The trial judge did not violate this section, etc. —**

Trial court did not err by allowing defendant to be convicted with fewer than 12 jurors finding him guilty because the trial court's use of the term "consensus" in an instruction did not violate the verdict unanimity requirement, as the trial judge twice repeated that the jury had to unanimously agree on a verdict. *State v.*

*Flemming*, 171 N.C. App. 413, 615 S.E.2d 310, 2005 N.C. App. LEXIS 1260 (2005).

**Giving of Supplemental Instruction Not Abuse of Discretion. —** Trial court did not abuse its discretion by providing a supplemental instruction to the jury which did not threaten to require the jury to deliberate for an unreasonable length of time or for unreasonable intervals. *State v. Hagans*, — N.C. App. —, 628 S.E.2d 776, 2006 N.C. App. LEXIS 719 (2006).

## § 15A-1236. Admonitions to jurors; regulation and separation of jurors.

### CASE NOTES

**No Prejudicial Error Where Defendant Failed to Object. —**

Defendant failed to demonstrate prejudice where he failed to object, the trial court conducted an adequate inquiry and correctly concluded that none of the seated jurors who participated in deliberations were present in the jury room when a newspaper article was read and discussed by the prospective alternate jurors, the admonition specifically advised the prospective jurors that, if they were selected for the jury, they were not to read media reports

about the case, and the record indicated that none of the deliberating jurors saw or read the article, *State v. Hurst*, 360 N.C. 181, 624 S.E.2d 309, 2006 N.C. LEXIS 7 (2006).

**Oral Admonition Held Sufficient. —** Oral giving of cautionary instructions to individual jurors and to the venire was sufficient to satisfy G.S. 15A-1236. *State v. Scanlon*, — N.C. App. —, 626 S.E.2d 770, 2006 N.C. App. LEXIS 541 (2006).

**Cited in** *State v. Elliott*, 360 N.C. 400, 628 S.E.2d 735, 2006 N.C. LEXIS 46 (2006).

## § 15A-1237. Verdict.

### CASE NOTES

**When Verdict Should Be Received and Recorded. —**

Where defendant claimed that the jury was fundamentally flawed because the foreperson lied to the trial court when the foreperson stated that the jury had not come to a verdict and sought to deliberate on the following day even though it appeared that the jury may have, indeed, come to a verdict, the argument failed, as the foreperson followed the instructions of the trial court and waited until all members of the jury were satisfied with the verdict before making the verdict final by marking the form in accordance with G.S. 15A-1237(a). *State v. Lewis*, 172 N.C. App. 97, 616 S.E.2d 1, 2005 N.C. App. LEXIS 1439 (2005).

**Unanimous Verdict. —**

Because of the trial court's failure to ensure that each juror had in mind the same instances of abuse when voting to convict defendant of multiple counts of first-degree sexual offense and indecent liberties with a minor, defendant's right to a unanimous jury verdict was jeopardized. *State v. Bates*, 172 N.C. App. 27, 616 S.E.2d 280, 2005 N.C. App. LEXIS 1585 (2005).

There was no risk of a lack of unanimity

where defendant was charged with and convicted of the same number of offenses, and the evidence supported that number of offenses, and using the same underlying act to support convictions for both first-degree sexual offense and indecent liberties did not violate defendant's constitutional protection against double jeopardy; where the instructions told jury that it must "agree unanimously" on particular sex offenses and limited consideration of first-degree sexual offenses to the approximate dates on which they were alleged to have occurred and to a specific act, and dates and acts corresponded with the evidence, the instructions were proper and there was no lack of unanimity. *State v. Brewer*, 171 N.C. App. 686, 615 S.E.2d 360, 2005 N.C. App. LEXIS 1363 (2005).

Defendant's convictions on five counts of statutory rape and three counts of taking indecent liberties with a child had to be reversed, and he had to be retried on those charges, as the State's proof at trial of many more acts than were pled in those counts meant that the appellate court could not determine whether defendant was found guilty by the required unanimous jury on the counts pled or some other

acts that were not pled; accordingly, defendant's right to conviction by a unanimous jury may have been compromised. *State v. Lawrence*, 170 N.C. App. 200, 612 S.E.2d 678, 2005 N.C. App. LEXIS 1016 (2005).

Defendant's right to a unanimous verdict under N.C. Const. art. I, § 24, G.S. 15A-1201, and G.S. 15A-1237(b) was not violated by generic testimony, or evidence of more incidents than there were criminal charges. *State v. Bullock*, — N.C. App. —, 631 S.E.2d 868, 2006 N.C. App. LEXIS 1572 (2006).

**Unanimous Verdict Found As To Some Charges But Not Others.** — Defendant's right to a unanimous verdict was not violated where the instructions and verdicts contained specific references to the date, act, and location of the alleged acts of first-degree sexual offense. Defendant's right to a unanimous verdict was violated, however, with regard to the charges for felonious sexual contact because the verdict sheets and instructions as to eight of the ten charges were not specific enough to allow the court to determine which specific act each juror had in mind when voting on those counts, and as to the indecent liberties charges because the court was not able to determine whether each juror had in mind the same four incidents when voting to convict defendant on those charges.

*State v. Massey*, 174 N.C. App. 216, 621 S.E.2d 633, 2005 N.C. App. LEXIS 2400 (2005).

**Multiple Short-Form Indictments Did Not Create a Danger of Unanimous Verdicts.** — Appellate court erred in reversing defendant's convictions of first-degree statutory rape, G.S. 14-27.2, and taking indecent liberties with a minor, G.S. 14-202.1(a)(1), as defendant was properly charged by short-form indictments on all the charges as authorized by G.S. 15-144.2(a), because there was no danger of a nonunanimous verdict resulting from the multiple indictments in violation of N.C. Const. art. 1, § 24, and G.S. 15A-1237(b), as even if some jurors disagreed on the kinds of sexual misconduct committed, the jury as a whole would unanimously find that there occurred sexual conduct within the ambit of any immoral, improper, or indecent liberties as required by G.S. 14-202.1(a)(1), and because defendant was indicted on five counts of statutory rape, the victim testified to five specific incidents of statutory rape, and five verdicts of guilty were returned. *State v. Lawrence*, 360 N.C. 368, 627 S.E.2d 609, 2006 N.C. LEXIS 30 (2006).

**Cited in** *State v. Herndon*, — N.C. App. —, 629 S.E.2d 170, 2006 N.C. App. LEXIS 961 (2006).

## § 15A-1240. Impeachment of the verdict.

### CASE NOTES

**Consultation of Dictionary Did Not Violate Right to Confront Witnesses.** — Jury's consultation of dictionary definitions for "malice" did not violate defendant's right to confront the witnesses against him and the jurors' affidavits could not be used to impeach the verdict as the information considered by the jury did not discredit defendant's testimony or witnesses; it concerned legal terminology, not evidence developed at trial. *State v. Bauberger*, — N.C. App. —, 626 S.E.2d 700, 2006 N.C. App. LEXIS 523 (2006).

**Consultation of Dictionary.** — Information contained in jurors' affidavits as to the reading of dictionary definitions of "malice" could not be used to impeach the verdict under G.S. 15A-1240 as under the caselaw, definitions in standard dictionaries were not extraneous information within the meaning of G.S. 8C-1-606(b). *State v. Bauberger*, — N.C. App. —, 626 S.E.2d 700, 2006 N.C. App. LEXIS 523 (2006).

**Testimony as to Juror Misconduct.** — Defendant had no right to an evidentiary hearing on his post-murder conviction motion for

appropriate relief under G.S. 15A-1414 and G.S. 15A-1420. The trial judge did not abuse his discretion in refusing a hearing because defendant failed to make an initial showing of juror misconduct, based on the fact that two jurors had prayed together outside the jury room, and a juror had no right to testify to show the effect of any statement, conduct, event, or condition upon the mind of a juror or concerning the mental processes by which the verdict was determined, G.S. 15A-1240(a), and could only testify to impeach the verdict when the testimony concerned matters not in evidence which came to the attention of one or more jurors under circumstances that violated the defendant's constitutional right to confront the witnesses against him, bribery, intimidation, or attempted bribery or intimidation of a juror, pursuant to G.S. 15A-1240(c). *State v. Elliott*, 360 N.C. 400, 628 S.E.2d 735, 2006 N.C. LEXIS 46 (2006).

**Cited in** *Robinson v. Polk*, 438 F.3d 350, 2006 U.S. App. LEXIS 3454 (Feb. 14, 2006).



## § 15A-1241. Record of proceedings.

### CASE NOTES

#### **Recordation Not Required. —**

Defendant's right to due process and effective assistance of appellate counsel were not violated by trial counsel's failure to request that the trial court record jury selection, bench con-

ferences, and the opening and closing arguments at trial, and such recordings are not required by statute. *State v. Verrier*, 173 N.C. App. 123, 617 S.E.2d 675, 2005 N.C. App. LEXIS 1899 (2005).

## § 15A-1242. Defendant's election to represent himself at trial.

### CASE NOTES

#### **Defendant knowingly, intelligently, and voluntarily waived her right to counsel, etc. —**

Trial judge made the appropriate inquiry under G.S. 15A-1242 as to whether defendant's waiver of counsel was knowing, intelligent, and voluntary, because: (1) the trial judge informed defendant of the right of assistance of counsel, including the right to a court-appointed attorney if defendant was entitled to one; (2) the trial judge made sure that defendant understood that her probation could be revoked, that her sentences could be activated, and that she could serve 11-15 months in prison; and (3) cognizant of those facts, defendant waived her right to counsel. Because defendant's waiver of counsel was knowing, intelligent, and volun-

tary, the trial judge acted properly in revoking defendant's probation, pursuant to G.S. 15A-1344, for her probation violations and activating her prison sentence. *State v. Whitfield*, 170 N.C. App. 618, 613 S.E.2d 289, 2005 N.C. App. LEXIS 1090 (2005).

#### **Request to Proceed Pro Se Properly Granted. —**

Trial court did not err in permitting defendant to waive his right to counsel and allowing him to proceed pro se where the record showed that the trial court fully complied with the requirements set forth in G.S. 15A-1242 before allowing defendant to waive his right to counsel. *State v. Hoover*, — N.C. App. —, 621 S.E.2d 303, 2005 N.C. App. LEXIS 2467 (2005).

## SUBCHAPTER XIII. DISPOSITION OF DEFENDANTS.

### ARTICLE 81B.

#### *Structured Sentencing of Persons Convicted of Crimes.*

##### Part 1. General Provisions.

## § 15A-1340.10. Applicability of structured sentencing.

**Parole Eligibility Report. —** Session Laws 2005-276, ss. 17.28(a)-(c), as amended by Session Laws 2006-66, s. 16.5, provides: "(a) The Post-Release Supervision and Parole Commission shall, with the assistance of the North Carolina Sentencing and Policy Advisory Commission and the Department of Correction, analyze the amount of time each inmate who is eligible for parole on or before July 1, 2007, has served compared to the time served by offenders under Structured Sentencing for comparable crimes. The Commission shall determine if the person has served more time in custody than the person would have served if sentenced

to the maximum sentence under the provisions of Article 81B of Chapter 15A of the General Statutes. The 'maximum sentence', for the purposes of this section, shall be calculated as set forth in subsection (b) of this section.

"(b) For the purposes of this section, the following rules apply for the calculation of the maximum sentence:

"(1) The offense upon which the person was convicted shall be classified as the same felony class as the offense would have been classified if committed after the effective date of Article 81B of Chapter 15A of the General Statutes.

"(2) The minimum sentence shall be the max-



imum number of months in the presumptive range of minimum durations in Prior Record Level VI of G.S. 15A-1340.17(c) for the felony class determined under subdivision (1) of this subsection. The maximum sentence shall be calculated using G.S. 15A-1340.17(d), (e), or (e1).

“(3) If a person is serving sentences for two or more offenses that are concurrent in any respect, then the offense with the greater classification shall be used to determine a single maximum sentence for the concurrent offenses. The fact that the person has been convicted of multiple offenses may be considered by the Commission in making its determinations under subsection (a) of this section.

“(c) The Commission shall report to the Joint Legislative Corrections, Crime Control, and Juvenile Justice Oversight Committee and to the Chairs of the Senate and House of Representatives Appropriations Committees, and the Chairs of the Senate and House of Representatives Appropriations Subcommittees on Justice and Public Safety by April 1, 2007. The report shall include the following: the class of the

offense for which each parole-eligible inmate was convicted and whether an inmate had multiple criminal convictions. The Commission shall reinstate the parole review process for each offender who has served more time than that person would have under Structured Sentencing as provided by subsections (a) and (b) of this section.

“The Commission shall also report on the number of parole-eligible inmates reconsidered in compliance with this section and the number who were actually paroled.”

Session Laws 2006-66, s. 1.2, provides: “This act shall be known as ‘The Current Operations and Capital Improvements Appropriations Act of 2006.’”

Session Laws 2006-66, s. 28.3, provides: “Except for statutory changes or other provisions that clearly indicate an intention to have effects beyond the 2006-2007 fiscal year, the textual provisions of this act apply only to funds appropriated for, and activities occurring during, the 2006-2007 fiscal year.”

Session Laws 2006-66, s. 28.6 is a severability clause.

#### CASE NOTES

**Plain Language Not Violated.** — Trial court’s use of defendant’s prior driving while impaired convictions in determining defendant’s sentence as a Level II offender did not violate G.S. 15A-1340.16(d) as defendant’s prior convictions were not used as aggravating factors; instead, the trial court added points to defendant’s prior record pursuant to G.S. 15A-1340.14, which in contrast to using the same prior convictions to establish a person’s status

as an habitual felon, was not expressly prohibited. Further, the use of the same prior convictions introduced by the State as evidence of malice during trial to increase defendant’s prior record level at sentencing did not violate the plain language of G.S. 15A-1340.10. *State v. Bauberger*, — N.C. App. —, 626 S.E.2d 700, 2006 N.C. App. LEXIS 523 (2006).

**Cited in** *State v. Bryant*, 359 N.C. 554, 614 S.E.2d 479, 2005 N.C. LEXIS 647 (2005).

## § 15A-1340.12. Purposes of sentencing.

#### CASE NOTES

**Habitual Felon Sentence Proper.** — Where defendant was sentenced within the presumptive range as a Level VI habitual felon, because he was given a very favorable plea bargain in which twenty-one felony offenses were consolidated for judgment with the original ten felony offenses such that defendant received no additional time for these twenty-one felonies, his sentence was upheld pursuant to G.S. 15A-1340.12, and counsel was not ineffective for failing to object to the sentence as violative of the Eighth Amendment and on grounds that legislative policy considerations constitute ineffective assistance of counsel. *State v. Cummings*, — N.C. App. —, 622 S.E.2d 183, 2005 N.C. App. LEXIS 2618 (2005).

**A factor that increases an offender’s culpability, etc.** —

Trial court’s finding that defendant joined with one other person in committing the offense differed significantly from the aggravator of G.S. 15A-1340.16(d)(2), and thus was not a proper statutory aggravator; however, it was a proper nonstatutory aggravator since it increased defendant’s culpability, but, since the sentence exceeded the “statutory maximum” and the increased penalty and was supported only by judicial findings of fact, it violated *Blakely*. *State v. Hurt*, 359 N.C. 840, 616 S.E.2d 910, 2005 N.C. LEXIS 837 (2005).

**Applied in** *State v. Norris*, 360 N.C. 507, 630 S.E.2d 915, 2006 N.C. LEXIS 592 (2006).

## Part 2. Felony Sentencing.

### § 15A-1340.13. Procedure and incidents of sentence of imprisonment for felonies.

#### CASE NOTES

**Constitutionality.** — Habitual felon statute under G.S. 15A-1340.13 does not violate the Eighth Amendment, as nothing in the Eighth Amendment prohibits the legislature from enhancing punishment for habitual offenders. *State v. Quick*, 170 N.C. App. 166, 611 S.E.2d 864, 2005 N.C. App. LEXIS 897 (2005).

**State's burden of proof with respect to the existence and classification of defendant's alleged prior conviction was not satisfied, etc.** —

Defendant's habitual offender sentence pursuant to G.S. 15A-1340.13 was remanded for resentencing, where the State's presentation of a prior record level worksheet did not meet its burden of establishing prior convictions under G.S. 15A-1340.14(f), as defendant did not stipulate to the contents of the worksheet. *State v. English*, 171 N.C. App. 277, 614 S.E.2d 405, 2005 N.C. App. LEXIS 1211 (2005).

**Proof of Prior Offenses Insufficient.** — Where defendant, in pleading *nolo contendere*, stipulated to three of defendant's eight prior convictions, but the State failed to prove any of the remaining convictions as required by G.S. 15A-1340.14(f) and G.S. 14-7.4, the trial court erred under G.S. 15A-1340.13(b) and G.S. 15A-1340.14(a) in sentencing defendant as a prior record level III offender based on prior convictions that were not proven at trial; the sentence, despite being agreed to by defendant,

had to be authorized by G.S. 15A-1340.17. *State v. Quick*, 170 N.C. App. 166, 611 S.E.2d 864, 2005 N.C. App. LEXIS 897 (2005).

**Proper Calculation of Defendant's Prior Record Level.** — Appellate court erred in ordering a new sentencing hearing for defendant because the trial court properly calculated defendant's prior record level in sentencing defendant to a minimum term of imprisonment of 80 months to a maximum term of 105 months where, pursuant to G.S. 15A-1340.13(b) and G.S. 15A-1340.14(f), defendant stipulated to defendant's prior record level and the trial court used a reliable method to calculate defendant's prior record level; specifically, the trial court's methodology included relying on defense counsel's statements regarding defendant's prior record level, defense counsel's invitation to consult defendant's prior record level worksheet, and the trial court's knowledge of the plea agreement between defendant and the State. *State v. Alexander*, 359 N.C. 824, 616 S.E.2d 914, 2005 N.C. LEXIS 843 (2005).

**Applied** in *State v. Norris*, 360 N.C. 507, 630 S.E.2d 915, 2006 N.C. LEXIS 592 (2006).

**Cited** in *State v. Allen*, 359 N.C. 425, 615 S.E.2d 256, 2005 N.C. LEXIS 695 (2005); *State v. Murphy*, 172 N.C. App. 734, 616 S.E.2d 567, 2005 N.C. App. LEXIS 1786 (2005); *State v. King*, — N.C. App. —, 630 S.E.2d 719, 2006 N.C. App. LEXIS 1307 (2006).

### § 15A-1340.14. Prior record level for felony sentencing.

#### CASE NOTES

**Determination of Prior Record Level.** — Trial court did not err in calculating defendant's prior record by including his driving while impaired convictions even though those convictions were also elements of his habitual impaired driving convictions; the trial court's calculation of defendant's prior record level did not represent a double-counting of convictions. *State v. Hyden*, — N.C. App. —, 625 S.E.2d 125, 2006 N.C. App. LEXIS 179 (2006).

In a prosecution for murder and related crimes, when a trial court found defendant was on probation when he committed the crime of discharging a firearm into occupied property and increased his prior record level points from eight to nine, and his prior record level from III

to IV, under G.S. 15A-1340.14(b)(7) and (c)(4), the sentence enhancement that defendant committed the crime while on probation did not have to be alleged in the indictment, as sentencing factors did not have to be stated in an indictment. *State v. Wissink*, 172 N.C. App. 829, 617 S.E.2d 319, 2005 N.C. App. LEXIS 1776 (2005).

In a prosecution for murder and related crimes, when a trial court found defendant was on probation when he committed the crime of discharging a firearm into occupied property and increased his prior record level points from eight to nine, and his prior record level from III to IV, under G.S. 15A-1340.14(b)(7) and (c)(4), it was error not to submit the issue of whether



defendant was on probation when he committed the crime to a jury, as: (1) any fact, other than a prior conviction, that increased the penalty for a crime beyond the prescribed presumptive range had to be submitted to a jury and proved beyond a reasonable doubt; (2) defendant's probationary status did not have the procedural safeguards of having been previously submitted to a jury or proved beyond a reasonable doubt; and (3) defendant's acknowledgment, at sentencing, that he was on probation at the time of the crime was not a knowing and intelligent waiver of his right to a jury determination of this issue because, at the time of his sentencing, Blakely and Allen had not been decided, so he was unaware of his right to have a jury decide the question. *State v. Wissink*, 172 N.C. App. 829, 617 S.E.2d 319, 2005 N.C. App. LEXIS 1776 (2005).

Trial court's use of defendant's prior driving while impaired convictions in determining defendant's sentence as a Level II offender did not violate G.S. 15A-1340.16(d) as defendant's prior convictions were not used as aggravating factors; instead, the trial court added points to defendant's prior record pursuant to G.S. 15A-1340.14, which in contrast to using the same prior convictions to establish a person's status as an habitual felon, was not expressly prohibited. Further, the use of the same prior convictions introduced by the State as evidence of malice during trial to increase defendant's prior record level at sentencing did not violate the plain language of G.S. 15A-1340.01. *State v. Bauberger*, — N.C. App. —, 626 S.E.2d 700, 2006 N.C. App. LEXIS 523 (2006).

Since G.S. 15A-1340.14(d) did not prohibit the use of multiple convictions obtained in different courts in the same week, defendant's assignment of error, that the trial court erred by including in its calculation of his prior record level two separate convictions received on the same day in the same county, was overruled. *State v. Fuller*, — N.C. App. —, 632 S.E.2d 509, 2006 N.C. App. LEXIS 1674 (2006).

**Calculation Proper Even Though Not Found by Jury or Admitted by Defendant.**

— Trial court was not precluded from assigning a point in the calculation of defendant's prior record level where all the elements of the present offense were included in a prior offense even though the same was neither found by the jury beyond a reasonable doubt nor admitted by defendant. *State v. Poore*, 172 N.C. App. 839, 616 S.E.2d 639, 2005 N.C. App. LEXIS 1774 (2005).

Defendant's habitual offender sentence pursuant to G.S. 15A-1340.13 was remanded for resentencing; the State's presentation of a prior record level worksheet did not meet its burden of establishing prior convictions under G.S. 15A-1340.14(f), as defendant did not stipulate to the contents of the worksheet. *State v. En-*

*glish*, 171 N.C. App. 277, 614 S.E.2d 405, 2005 N.C. App. LEXIS 1211 (2005).

Trial court erred in determining defendant's prior record level pursuant to G.S. 15A-1340.14(e), as the State failed to show that defendant's prior conviction in New York was substantially similar to a class I misdemeanor in North Carolina. *State v. Ayscue*, 169 N.C. App. 548, 610 S.E.2d 389, 2005 N.C. App. LEXIS 677 (2005).

Enhanced sentence imposed on defendant's drug convictions had to be remanded for resentencing, because error based on insufficient evidence as a matter of law does not require an objection at the sentencing hearing to be preserved for appellate review, G.S. 15A-1446(d)(5), (18), and the trial court failed to satisfy its burden under G.S. 15A-1340.14(e) to show that defendant's Texas convictions were substantially similar to corresponding Class I North Carolina felony offenses. *State v. Huu The Cao*, — N.C. App. —, 626 S.E.2d 301, 2006 N.C. App. LEXIS 185 (2006).

Trial court erred in sentencing defendant as a level IV offender on his conviction of second-degree murder, as the trial court erred in finding that a prior New York conviction of N.Y. Penal Law § 120.05 was substantially similar to North Carolina's offense of simple assault set forth in G.S. 14-33(a), as the North Carolina offense required serious injury to the victim and the New York offense did not; furthermore, under G.S. 14-2.5, an attempt to commit a misdemeanor or a felony is punishable under the next lower classification as the offense the offender attempted to commit, and defendant's prior New York conviction for attempted second-degree assault should have been treated as a class 3 misdemeanor, which would have not had any point value for prior record purposes. *State v. Hanton*, — N.C. App. —, 623 S.E.2d 600, 2006 N.C. App. LEXIS 45 (2006).

Trial court did not err in sentencing defendant based on defendant's stipulation as to his prior criminal history, which was sufficient to prove that defendant had enough prior criminal history points to be sentenced within a certain sentencing range; even if it was conceded that only one of defendant's two prior convictions on the same date should have been counted in the prior criminal history, the sentencing points still would have allowed for sentencing in the same range, and thus any error in sentencing defendant was harmless. *State v. Bethea*, 173 N.C. App. 43, 617 S.E.2d 687, 2005 N.C. App. LEXIS 1907 (2005).

Appellate court erred in ordering a new sentencing hearing for defendant because the trial court properly calculated defendant's prior record level in sentencing defendant to a minimum term of imprisonment of 80 months to a maximum term of 105 months where, pursuant to G.S. 15A-1340.13(b) and G.S. 15A-1340.14(f),



defendant stipulated to defendant's prior record level and the trial court used a reliable method to calculate defendant's prior record level; specifically, the trial court's methodology included relying on defense counsel's statements regarding defendant's prior record level, defense counsel's invitation to consult defendant's prior record level worksheet, and the trial court's knowledge of the plea agreement between defendant and the State. *State v. Alexander*, 359 N.C. 824, 616 S.E.2d 914, 2005 N.C. LEXIS 843 (2005).

**Proof of Criminal History.** —

Where defendant, in pleading *nolo contendere*, stipulated to three of defendant's eight prior convictions, but the State failed to prove any of the remaining convictions as required by G.S. 15A-1340.14(f) and G.S. 14-7.4, the trial court erred under G.S. 15A-1340.13(b) and G.S. 15A-1340.14(a) in sentencing defendant as a prior record level III offender based on prior convictions that were not proven at trial; the sentence, despite being agreed to by defendant, had to be authorized by G.S. 15A-1340.17. *State v. Quick*, 170 N.C. App. 166, 611 S.E.2d 864, 2005 N.C. App. LEXIS 897 (2005).

Even though defendant did not disagree with statements made by the prosecutor or the trial court as to his prior convictions, defendant did not clearly stipulate to his prior convictions and the State provided no other proof of prior convictions; therefore, pursuant to G.S. 15A-1340.14(f), the State failed to meet its burden of proving defendant's prior record level, and defendant was entitled to a new sentencing hearing. *State v. McIlwaine*, 169 N.C. App. 397, 610 S.E.2d 399, 2005 N.C. App. LEXIS 607 (2005).

State met its burden of proving defendant's prior convictions by presenting a certified Division of Criminal Information printout and a certified Division of Motor Vehicle driving history to the court. *State v. Jordan*, — N.C. App. —, 621 S.E.2d 229, 2005 N.C. App. LEXIS 2481 (2005).

**Sentence Did Not Constitute Cruel And Unusual Punishment.** — Sentence consistent with G.S. 15A-1340.14 did not constitute cruel and unusual punishment under the Eighth Amendment; the State's use of defendant's

prior misdemeanor convictions to enhance a sentence already enhanced under the Habitual Felon Act, G.S. 14-7.1 et seq., did not constitute cruel and unusual punishment. *State v. Hall*, 174 N.C. App. 353, 620 S.E.2d 723, 2005 N.C. App. LEXIS 2397 (2005).

**Stipulation.** —

Based on defense counsel's clear stipulation that defendant was a Level IV felon with ten prior record points, defendant's prior record level was sufficiently proven. Hence, defendant's claim that the trial court committed plain error by sentencing defendant as a Class C, Level IV offender was overruled. *State v. Renfro*, — N.C. App. —, 621 S.E.2d 221, 2005 N.C. App. LEXIS 2483 (2005).

Trial court's findings regarding defendant's prior record points and prior record level were supported by the evidence under G.S. 15A-1340.14(f) as defense counsel stipulated to the convictions shown on a worksheet and found by the trial court to support a felony record level IV. *State v. Cromartie*, — N.C. App. —, 627 S.E.2d 677, 2006 N.C. App. LEXIS 701 (2006).

Matter was remanded for resentencing as, *inter alia*: (1) the parties stipulated to several out-of-state convictions on the prior record level worksheet, the date of the convictions, and their classification; (2) based on the stipulation, the trial court found that defendant had six points for a prior record level of III; and (3) the question of whether a conviction under an out-of-state statute was substantially similar to an offense under North Carolina statutes was a question of law to be resolved by the trial court. *State v. Palmateer*, — N.C. App. —, 634 S.E.2d 592, 2006 N.C. App. LEXIS 1967 (2006).

**Applied** in *State v. Hadden*, — N.C. App. —, 624 S.E.2d 417, 2006 N.C. App. LEXIS 190 (2006).

**Cited** in *State v. Brown*, 170 N.C. App. 601, 613 S.E.2d 284, 2005 N.C. App. LEXIS 1069 (2005), cert. denied, 360 N.C. 68, 621 S.E.2d 882 (2005); *State v. Allen*, 359 N.C. 425, 615 S.E.2d 256, 2005 N.C. LEXIS 695 (2005); *State v. Murphy*, 172 N.C. App. 734, 616 S.E.2d 567, 2005 N.C. App. LEXIS 1786 (2005); *State v. King*, — N.C. App. —, 630 S.E.2d 719, 2006 N.C. App. LEXIS 1307 (2006).

## § 15A-1340.15. Multiple convictions.

### CASE NOTES

**Proper Assignment of Points.** — Trial court did not err in assigning one point in defendant's prior record level calculation under G.S. 15A-1340.14(b)(5) for conviction of purchase or possession of beer or wine under G.S.

18B-302, as any person who violated any provision of the chapter at issue was guilty of a class one misdemeanor. *State v. Frady*, — N.C. App. —, 623 S.E.2d 346, 2006 N.C. App. LEXIS 53 (2006).

## § 15A-1340.16. Aggravated and mitigated sentences.

### CASE NOTES

**Constitutionality.** — Those parts of G.S. 15A-1340.16(a), (b), and (c) that allow a judge to find an aggravating factor be proved by a preponderance of the evidence are unconstitutional under U.S. Const. amend VI; those aggravators must be proved to a jury beyond a reasonable doubt. The court struck those provisions, but left G.S. 15A-1340.16(d), which was constitutional and stood on its own, intact. *State v. Allen*, 359 N.C. 425, 615 S.E.2d 256, 2005 N.C. LEXIS 695 (2005).

#### **Findings.** —

Regarding two counts of robbery with a dangerous weapon, the trial court erred in finding an aggravating factor and sentencing a juvenile defendant within the aggravated range in violation of his Sixth Amendment right to a jury trial, where there was no evidence that the facts for the aggravating factor were presented to a jury, proven beyond a reasonable doubt, nor stipulated to by the juvenile; hence, the matter was remanded for resentencing. *State v. Oglesby*, — N.C. App. —, 622 S.E.2d 152, 2005 N.C. App. LEXIS 2624 (2005).

Sentence in the aggravated range violated defendant's Sixth Amendment right to a jury trial. The aggravating factors found by the trial court pursuant to G. S. 15A-1340.16 were not admitted by defendant, were not found by a jury, and did not constitute prior convictions. *State v. Lacey*, — N.C. App. —, 623 S.E.2d 351, 2006 N.C. App. LEXIS 10 (2006).

Defendant was entitled to resentencing where the trial judge made findings of aggravating factors and imposed an aggravated range sentence from a minimum term of 120 months to maximum term of 153 months of imprisonment for armed robbery without defendant either stipulating to the findings or a jury finding defendant guilty of the aggravating factors beyond a reasonable doubt. *State v. Corey*, 173 N.C. App. 444, 618 S.E.2d 784, 2005 N.C. App. LEXIS 2011 (2005).

Trial court did not violate defendant's Sixth Amendment right to jury trial when it found that a statutory aggravating factor existed, but sentenced defendant within the presumptive range. *State v. Norris*, 360 N.C. 507, 630 S.E.2d 915, 2006 N.C. LEXIS 592 (2006).

**Finding Not Found By Jury Violated Sixth Amendment.** — Where the trial court, sentencing defendant for attempted voluntary manslaughter, enhanced the sentence, pursuant to G.S. 15A-1340.16, based on the aggravating factor found by the trial court that the victim suffered serious injury that was permanent and debilitating, this violated U.S. Const., Amend. VI because the fact was not found by a

jury beyond the reasonable doubt. *State v. Bullock*, 171 N.C. App. 763, 615 S.E.2d 337, 2005 N.C. App. LEXIS 1353 (2005).

Trial court was not required to resentence defendant, as it did not err in imposing an enhanced term on him following his conviction for second-degree murder; G.S. 15A-1340.16(d) proscribed the use of the same fact to enhance a sentence, which the trial court did not do, but did not prohibit use of the same source, such as the Florida fugitive warrant that the trial court relied on. *State v. Beck*, 359 N.C. 611, 614 S.E.2d 274, 2005 N.C. LEXIS 644 (2005).

#### **Burden of Proof.** —

Defendant's sentence for felony child abuse inflicting serious bodily injury was remanded for resentencing where the aggravating factor under G.S. 15A-1340.16 of the crime being heinous, atrocious, or cruel was established by a trial judge by the preponderance of the evidence; under U.S. Const. amend. VI, defendant had a right to have that aggravating factor determined by a jury beyond a reasonable doubt and not simply by a trial judge by the preponderance of the evidence. *State v. Allen*, 359 N.C. 425, 615 S.E.2d 256, 2005 N.C. LEXIS 695 (2005).

#### **Proof of Element of Offense Not to Be Used for Aggravating Factor.** —

Trial court's use of defendant's prior driving while impaired convictions in determining defendant's sentence as a Level II offender did not violate G.S. 15A-1340.16(d) as defendant's prior convictions were not used as aggravating factors; instead, the trial court added points to defendant's prior record pursuant to G.S. 15A-1340.14, which in contrast to using the same prior convictions to establish a person's status as an habitual felon, was not expressly prohibited. Further, the use of the same prior convictions introduced by the State as evidence of malice during trial to increase defendant's prior record level at sentencing did not violate the plain language of G.S. 15A-1340.10. *State v. Bauberger*, — N.C. App. —, 626 S.E.2d 700, 2006 N.C. App. LEXIS 523 (2006).

#### **Evidence of Good Character.** —

Under G.S. 15A-1443(c), exclusion of the defendant's mother's testimony that she believed that he had remorse for the two murders that he committed and that he would adjust well to prison life was harmless error beyond a reasonable doubt because there were other similar opinions that were admitted and there was no foundation laid for the mother's opinions under G.S. 15A-1340.16(e)(12). *State v. Duke*, 360 N.C. 110, 623 S.E.2d 11, 2005 N.C. LEXIS 1314 (2005).



### **Breach of Trust — Aggravating Factor.**

While the Court of Appeals of North Carolina has recognized a position of trust aggravating factor in familial relationships when the child in question is a minor, there is no precedent for such a finding where the child in question is an adult; therefore, in a case involving assault with a deadly weapon with intent to kill inflicting serious injury, the aggravating circumstance was improperly found, and, even if there was such a relationship, the facts showed that the crime was not committed by taking advantage of a relationship with the victim's mother. *State v. Nicholson*, 169 N.C. App. 390, 610 S.E.2d 433, 2005 N.C. App. LEXIS 601 (2005).

### **Proper Aggravation. —**

Defendant has failed to show any abuse in the trial court's discretion to sentence defendant in the aggravating range under G.S. 15A-1340.16 after the jury found the aggravating factor that defendant took advantage of a position of trust or confidence to exist for each offense defendant committed towards his minor victim, the defendant's stepdaughter, beyond a reasonable doubt. Therefore, the sentence was proper notwithstanding the trial court also finding two mitigating factors to exist. *State v. Anderson*, — N.C. App. —, 627 S.E.2d 501, 2006 N.C. App. LEXIS 703 (2006).

### **Improper Aggravation. —**

Trial court violated Blakely by imposing an aggravated sentence that exceeded the statutory maximum after making a unilateral finding that defendant was on pretrial release for another charge when he committed the instant offense. Since Blakely errors arising under North Carolina's Structured Sentencing Act were structural and, therefore, reversible per se, defendant's case had to be remanded to the trial court for resentencing. *State v. Blackwell*, 359 N.C. 814, 618 S.E.2d 213, 2005 N.C. LEXIS 846 (2005).

**Failure to Submit Aggravator to Jury was Error. —** Where a trial court failed to submit to a jury the factual issue of the sentencing aggravator that defendant took advantage of a position of trust and confidence to commit the crimes, the finding of that aggravating factor was error unless defendant admitted to it; since cases holding that an offender had the right to have a jury determine the existence of aggravating factors had not been decided at the time of defendant's sentencing hearing, he was unaware of this right, his stipulation to the factual basis for his plea was not a knowing and intelligent act done with sufficient awareness of the relevant circumstances and likely consequences, and he did not knowingly and effectively stipulate to the aggravating factor, or waive his right to a jury trial on the issue of the aggravating factor.

*State v. Meynardie*, 172 N.C. App. 127, 616 S.E.2d 21, 2005 N.C. App. LEXIS 1576 (2005).

Defendant was entitled to a new sentencing hearing because the judge, not the jury, found as an aggravating factor that defendant took advantage of a position of trust or confidence. *State v. Massey*, 174 N.C. App. 216, 621 S.E.2d 633, 2005 N.C. App. LEXIS 2400 (2005).

The sentence imposed for conviction of second-degree murder was error where the aggravated sentence imposed by the trial court pursuant to G.S. 15A-1340.16(d) was based on factors neither pled in an indictment, found by a jury beyond a reasonable doubt, nor admitted by defendant. *State v. Harris*, — N.C. App. —, 623 S.E.2d 588, 2006 N.C. App. LEXIS 57 (2006).

**Right To Jury Trial Violated by Finding of Aggravating Factor. —** Where, in sentencing defendant, the trial court found as an aggravating factor that defendant took advantage of a position of trust or confidence to commit the offense, this judicial finding under G.S. 15A-1340.16 violated defendant's Sixth Amendment right to be tried by a jury, as the jury did not find the aggravating factor beyond a reasonable doubt, an error that was reversible per se. *State v. Lewis*, 172 N.C. App. 97, 616 S.E.2d 1, 2005 N.C. App. LEXIS 1439 (2005).

**Right to Jury Determination. —** Trial court erred where, in sentencing defendant for two counts of assault with a deadly weapon inflicting serious injury, the trial court found as aggravating factors that defendant committed the offense while on pretrial release on another charge and that he joined with more than one other person in committing the offense, since these were not prior convictions, not admitted by defendant, and the facts for the aggravators were not presented to a jury and proved beyond a reasonable doubt; use of defendant's prior juvenile adjudication as an aggravator was also error since it was not a prior conviction, and not proven to a jury beyond a reasonable doubt. *State v. Yarrell*, 172 N.C. App. 135, 616 S.E.2d 258, 2005 N.C. App. LEXIS 1428 (2005).

Resentencing was necessary where the trial court sentenced defendant as a habitual felon at the top of the aggravated range, to a term of 167 to 210 months, but the aggravating factors under G.S. 15A-1340.16(d) were not found beyond a reasonable doubt by the jury and were not admitted by defendant. *State v. Phillips*, 172 N.C. App. 143, 615 S.E.2d 880, 2005 N.C. App. LEXIS 1426 (2005).

North Carolina Supreme Court has considered the application of Blakely to North Carolina's Structured Sentencing Act. G.S. 15A-1340 et seq., and held that U.S. Const. Amend. 6 required aggravating sentencing factors, like elements, to be found by a jury beyond a reasonable doubt; however, the trial court sentenced defendant, pursuant to G.S. 15A-



1340.16, to the maximum aggravated range terms of imprisonment based on its finding of two aggravating factors without the jury's consideration, and therefore if the court had not already awarded defendant a new trial on separate grounds, he would have been entitled to a new sentencing hearing on this basis. *State v. McCoy*, 174 N.C. App. 105, 620 S.E.2d 863, 2005 N.C. App. LEXIS 2289 (2005).

**Blakely Issue Not Reached.** — Defendant's claim of a *Blakely v. Washington*, 542 U.S. 296 (2004), violation was not reached as defendant was indicted on March 13, 1995, which was before the certification date of the *State v. Allen*, 615 S.E.2d 256 (2005), opinion, his appeal was not pending direct review, and

his case was final; defendant did not appeal the trial court's acceptance of the plea agreement under which he entered his Alford pleas, the finding of aggravating and mitigating factors by the trial court, nor his sentence to 55 years of imprisonment and it was not until November 7, 2003, that defendant filed a petition for a writ of certiorari and was allowed a limited review of only those issues within his appeal of right pursuant to G.S. 15A-1444(a1) and (a2). *State v. Pender*, — N.C. App. —, 622 S.E.2d 664, 2005 N.C. App. LEXIS 2710 (2005).

**Cited** in *State v. Everette*, 172 N.C. App. 237, 616 S.E.2d 237, 2005 N.C. App. LEXIS 1437 (2005); *State v. Hagans*, — N.C. App. —, 628 S.E.2d 776, 2006 N.C. App. LEXIS 719 (2006).

## § 15A-1340.16A. Enhanced sentence if defendant is convicted of a Class A, B1, B2, C, D, or E felony and the defendant used, displayed, or threatened to use or display a firearm during the commission of the felony.

### CASE NOTES

**Cited** in *State v. Allen*, 359 N.C. 425, 615 S.E.2d 256, 2005 N.C. LEXIS 695 (2005).

## § 15A-1340.17. Punishment limits for each class of offense and prior record level.

### CASE NOTES

#### **Habitual Felons.** —

Where defendant, in pleading nolo contendere, stipulated to three of defendant's eight prior convictions, but the State failed to prove any of the remaining convictions as required by G.S. 15A-1340.14(f) and G.S. 14-7.4, the trial court erred under G.S. 15A-1340.13(b) and G.S. 15A-1340.14(a) in sentencing defendant as a prior record level III offender based on prior convictions that were not proven at trial; the sentence, despite being agreed to by defendant, had to be authorized by G.S. 15A-1340.17. *State v. Quick*, 170 N.C. App. 166, 611 S.E.2d 864, 2005 N.C. App. LEXIS 897 (2005).

#### **Findings as to Aggravating Factors.** —

Trial court did not violate defendant's Sixth Amendment right to a jury trial by sentencing him, under G.S. 15A-1340.17(c), within the aggravated range because of aggravating factors that the court found, but which were not admitted by defendant or submitted to the jury because defendant's sentence fell within the presumptive range. *State v. Garcia*, — N.C. App. —, 621 S.E.2d 292, 2005 N.C. App. LEXIS 2493 (2005).

**Aggravation Improper.** — Trial court erred in sentencing defendant in the aggravated range because the issue was not submitted to the jury and there was no evidence that defendant admitted that the aggravating factor, that defendant committed the offense while on pretrial release of another charge, applied. *State v. Caudle*, 172 N.C. App. 261, 616 S.E.2d 8, 2005 N.C. App. LEXIS 1430 (2005).

#### **Sentence Held Proper.** —

Sentence imposed on defendant of 84 months to 110 months imprisonment, where defendant had a prior record level of III, was not grossly disproportionate under the Eighth Amendment; defendant's sentence was as a Class C felony under G.S. 14-7.6 and his sentence was in the mitigated sentencing range of G.S. 15A-1340.17. *State v. Flemming*, 171 N.C. App. 413, 615 S.E.2d 310, 2005 N.C. App. LEXIS 1260 (2005).

**Applied** in *State v. Alexander*, 359 N.C. 824, 616 S.E.2d 914, 2005 N.C. LEXIS 843 (2005); *State v. Norris*, 360 N.C. 507, 630 S.E.2d 915, 2006 N.C. LEXIS 592 (2006).

**Cited** in *State v. Brown*, 170 N.C. App. 601,

613 S.E.2d 284, 2005 N.C. App. LEXIS 1069 (2005), cert. denied, 360 N.C. 68, 621 S.E.2d 882 (2005); State v. Bryant, 359 N.C. 554, 614 S.E.2d 479, 2005 N.C. LEXIS 647 (2005); State v. Allen, 359 N.C. 425, 615 S.E.2d 256, 2005

N.C. LEXIS 695 (2005); State v. Murphy, 172 N.C. App. 734, 616 S.E.2d 567, 2005 N.C. App. LEXIS 1786 (2005); State v. Anderson, — N.C. App. —, 627 S.E.2d 501, 2006 N.C. App. LEXIS 703 (2006).

### Part 3. Misdemeanor Sentencing.

#### § 15A-1340.21. Prior conviction level for misdemeanor sentencing.

##### CASE NOTES

**Cited** in State v. Brown, 170 N.C. App. 601, 613 S.E.2d 284, 2005 N.C. App. LEXIS 1069

(2005), cert. denied, 360 N.C. 68, 621 S.E.2d 882 (2005).

#### § 15A-1340.23. Punishment limits for each class of offense and prior conviction level.

##### CASE NOTES

**Cited** in State v. Brown, 170 N.C. App. 601, 613 S.E.2d 284, 2005 N.C. App. LEXIS 1069 (2005), cert. denied, 360 N.C. 68, 621 S.E.2d 882 (2005); State v. Bryant, 359 N.C. 554, 614 S.E.2d 479, 2005 N.C. LEXIS 647 (2005); State

v. Shearin, 170 N.C. App. 222, 612 S.E.2d 371, 2005 N.C. App. LEXIS 1002 (2005), appeal dismissed, cert. denied, — N.C. —, 624 S.E.2d 369 (2005).

### ARTICLE 82.

#### *Probation.*

#### § 15A-1341. Probation generally.

(a) Use of Probation. — Unless specifically prohibited, a person who has been convicted of any criminal offense may be placed on probation as provided by this Article if the class of offense of which the person is convicted and the person's prior record or conviction level under Article 81B of this Chapter authorizes a community or intermediate punishment as a type of sentence disposition or if the person is convicted of impaired driving under G.S. 20-138.1.

(a1) Deferred Prosecution. — A person who has been charged with a Class H or I felony or a misdemeanor may be placed on probation as provided in this Article on motion of the defendant and the prosecutor if the court finds each of the following facts:

- (1) Prosecution has been deferred by the prosecutor pursuant to written agreement with the defendant, with the approval of the court, for the purpose of allowing the defendant to demonstrate his good conduct.
- (2) Each known victim of the crime has been notified of the motion for probation by subpoena or certified mail and has been given an opportunity to be heard.
- (3) The defendant has not been convicted of any felony or of any misdemeanor involving moral turpitude.
- (4) The defendant has not previously been placed on probation and so states under oath.

(5) The defendant is unlikely to commit another offense other than a Class 3 misdemeanor.

(a2) **Deferred Prosecution for Purpose of Drug Treatment Court Program.** — A defendant eligible for a Drug Treatment Court Program pursuant to Article 62 of Chapter 7A of the General Statutes may be placed on probation if the court finds that prosecution has been deferred by the prosecutor, with the approval of the court, pursuant to a written agreement with the defendant, for the purpose of allowing the defendant to participate in and successfully complete the Drug Treatment Court Program.

(b) **Supervised and Unsupervised Probation.** — The court may place a person on supervised or unsupervised probation. A person on unsupervised probation is subject to all incidents of probation except supervision by or assignment to a probation officer.

(c) **Repealed by Session Laws 1995, c. 429, s. 1.**

(d) **Search of Sex Offender Registration Information Required When Placing a Defendant on Probation.** — When the court places a defendant on probation, the probation officer assigned to the defendant shall conduct a search of the defendant's name or other identifying information against the registration information regarding sex offenders compiled by the Division of Criminal Statistics of the Department of Justice in accordance with Article 27A of Chapter 14 of the General Statutes. The probation officer may conduct the search using the Internet site maintained by the Division of Criminal Statistics. (1977, c. 711, s. 1; 1977, 2nd Sess., c. 1147, ss. 4A, 5; 1981, c. 377, ss. 2, 3; 1993, c. 538, s. 15; 1994, Ex. Sess., c. 24, s. 14(b); 1995, c. 429, s. 1; 1999-298, s. 1; 2006-247, s. 14.)

**Editor's Note.** —

Session Laws 2006-247, s. 1, provides: "This act shall be known as 'An Act To Protect North Carolina's Children/Sex Offender Law Changes'."

Session Laws 2006-247, s. 21, is a severability clause.

Session Laws 2006-247, s. 22, provides, in

part: "Prosecutions for offenses committed before the effective date of this act are not abated or affected by this act, and the statutes that would be applicable but for this act remain applicable to those prosecutions."

**Effect of Amendments.** — Session Laws 2006-247, s. 14, effective August 16, 2006, added subsection (d).

## CASE NOTES

**Double Jeopardy Not Violated by Dismissal.** — Before trial, defendant failed to comply with the conditions of a deferred prosecution agreement he entered under G.S. 15A-1341(a1); because defendant was neither tried on, nor pled guilty to, the original misdemeanor charges, jeopardy never attached so that his

right to be free from double jeopardy under USCS Const. Amend. 5 was not violated by his subsequent trial and conviction for embezzlement by aiding and abetting. *State v. Ross*, 173 N.C. App. 569, 620 S.E.2d 33, 2005 N.C. App. LEXIS 2084 (2005), *aff'd*, — N.C. —, 625 S.E.2d 779 (2006).

## § 15A-1343. Conditions of probation.

(a) **In General.** — The court may impose conditions of probation reasonably necessary to insure that the defendant will lead a law-abiding life or to assist him to do so.

(b) **Regular Conditions.** — As regular conditions of probation, a defendant must:

- (1) Commit no criminal offense in any jurisdiction.
- (2) Remain within the jurisdiction of the court unless granted written permission to leave by the court or his probation officer.
- (3) Report as directed by the court or his probation officer to the officer at reasonable times and places and in a reasonable manner, permit the



officer to visit him at reasonable times, answer all reasonable inquiries by the officer and obtain prior approval from the officer for, and notify the officer of, any change in address or employment.

- (4) Satisfy child support and other family obligations as required by the court. If the court requires the payment of child support, the amount of the payments shall be determined as provided in G.S. 50-13.4(c).
- (5) Possess no firearm, explosive device or other deadly weapon listed in G.S. 14-269 without the written permission of the court.
- (6) Pay a supervision fee as specified in subsection (c1).
- (7) Remain gainfully and suitably employed or faithfully pursue a course of study or of vocational training that will equip him for suitable employment. A defendant pursuing a course of study or of vocational training shall abide by all of the rules of the institution providing the education or training, and the probation officer shall forward a copy of the probation judgment to that institution and request to be notified of any violations of institutional rules by the defendant.
- (8) Notify the probation officer if he fails to obtain or retain satisfactory employment.
- (9) Pay the costs of court, any fine ordered by the court, and make restitution or reparation as provided in subsection (d).
- (10) Pay the State of North Carolina for the costs of appointed counsel, public defender, or appellate defender to represent him in the case(s) for which he was placed on probation.
- (11) At a time to be designated by his probation officer, visit with his probation officer a facility maintained by the Division of Prisons.
- (12) Attend and complete an abuser treatment program if (i) the court finds the defendant is responsible for acts of domestic violence and (ii) there is a program, approved by the Domestic Violence Commission, reasonably available to the defendant, unless the court finds that such would not be in the best interests of justice.

A defendant shall not pay costs associated with a substance abuse monitoring program or any other special condition of probation in lieu of, or prior to, the payments required by this subsection.

In addition to these regular conditions of probation, a defendant required to serve an active term of imprisonment as a condition of special probation pursuant to G.S. 15A-1344(e) or G.S. 15A-1351(a) shall, as additional regular conditions of probation, obey the rules and regulations of the Department of Correction governing the conduct of inmates while imprisoned and report to a probation officer in the State of North Carolina within 72 hours of his discharge from the active term of imprisonment.

Regular conditions of probation apply to each defendant placed on supervised probation unless the presiding judge specifically exempts the defendant from one or more of the conditions in open court and in the judgment of the court. It is not necessary for the presiding judge to state each regular condition of probation in open court, but the conditions must be set forth in the judgment of the court.

Defendants placed on unsupervised probation are subject to the provisions of this subsection, except that defendants placed on unsupervised probation are not subject to the regular conditions contained in subdivisions (2), (3), (6), (8), and (11).

(b1) Special Conditions. — In addition to the regular conditions of probation specified in subsection (b), the court may, as a condition of probation, require that during the probation the defendant comply with one or more of the following special conditions:

- (1) Undergo available medical or psychiatric treatment and remain in a specified institution if required for that purpose.

- (2) Attend or reside in a facility providing rehabilitation, counseling, treatment, social skills, or employment training, instruction, recreation, or residence for persons on probation.
- (2a) Repealed by Session Laws 2002, ch. 126, s. 17.18, effective August 15, 2002.
- (2b) Participate in and successfully complete a Drug Treatment Court Program pursuant to Article 62 of Chapter 7A of the General Statutes.
- (3) Submit to imprisonment required for special probation under G.S. 15A-1351(a) or G.S. 15A-1344(e).
- (3a) Repealed by Session Laws 1997-57, s. 3.
- (3b) Submit to supervision by officers assigned to the Intensive Supervision Program established pursuant to G.S. 143B-262(c), and abide by the rules adopted for that Program. Unless otherwise ordered by the court, intensive supervision also requires multiple contacts by a probation officer per week, a specific period each day during which the offender must be at his or her residence, and that the offender remain gainfully and suitably employed or faithfully pursue a course of study or of vocational training that will equip the offender for suitable employment.
- (3c) Remain at his or her residence unless the court or the probation officer authorizes the offender to leave for the purpose of employment, counseling, a course of study, or vocational training. The offender shall be required to wear a device which permits the supervising agency to monitor the offender's compliance with the condition electronically and to pay a fee for the device as specified in subsection (c2) of this section.
- (4) Surrender his or her driver's license to the clerk of superior court, and not operate a motor vehicle for a period specified by the court.
- (5) Compensate the Department of Environment and Natural Resources or the North Carolina Wildlife Resources Commission, as the case may be, for the replacement costs of any marine and estuarine resources or any wildlife resources which were taken, injured, removed, harmfully altered, damaged or destroyed as a result of a criminal offense of which the defendant was convicted. If any investigation is required by officers or agents of the Department of Environment and Natural Resources or the Wildlife Resources Commission in determining the extent of the destruction of resources involved, the court may include compensation of the agency for investigative costs as a condition of probation. This subdivision does not apply in any case governed by G.S. 143-215.3(a)(7).
- (6) Perform community or reparation service and pay any fee required by law or ordered by the court for participation in the community or reparation service program.
- (7) Submit at reasonable times to warrantless searches by a probation officer of his or her person and of his or her vehicle and premises while the probationer is present, for purposes specified by the court and reasonably related to his or her probation supervision, but the probationer may not be required to submit to any other search that would otherwise be unlawful. Whenever the warrantless search consists of testing for the presence of illegal drugs, the probationer may also be required to reimburse the Department of Correction for the actual cost of drug screening and drug testing, if the results are positive.
- (8) Not use, possess, or control any illegal drug or controlled substance unless it has been prescribed for him or her by a licensed physician and is in the original container with the prescription number affixed



on it; not knowingly associate with any known or previously convicted users, possessors or sellers of any such illegal drugs or controlled substances; and not knowingly be present at or frequent any place where such illegal drugs or controlled substances are sold, kept, or used.

- (8a) Purchase the least expensive annual statewide license or combination of licenses to hunt, trap, or fish listed in G.S. 113-270.2, 113-270.3, 113-270.5, 113-271, 113-272, and 113-272.2 that would be required to engage lawfully in the specific activity or activities in which the defendant was engaged and which constitute the basis of the offense or offenses of which he was convicted.
- (9) If the offense is one in which there is evidence of physical, mental or sexual abuse of a minor, the court should encourage the minor and the minor's parents or custodians to participate in rehabilitative treatment and may order the defendant to pay the cost of such treatment.
- (9a) Repealed by Session Laws 2004-186, s. 1.1, effective December 1, 2004, and applicable to offenses committed on or after that date.
- (10) Satisfy any other conditions determined by the court to be reasonably related to his rehabilitation.
- (b2) Special Conditions of Probation for Sex Offenders and Persons Convicted of Offenses Involving Physical, Mental, or Sexual Abuse of a Minor. — As special conditions of probation, a defendant who has been convicted of an offense which is a reportable conviction as defined in G.S. 14-208.6(4), or which involves the physical, mental, or sexual abuse of a minor, must:
  - (1) Register as required by G.S. 14-208.7 if the offense is a reportable conviction as defined by G.S. 14-208.6(4).
  - (2) Participate in such evaluation and treatment as is necessary to complete a prescribed course of psychiatric, psychological, or other rehabilitative treatment as ordered by the court.
  - (3) Not communicate with, be in the presence of, or found in or on the premises of the victim of the offense.
  - (4) Not reside in a household with any minor child if the offense is one in which there is evidence of sexual abuse of a minor.
  - (5) Not reside in a household with any minor child if the offense is one in which there is evidence of physical or mental abuse of a minor, unless the court expressly finds that it is unlikely that the defendant's harmful or abusive conduct will recur and that it would be in the minor child's best interest to allow the probationer to reside in the same household with a minor child.
  - (6) Satisfy any other conditions determined by the court to be reasonably related to his rehabilitation.
  - (7) Submit to satellite-based monitoring pursuant to Part 5 of Article 27A of Chapter 14 of the General Statutes, if the defendant is described by G.S. 14-208.40(a)(1).
  - (8) Submit to satellite-based monitoring pursuant to Part 5 of Article 27A of Chapter 14 of the General Statutes, if the defendant is in the category described by G.S. 14-208.40(a)(2), and the Department of Correction, based on the Department's risk assessment program, recommends that the defendant submit to the highest possible level of supervision and monitoring.

Defendants subject to the provisions of this subsection shall not be placed on unsupervised probation, except as provided in G.S. 14-208.42.

(b3) Screening and Assessing for Chemical Dependency. — A defendant ordered to submit to a period of residential treatment in the Drug Alcohol Recovery Treatment program (DART) operated by the Department of Correction must undergo a screening to determine chemical dependency. If the



screening indicates the defendant is chemically dependent, the court shall order an assessment to determine the appropriate level of treatment. The assessment may be conducted either before or after the court imposes the condition, but participation in the program shall be based on the results of the assessment.

(c) Statement of Conditions. — A defendant released on supervised probation must be given a written statement explicitly setting forth the conditions on which he is being released. If any modification of the terms of that probation is subsequently made, he must be given a written statement setting forth the modifications.

(c1) Supervision Fee. — Any person placed on supervised probation pursuant to subsection (a) of this section shall pay a supervision fee of thirty dollars (\$30.00) per month, unless exempted by the court. The court may exempt a person from paying the fee only for good cause and upon motion of the person placed on supervised probation. No person shall be required to pay more than one supervision fee per month. The court may require that the fee be paid in advance or in a lump sum or sums, and a probation officer may require payment by such methods if he is authorized by subsection (g) to determine the payment schedule. Supervision fees must be paid to the clerk of court for the county in which the judgment was entered or the deferred prosecution agreement was filed. Fees collected under this subsection shall be transmitted to the State for deposit into the State's General Fund.

(c2) Electronic Monitoring Device Fee. — Any person placed on house arrest with electronic monitoring under subsection (b1) of this section shall pay a fee of ninety dollars (\$90.00) for the electronic monitoring device. The court may exempt a person from paying the fee only for good cause and upon motion of the person placed on house arrest with electronic monitoring. The court may require that the fee be paid in advance or in a lump sum or sums, and a probation officer may require payment by those methods if the officer is authorized by subsection (g) of this section to determine the payment schedule. The fee must be paid to the clerk of court for the county in which the judgment was entered or the deferred prosecution agreement was filed. Fees collected under this subsection shall be transmitted to the State for deposit into the State's General Fund.

(d) Restitution as a Condition of Probation. — As a condition of probation, a defendant may be required to make restitution or reparation to an aggrieved party or parties who shall be named by the court for the damage or loss caused by the defendant arising out of the offense or offenses committed by the defendant. When restitution or reparation is a condition imposed, the court shall take into consideration the factors set out in G.S. 15A-1340.35 and G.S. 15A-1340.36. As used herein, "reparation" shall include but not be limited to the performing of community services, volunteer work, or doing such other acts or things as shall aid the defendant in his rehabilitation. As used herein "aggrieved party" includes individuals, firms, corporations, associations, other organizations, and government agencies, whether federal, State or local, including the Crime Victims Compensation Fund established by G.S. 15B-23. A government agency may benefit by way of reparation even though the agency was not a party to the crime provided that when reparation is ordered, community service work shall be rendered only after approval has been granted by the owner or person in charge of the property or premises where the work will be done.

(e) Costs of Court and Appointed Counsel. — Unless the court finds there are extenuating circumstances, any person placed upon supervised or unsupervised probation under the terms set forth by the court shall, as a condition of probation, be required to pay all court costs and all fees and costs for appointed counsel, public defender, or counsel employed by or under contract

with the Office of Indigent Defense Services in the case in which the person was convicted. The fees and costs for appointed counsel, public defender, or other counsel services shall be determined in accordance with rules adopted by the Office of Indigent Defense Services. The court shall determine the amount of those costs and fees to be repaid and the method of payment.

(f) Repealed by Session Laws 1983, c. 561, s. 5.

(g) Probation Officer May Determine Payment Schedules. — If a person placed on supervised probation is required as a condition of that probation to pay any moneys to the clerk of superior court, the court may delegate to a probation officer the responsibility to determine the payment schedule. The court may also authorize the probation officer to transfer the person to unsupervised probation after all the moneys are paid to the clerk. If the probation officer transfers a person to unsupervised probation, he must notify the clerk of that action. (1977, c. 711, s. 1; 1977, 2nd Sess., c. 1147, ss. 8-10; 1979, c. 662, s. 1; c. 801, s. 3; c. 830, s. 12; 1981, c. 530, ss. 1, 2; 1983, c. 135, s. 1; c. 561, ss. 1-6; c. 567, s. 2; c. 712, s. 1; 1983 (Reg. Sess., 1984), c. 972, ss. 1, 2; 1985, c. 474, ss. 1, 7, 8; 1985 (Reg. Sess., 1986), c. 859, ss. 1, 2; 1987, c. 282, s. 33; c. 397, s. 1; c. 579, ss. 1, 2; c. 598, s. 1; c. 819, s. 32; c. 830, s. 17; 1989, c. 529, s. 5; c. 727, s. 218(4); 1989 (Reg. Sess., 1990), c. 1010, s. 1; c. 1034, s. 1; 1991 (Reg. Sess., 1992), c. 1000, s. 1; 1993, c. 538, s. 16; 1994, Ex. Sess., c. 9, s. 1; c. 24, s. 14(b); 1996, 2nd Ex. Sess., c. 18, s. 20.14(c); 1997-57, s. 3; 1997-443, ss. 11A.119(a), 19.11(a); 1998-212, ss. 17.21(a), 19.4(f); 1999-298, s. 2; 2000-125, s. 8; 2000-144, s. 31; 2002-105, s. 3; 2002-126, ss. 17.18(a), 29A.2(a); 2003-141, s. 1; 2004-186, s. 1.1; 2005-250, s. 4; 2005-276, ss. 17.29, 43.1(f), 43.2(a); 2006-247, s. 15(b).)

#### Editor's Note. —

Session Laws 2006-247, s. 1(a), provides: "This act shall be known as 'An Act To Protect North Carolina's Children/Sex Offender Law Changes'."

Session Laws 2006-247, s. 15(l) provides: "Unless otherwise provided in the section, this section is effective when it becomes law and applies to offenses committed on or after that date. This section also applies to any person sentenced to intermediate punishment on or after that date and to any person released from prison by parole or post-release supervision on or after that date. This section also applies to any person who completes his or her sentence on or after the effective date of this section who is not on post-release supervision or parole. However, the requirement to enroll in a satellite-based program is not mandatory until January 1, 2007, when the program is established."

Session Laws 2006-247, s. 17, provides: "No later than January 1, 2007, the Department of Correction shall develop a graduated risk assessment program that identifies, assesses, and

closely monitors a high-risk sex offender who, while not classified as a sexually violent predator, a recidivist, or convicted of an aggravated offense as those terms are defined in G.S. 14-208.6, may still require extraordinary supervision and may be placed on probation, parole, or post-release supervision only on the conditions provided in G.S. 15A-1343(b2) or G.S. 15A-1368.4(b1)."

Session Laws 2006-247, s. 21, is a severability clause.

Session Laws 2006-247, s. 22, provides, in part: "Prosecutions for offenses committed before the effective date of this act are not abated or affected by this act, and the statutes that would be applicable but for this act remain applicable to those prosecutions."

#### Effect of Amendments. —

Session Laws 2006-247, s. 15(b), effective August 16, 2006, added new subdivisions (b2)(7) and (8); substituted "probation, except as provided in G.S. 14-208.42" for "probation" at the end of the undesignated paragraph of (b2). For applicability provision, see Editor's note.

## CASE NOTES

### I. General Consideration.

#### I. GENERAL CONSIDERATION.

**Acknowledgement of Condition of Probation Sufficient.** — Defendant's executed acknowledgment of the monetary condition of

probation was sufficient to prove notification of probation conditions. *State v. Henderson*, — N.C. App. —, 632 S.E.2d 818, 2006 N.C. App. LEXIS 1832 (2006).



## **§ 15A-1343.2. Special probation rules for persons sentenced under Article 81B.**

(a) **Applicability.** — This section applies only to persons sentenced under Article 81B of this Chapter.

(b) **Purposes of Probation for Community and Intermediate Punishments.** — The Department of Correction shall develop a plan to handle offenders sentenced to community and intermediate punishments. The probation program designed to handle these offenders shall have the following principal purposes: to hold offenders accountable for making restitution, to ensure compliance with the court's judgment, to effectively rehabilitate offenders by directing them to specialized treatment or education programs, and to protect the public safety.

(c) **Probation Caseload Goals.** — It is the goal of the General Assembly that, subject to the availability of funds, caseloads for probation officers supervising persons sentenced to community punishment should not exceed an average of 90 offenders per officer, and caseloads for offenders sentenced to intermediate punishments should not exceed an average of 60 offenders per officer by July 1, 1998.

(d) **Lengths of Probation Terms Under Structured Sentencing.** — Unless the court makes specific findings that longer or shorter periods of probation are necessary, the length of the original period of probation for offenders sentenced under Article 81B shall be as follows:

- (1) For misdemeanants sentenced to community punishment, not less than six nor more than 18 months;
- (2) For misdemeanants sentenced to intermediate punishment, not less than 12 nor more than 24 months;
- (3) For felons sentenced to community punishment, not less than 12 nor more than 30 months; and
- (4) For felons sentenced to intermediate punishment, not less than 18 nor more than 36 months.

If the court finds at the time of sentencing that a longer period of probation is necessary, that period may not exceed a maximum of five years, as specified in G.S. 15A-1342 and G.S. 15A-1351.

**Extension.** — The court may with the consent of the offender extend the original period of the probation if necessary to complete a program of restitution or to complete medical or psychiatric treatment ordered as a condition of probation. This extension may be for no more than three years, and may only be ordered in the last six months of the original period of probation.

(e) **Delegation to Probation Officer in Community Punishment.** — Unless the presiding judge specifically finds in the judgment of the court that delegation is not appropriate, the Division of Community Corrections in the Department of Correction may require an offender sentenced to community punishment to:

- (1) Perform up to 20 hours of community service, and pay the fee prescribed by law for this supervision;
- (2) Report to the offender's probation officer on a frequency to be determined by the officer; or
- (3) Submit to substance abuse assessment, monitoring or treatment.

If the Division imposes any of the above requirements, then it may subsequently reduce or remove those same requirements.

If the probation officer exercises authority delegated by the court pursuant to this subsection, the offender may file a motion with the court to review the action taken by the probation officer. The offender shall be given notice of the right to seek such a court review. The Division may exercise any authority



delegated to it under this subsection only if it first determines that the offender has failed to comply with one or more of the conditions of probation imposed by the court.

(f) Delegation to Probation Officer in Intermediate Punishments. — Unless the presiding judge specifically finds in the judgment of the court that delegation is not appropriate, the Division of Community Corrections in the Department of Correction may require an offender sentenced to intermediate punishment to:

- (1) Perform up to 50 hours of community service, and pay the fee prescribed by law for this supervision;
- (2) Submit to a curfew which requires the offender to remain in a specified place for a specified period each day and wear a device that permits the offender's compliance with the condition to be monitored electronically;
- (3) Submit to substance abuse assessment, monitoring or treatment; or
- (4) Participate in an educational or vocational skills development program.
- (5) Submit to satellite-based monitoring pursuant to Part 5 of Article 27A of Chapter 14 of the General Statutes, if the defendant is described by G.S. 14-208.40(a)(2).

If the Division imposes any of the above requirements, then it may subsequently reduce or remove those same requirements.

If the probation officer exercises authority delegated to him or her by the court pursuant to this subsection, the offender may file a motion with the court to review the action taken by the probation officer. The offender shall be given notice of the right to seek such a court review. The Division may exercise any authority delegated to it under this subsection only if it first determines that the offender has failed to comply with one or more of the conditions of probation imposed by the court.

(f1) Mandatory Condition of Satellite-Based Monitoring for Some Sex Offenders. — Notwithstanding any other provision of this section, the court shall impose satellite-based monitoring pursuant to Part 5 of Article 27A of Chapter 14 of the General Statutes as a condition of probation on any offender who is described by G.S. 14-208.40(a)(1).

(g) Repealed by Session Laws 1993 (Reg. Sess., 1994), c. 19, s. 3.

(h) Definitions. — For purposes of this section, the definitions in G.S. 15A-1340.11 apply. (1993, c. 538, s. 17.1; 1994, Ex. Sess., c. 14, s. 22; c. 19, s. 3; c. 24, s. 14(b); 1993 (Reg. Sess., 1994), c. 767, s. 8; 1997-57, s. 4; 2001-487, s. 47(b); 2006-247, ss. 15(c), 15(d).)

**Editor's Note.** — Session Laws 2006-247, s. 1(a) provides: "This act shall be known as 'An Act To Protect North Carolina's Children/Sex Offender Law Changes'."

Session Laws 2006-247, s. 15(l) provides: "Unless otherwise provided in the section, this section is effective when it becomes law and applies to offenses committed on or after that date. This section also applies to any person sentenced to intermediate punishment on or after that date and to any person released from prison by parole or post-release supervision on or after that date. This section also applies to any person who completes his or her sentence on or after the effective date of this section who is not on post-release supervision or parole.

However, the requirement to enroll in a satellite-based program is not mandatory until January 1, 2007, when the program is established."

Session Laws 2006-247, s. 21 is a severability clause.

Session Laws 2006-247, s. 22, provides, in part: "Prosecutions for offenses committed before the effective date of this act are not abated or affected by this act, and the statutes that would be applicable but for this act remain applicable to those prosecutions."

**Effect of Amendments.** — Session Laws 2006-247, s. 15(c), (d), effective August 16, 2006, added new subdivision (f)(5) and subsection (f1). For applicability provision, see Editor's note.

## **§ 15A-1344. Response to violations; alteration and revocation.**

(a) Authority to Alter or Revoke. — Except as provided in subsection (b), probation may be reduced, terminated, continued, extended, modified, or revoked by any judge entitled to sit in the court which imposed probation and who is resident or presiding in the district court district as defined in G.S. 7A-133 or superior court district or set of districts as defined in G.S. 7A-41.1, as the case may be, where the sentence of probation was imposed, where the probationer violates probation, or where the probationer resides. Upon a finding that an offender sentenced to community punishment under Article 81B has violated one or more conditions of probation, the court's authority to modify the probation judgment includes the authority to require the offender to comply with conditions of probation that would otherwise make the sentence an intermediate punishment. The district attorney of the prosecutorial district as defined in G.S. 7A-60 in which probation was imposed must be given reasonable notice of any hearing to affect probation substantially.

(b) Limits on Jurisdiction to Alter or Revoke Unsupervised Probation. — If the sentencing judge has entered an order to limit jurisdiction to consider a sentence of unsupervised probation under G.S. 15A-1342(h), a sentence of unsupervised probation may be reduced, terminated, continued, extended, modified, or revoked only by the sentencing judge or, if the sentencing judge is no longer on the bench, by a presiding judge in the court where the defendant was sentenced.

(c) Procedure on Altering or Revoking Probation; Returning Probationer to District Where Sentenced. — When a judge reduces, terminates, extends, modifies, or revokes probation outside the county where the judgment was entered, the clerk must send a copy of the order and any other records to the court where probation was originally imposed. A court on its own motion may return the probationer to the district court district as defined in G.S. 7A-133 or superior court district or set of districts as defined in G.S. 7A-41.1, as the case may be, where probation was imposed or where the probationer resides for reduction, termination, continuation, extension, modification, or revocation of probation. In cases where the probation is revoked in a county other than the county of original conviction the clerk in that county must issue a commitment order and must file the order revoking probation and the commitment order, which will constitute sufficient permanent record of the proceeding in that court, and must send a certified copy of the order revoking probation, the commitment order, and all other records pertaining thereto to the county of original conviction to be filed with the original records. The clerk in the county other than the county of original conviction must issue the formal commitment to the North Carolina Department of Correction.

(d) Extension and Modification; Response to Violations. — At any time prior to the expiration or termination of the probation period, the court may after notice and hearing and for good cause shown extend the period of probation up to the maximum allowed under G.S. 15A-1342(a) and may modify the conditions of probation. The probation period shall be tolled if the probationer shall have pending against him criminal charges in any court of competent jurisdiction, which, upon conviction, could result in revocation proceedings against him for violation of the terms of this probation. The hearing may be held in the absence of the defendant, if he fails to appear for the hearing after a reasonable effort to notify him. If a convicted defendant violates a condition of probation at any time prior to the expiration or termination of the period of probation, the court, in accordance with the provisions of G.S. 15A-1345, may continue him on probation, with or without modifying the conditions, may place the defendant on special probation as provided in subsection (e), or, if continuation, modifi-



cation, or special probation is not appropriate, may revoke the probation and activate the suspended sentence imposed at the time of initial sentencing, if any, or may order that charges as to which prosecution has been deferred be brought to trial; provided that probation may not be revoked solely for conviction of a Class 3 misdemeanor. The court, before activating a sentence to imprisonment established when the defendant was placed on probation, may reduce the sentence, but the reduction shall be consistent with subsection (d1) of this section. A sentence activated upon revocation of probation commences on the day probation is revoked and runs concurrently with any other period of probation, parole, or imprisonment to which the defendant is subject during that period unless the revoking judge specifies that it is to run consecutively with the other period.

(d1) Reduction of Initial Sentence. — If the court elects to reduce the sentence of imprisonment for a felony, it shall not deviate from the range of minimum durations established in Article 81B of this Chapter for the class of offense and prior record level used in determining the initial sentence. If the presumptive range is used for the initial suspended sentence, the reduced sentence shall be within the presumptive range. If the mitigated range is used for the initial suspended sentence, the reduced sentence shall be within the mitigated range. If the aggravated range is used for the initial suspended sentence, the reduced sentence shall be within the aggravated range. If the court elects to reduce the sentence for a misdemeanor, it shall not deviate from the range of durations established in Article 81B for the class of offense and prior conviction level used in determining the initial sentence.

(e) Special Probation in Response to Violation. — When a defendant has violated a condition of probation, the court may modify his probation to place him on special probation as provided in this subsection. In placing him on special probation, the court may continue or modify the conditions of his probation and in addition require that he submit to a period or periods of imprisonment, either continuous or noncontinuous, at whatever time or intervals within the period of probation the court determines. In addition to any other conditions of probation which the court may impose, the court shall impose, when imposing a period or periods of imprisonment as a condition of special probation, the condition that the defendant obey the Rules and Regulations of the Department of Correction governing conduct of inmates, and this condition shall apply to the defendant whether or not the court imposes it as a part of the written order. If imprisonment is for continuous periods, the confinement may be in either the custody of the Department of Correction or a local confinement facility. Noncontinuous periods of imprisonment under special probation may only be served in a designated local confinement or treatment facility. Except for probationary sentences for impaired driving under G.S. 20-138.1, the total of all periods of confinement imposed as an incident of special probation, but not including an activated suspended sentence, may not exceed one-fourth the maximum sentence of imprisonment imposed for the offense. For probationary sentences for impaired driving under G.S. 20-138.1, the total of all periods of confinement imposed as an incident of special probation, but not including an activated suspended sentence, shall not exceed one-fourth the maximum penalty allowed by law. No confinement other than an activated suspended sentence may be required beyond the period of probation or beyond two years of the time the special probation is imposed, whichever comes first.

(e1) Criminal Contempt in Response to Violation. — If a defendant willfully violates a condition of probation, the court may hold the defendant in criminal contempt as provided in Article 1 of Chapter 5A of the General Statutes. A finding of criminal contempt by the court shall not revoke the probation. If the offender serves a sentence for contempt in a local confinement facility, the



Department of Correction shall pay for the confinement at the standard rate set by the General Assembly pursuant to G.S. 148-32.1(a) regardless of whether the offender would be eligible under the terms of that subsection.

(e2) **Mandatory Satellite-Based Monitoring Required for Extension of Probation in Response to Violation by Certain Sex Offenders.** — If a defendant who is in the category described by G.S. 14-208.40(a)(1) or G.S. 14-208.40(a)(2) violates probation and if the court extends the probation as a result of the violation, then the court shall order satellite-based monitoring pursuant to Part 5 of Article 27A of Chapter 14 of the General Statutes as a condition of the extended probation.

(f) **Revocation after Period of Probation.** — The court may revoke probation after the expiration of the period of probation if:

- (1) Before the expiration of the period of probation the State has filed a written motion with the clerk indicating its intent to conduct a revocation hearing; and
- (2) The court finds that the State has made reasonable effort to notify the probationer and to conduct the hearing earlier. (1977, c. 711, s. 1; 1977, 2nd Sess., c. 1147, ss. 11, 11A, 13A; 1979, c. 749, ss. 1-3; 1981, c. 377, s. 7; 1983, c. 536; 1987, (Reg. Sess., 1988), c. 1037, ss. 67, 68; 1993, c. 538, s. 18; 1994, Ex. Sess., c. 19, s. 2; c. 24, s. 14(b); 1993 (Reg. Sess., 1994), c. 767, s. 9; c. 769, s. 21.7(a); 1998-212, s. 17.21(c); 2003-151, s. 1; 2006-247, s. 15(e).)

**Editor's Note.** — Session Laws 2006-247, s. 1(a) provides: "This act shall be known as 'An Act To Protect North Carolina's Children/Sex Offender Law Changes'."

Session Laws 2006-247, s. 15(l) provides: "Unless otherwise provided in the section, this section is effective when it becomes law and applies to offenses committed on or after that date. This section also applies to any person sentenced to intermediate punishment on or after that date and to any person released from prison by parole or post-release supervision on or after that date. This section also applies to any person who completes his or her sentence on or after the effective date of this section who is not on post-release supervision or parole.

However, the requirement to enroll in a satellite-based program is not mandatory until January 1, 2007, when the program is established."

Session Laws 2006-247, s. 21 is a severability clause.

Session Laws 2006-247, s. 22, provides, in part: "Prosecutions for offenses committed before the effective date of this act are not abated or affected by this act, and the statutes that would be applicable but for this act remain applicable to those prosecutions."

**Effect of Amendments.** — Session Laws 2006-247, s. 15(e), effective August 16, 2006, added subsection (e2). For applicability provisions, see Editor's note.

## CASE NOTES

**Trial Court Lacked Jurisdiction to Revoke Probation.** — Defendant's 60-month probation term began on the date it was imposed, ran concurrently with his active sentence on another offense under G.S. 15A-1346, and expired when its 60-month term elapsed without allegations of violation; a trial court therefore lacked jurisdiction under G.S. 15A-1344(f) to revoke the probation after the term expired because it could have brought defendant before it to revoke his probation when it modified the conditions of his probation without allegations of violation during the 60-month term. *State v. Surratt*, — N.C. App., 629 S.E.2d 341, 2006 N.C. App. LEXIS 1025 (2006).

**Judgment Revoking Probation Arrested.** —

G.S. 15A-1344(f) requirement applied to G.S. 90-96, and except as provided in G.S. 15A-1344(f), a trial court lacked jurisdiction to revoke a defendant's probation after the expiration of the probationary term; a trial court's revocation of defendant's probation after his probation period expired, without the specific findings of G.S. 15A-1344(f), was error. *State v. Burns*, 171 N.C. App. 759, 615 S.E.2d 347, 2005 N.C. App. LEXIS 1273 (2005).

Judgment revoking defendant's first probation was arrested because the revocation hearing was held 18 months after defendant's probationary period expired. *State v. Henderson*, — N.C. App., 632 S.E.2d 818, 2006 N.C. App. LEXIS 1832 (2006).

**Reasonable Effort to Notify Defendant of Probation Violation.** — "Reasonable ef-

fort” has been defined to mean the diligent and timely implementation of a plan of action; in the context of G.S. 15A-1344(f) that would mean those actions a reasonable person would pursue in seeking to notify defendant of his probation violation and conduct a hearing on the matter. *State v. Burns*, 171 N.C. App. 759, 615 S.E.2d 347, 2005 N.C. App. LEXIS 1273 (2005).

**Revocation of Probation Improper When Decision Delegated to Victim.** — Trial court’s judgment revoking defendant’s probation imposed upon his conviction for obtaining property by false pretenses was reversed because the trial court improperly abdicated its discretionary authority to determine whether probation should be revoked and, instead, delegated to the victim the authority of determining whether revocation was proper by stating that it would continue defendant on probation only if the victim agreed to that course of action. *State v. Arnold*, 169 N.C. App. 438, 610 S.E.2d 396, 2005 N.C. App. LEXIS 672 (2005).

**Probation properly revoked.** — Trial judge made the appropriate inquiry under G.S. 15A-1242 as to whether defendant’s waiver of counsel was knowing, intelligent, and voluntary, because: (1) the trial judge informed defendant of the right of assistance of counsel, including the right to a court-appointed attorney if defendant was entitled to one; (2) the

trial judge made sure that defendant understood that her probation could be revoked, that her sentences could be activated, and that she could serve 11-15 months in prison; and (3) cognizant of those facts, defendant waived her right to counsel. Because defendant’s waiver of counsel was knowing, intelligent, and voluntary, the trial judge acted properly in revoking defendant’s probation, pursuant to G.S. 15A-1344, for her probation violations and activating her prison sentence. *State v. Whitfield*, 170 N.C. App. 618, 613 S.E.2d 289, 2005 N.C. App. LEXIS 1090 (2005).

Trial court did not abuse its discretion in revoking defendant’s probation, even if there was error in basing the violation, in part, on defendant’s failure to meet her curfew, as there was substantial evidence supporting a finding that defendant tested positive for cocaine, failed to complete her community service, failed to notify her probation officer of her change of address, and was in arrears on her restitution payments. *State v. Belcher*, 173 N.C. App. 620, 619 S.E.2d 567, 2005 N.C. App. LEXIS 2112 (2005).

**Failure to Make Findings Not Abuse of Discretion.** — Trial court did not abuse its discretion in revoking defendant’s probation, even though it failed to enter findings regarding the sufficiency of the explanations defendant gave at her probation revocation hearing. *State v. Belcher*, 173 N.C. App. 620, 619 S.E.2d 567, 2005 N.C. App. LEXIS 2112 (2005).

## § 15A-1345. Arrest and hearing on probation violation.

### CASE NOTES

#### IV. Evidence.

##### IV. EVIDENCE.

**Evidence Sufficient to Revoke Probation.** — Completed form for judgment and commitment upon revocation, together with a probation violation report which alleged that defendant failed to report to defendant’s proba-

tion officer and which was incorporated by reference, contained sufficient findings to support revocation of defendant’s second probation. *State v. Henderson*, — N.C. App. —, 632 S.E.2d 818, 2006 N.C. App. LEXIS 1832 (2006).

## § 15A-1346. Commencement of probation; multiple sentence.

### CASE NOTES

**Probationary Term Runs Concurrently With Another Sentence.** — Defendant’s 60-month probation term began on the date it was imposed, ran concurrently with his active sentence on another offense under G.S. 15A-1346, and expired when its 60-month term elapsed without allegations of violation; a trial court

therefore lacked jurisdiction under G.S. 15A-1344(f) to revoke the probation after the term expired because it could have brought defendant before it to revoke his probation when it modified the conditions of his probation without allegations of violation during the 60-month term. *State v. Surratt*, — N.C. App. —,

629 S.E.2d 341, 2006 N.C. App. LEXIS 1025 (2006).

**§ 15A-1347. Appeal from revocation of probation or imposition of special probation upon violation.**

**CASE NOTES**

**Cited** in *State v. Henderson*, — N.C. App. —, 632 S.E.2d 818, 2006 N.C. App. LEXIS 1832 (2006).

**ARTICLE 83.**

*Imprisonment.*

**§ 15A-1354. Concurrent and consecutive terms of imprisonment.**

**CASE NOTES**

**Cited** in *State v. Brown*, — N.C. App. —, 628 S.E.2d 787, 2006 N.C. App. LEXIS 882 (2006).

**ARTICLE 84A.**

*Post-Release Supervision.*

**§ 15A-1368.2. Post-release supervision eligibility and procedure.**

(a) A prisoner to whom this Article applies shall be released from prison for post-release supervision on the date equivalent to his maximum imposed prison term less nine months, less any earned time awarded by the Department of Correction or the custodian of a local confinement facility under G.S. 15A-1340.13(d). If a prisoner has not been awarded any earned time, the prisoner shall be released for post-release supervision on the date equivalent to his maximum prison term less nine months.

(b) A prisoner shall not refuse post-release supervision.

(c) A supervisee's period of post-release supervision shall be for a period of nine months, unless the offense is an offense for which registration is required pursuant to Article 27A of Chapter 14 of the General Statutes. For offenses subject to the registration requirement of Article 27A of Chapter 14 of the General Statutes, the period of post-release supervision is five years. The conditions of post-release supervision are as authorized in G.S. 15A-1368.5.

(c1) Notwithstanding subsection (c) of this section, a person required to submit to satellite-based monitoring pursuant to G.S. 15A-1368.4(b1)(6) shall continue to participate in satellite-based monitoring beyond the period of post-release supervision until the Commission releases the person from that requirement pursuant to G.S. 14-208.43.

(d) A supervisee's period of post-release supervision may be reduced while the supervisee is under supervision by earned time awarded by the Department of Correction, pursuant to rules adopted in accordance with law. A supervisee is eligible to receive earned time credit toward the period of



supervision for compliance with reintegrative conditions described in G.S. 15A-1368.5.

(e) Repealed by Session Laws 1997-237, s. 7.

(f) When a supervisee completes the period of post-release supervision, the sentence or sentences from which the supervisee was placed on post-release supervision are terminated. (1993, c. 538, s. 20.1; 1994, Ex. Sess., c. 24, s. 14(b); 1993 (Reg. Sess., 1994), c. 767, s. 4; 1996, 2nd Ex. Sess., c. 18, s. 20.14(a); 1997-237, s. 7; 2006-247, s. 15(f).)

**Editor's Note. —**

Session Laws 2006-247, s. 1(a) provides: "This act shall be known as 'An Act To Protect North Carolina's Children/Sex Offender Law Changes'."

Session Laws 2006-247, s. 15(l) provides: "Unless otherwise provided in the section, this section is effective when it becomes law and applies to offenses committed on or after that date. This section also applies to any person sentenced to intermediate punishment on or after that date and to any person released from prison by parole or post-release supervision on or after that date. This section also applies to any person who completes his or her sentence on or after the effective date of this section who

is not on post-release supervision or parole. However, the requirement to enroll in a satellite-based program is not mandatory until January 1, 2007, when the program is established."

Session Laws 2006-247, s. 21 is a severability clause.

Session Laws 2006-247, s. 22, provides, in part: "Prosecutions for offenses committed before the effective date of this act are not abated or affected by this act, and the statutes that would be applicable but for this act remain applicable to those prosecutions."

**Effect of Amendments. —** Session Laws 2006-247, s. 15(f), effective August 16, 2006, added subsection (c1). For applicability provisions, see Editor's note.

## § 15A-1368.4. Conditions of post-release supervision.

(a) In General. — Conditions of post-release supervision may be reintegrative in nature or designed to control the supervisee's behavior and to enforce compliance with law or judicial order. A supervisee may have his supervision period revoked for any violation of a controlling condition or for repeated violation of a reintegrative condition. Compliance with reintegrative conditions may entitle a supervisee to earned time credits as described in G.S. 15A-1368.2(d).

(b) Required Condition. — The Commission shall provide as an express condition of every release that the supervisee not commit another crime during the period for which the supervisee remains subject to revocation. A supervisee's failure to comply with this controlling condition is a supervision violation for which the supervisee may face revocation as provided in G.S. 15A-1368.3.

(b1) Additional Required Conditions for Sex Offenders and Persons Convicted of Offenses Involving Physical, Mental, or Sexual Abuse of a Minor. — In addition to the required condition set forth in subsection (b) of this section, for a supervisee who has been convicted of an offense which is a reportable conviction as defined in G.S. 14-208.6(4), or which involves the physical, mental, or sexual abuse of a minor, controlling conditions, violations of which may result in revocation of post-release supervision, are:

- (1) Register as required by G.S. 14-208.7 if the offense is a reportable conviction as defined by G.S. 14-208.6(4).
- (2) Participate in such evaluation and treatment as is necessary to complete a prescribed course of psychiatric, psychological, or other rehabilitative treatment as ordered by the Commission.
- (3) Not communicate with, be in the presence of, or found in or on the premises of the victim of the offense.
- (4) Not reside in a household with any minor child if the offense is one in which there is evidence of sexual abuse of a minor.
- (5) Not reside in a household with any minor child if the offense is one in which there is evidence of physical or mental abuse of a minor, unless

a court of competent jurisdiction expressly finds that it is unlikely that the defendant's harmful or abusive conduct will recur and that it would be in the child's best interest to allow the supervisee to reside in the same household with a minor child.

- (6) Submit to satellite-based monitoring pursuant to Part 5 of Article 27A of Chapter 14 of the General Statutes, if the offense is a reportable conviction as defined by G.S. 14-208.6(4) and the supervisee is in the category described by G.S. 14-208.40(a)(1).
- (7) Submit to satellite-based monitoring pursuant to Part 5 of Article 27A of Chapter 14 of the General Statutes, if the offense is a reportable conviction as defined by G.S. 14-208.6(4) and the supervisee is in the category described by G.S. 14-208.40(a)(2).

(c) Discretionary Conditions. — The Commission, in consultation with the Division of Community Corrections, may impose conditions on a supervisee it believes reasonably necessary to ensure that the supervisee will lead a law-abiding life or to assist the supervisee to do so.

(d) Reintegrative Conditions. — Appropriate reintegrative conditions, for which a supervisee may receive earned time credits against the length of the supervision period, and repeated violation that may result in revocation of post-release supervision, are:

- (1) Work faithfully at suitable employment or faithfully pursue a course of study or vocational training that will equip the supervisee for suitable employment.
- (2) Undergo available medical or psychiatric treatment and remain in a specified institution if required for that purpose.
- (3) Attend or reside in a facility providing rehabilitation, instruction, recreation, or residence for persons on post-release supervision.
- (4) Support the supervisee's dependents and meet other family responsibilities.
- (5) In the case of a supervisee who attended a basic skills program during incarceration, continue attending a basic skills program in pursuit of a General Education Development Degree or adult high school diploma.
- (6) Satisfy other conditions reasonably related to reintegration into society.

(e) Controlling Conditions. — Appropriate controlling conditions, violation of which may result in revocation of post-release supervision, are:

- (1) Not use, possess, or control any illegal drug or controlled substance unless it has been prescribed for the supervisee by a licensed physician and is in the original container with the prescription number affixed on it; not knowingly associate with any known or previously convicted users, possessors, or sellers of any such illegal drugs or controlled substances; and not knowingly be present at or frequent any place where such illegal drugs or controlled substances are sold, kept, or used.
- (2) Comply with a court order to pay the costs of reintegrative treatment for a minor and a minor's parents or custodians where the offense involved evidence of physical, mental, or sexual abuse of a minor.
- (3) Comply with a court order to pay court costs and costs for appointed counsel or public defender in the case for which the supervisee was convicted.
- (4) Not possess a firearm, destructive device, or other dangerous weapon unless granted written permission by the Commission or a post-release supervision officer.
- (5) Report to a post-release supervision officer at reasonable times and in a reasonable manner, as directed by the Commission or a post-release supervision officer.



- (6) Permit a post-release supervision officer to visit at reasonable times at the supervisee's home or elsewhere.
  - (7) Remain within the geographic limits fixed by the Commission unless granted written permission to leave by the Commission or the post-release supervision officer.
  - (8) Answer all reasonable inquiries by the post-release supervision officer and obtain prior approval from the post-release supervision officer for any change in address or employment.
  - (9) Promptly notify the post-release supervision officer of any change in address or employment.
  - (10) Submit at reasonable times to searches of the supervisee's person by a post-release supervision officer for purposes reasonably related to the post-release supervision. The Commission shall not require as a condition of post-release supervision that the supervisee submit to any other searches that would otherwise be unlawful. Whenever the search consists of testing for the presence of illegal drugs, the supervisee may also be required to reimburse the Department of Correction for the actual cost of drug testing and drug screening, if the results are positive.
  - (11) Make restitution or reparation to an aggrieved party as provided in G.S. 148-57.1.
  - (12) Comply with an order from a court of competent jurisdiction regarding the payment of an obligation of the supervisee in connection with any judgment rendered by the court.
  - (13) Remain in one or more specified places for a specified period or periods each day, and wear a device that permits the defendant's compliance with the condition to be monitored electronically.
  - (14) Submit to supervision by officers assigned to the Intensive Post-Release Supervision Program established pursuant to G.S. 143B-262(c), and abide by the rules adopted for that Program.
- (e1) Prohibited Conditions. — The Commission shall not impose community service as a condition of post-release supervision.
- (f) Required Supervision Fee. — The Commission shall require as a condition of post-release supervision that the supervisee pay a supervision fee of thirty dollars (\$30.00) per month. The Commission may exempt a supervisee from this condition only if it finds that requiring payment of the fee is an undue economic burden. The fee shall be paid to the clerk of superior court of the county in which the supervisee was convicted. The clerk shall transmit any money collected pursuant to this subsection to the State to be deposited in the State's General Fund. In no event shall a supervisee be required to pay more than one supervision fee per month. (1993, c. 538, s. 20.1; 1994, Ex. Sess., c. 24, s. 14(b); 1996, 2nd Ex. Sess., c. 18, s. 20.14(b); 1997-57, s. 6; 1997-237, s. 6; 2001-487, s. 47(c); 2002-126, s. 29A.2(b); 2006-247, s. 15(g).)

**Editor's Note. —**

Session Laws 2006-247, s. 1(a) provides: "This act shall be known as 'An Act To Protect North Carolina's Children/Sex Offender Law Changes'."

Session Laws 2006-247, s. 15(l) provides: "Unless otherwise provided in the section, this section is effective when it becomes law and applies to offenses committed on or after that date. This section also applies to any person sentenced to intermediate punishment on or after that date and to any person released from prison by parole or post-release supervision on or after that date. This section also applies to

any person who completes his or her sentence on or after the effective date of this section who is not on post-release supervision or parole. However, the requirement to enroll in a satellite-based program is not mandatory until January 1, 2007, when the program is established."

Session Laws 2006-247, s. 17 provides: "No later than January 1, 2007, the Department of Correction shall develop a graduated risk assessment program that identifies, assesses, and closely monitors a high-risk sex offender who, while not classified as a sexually violent predator, a recidivist, or convicted of an aggravated offense as those terms are defined in G.S.



14-208.6, may still require extraordinary supervision and may be placed on probation, parole, or post-release supervision only on the conditions provided in G.S. 15A-1343(b2) or G.S. 15A-1368.4(b1)."

Session Laws 2006-247, s. 21 is a severability clause.

Session Laws 2006-247, s. 22, provides, in part: "Prosecutions for offenses committed be-

fore the effective date of this act are not abated or affected by this act, and the statutes that would be applicable but for this act remain applicable to those prosecutions."

**Effect of Amendments.** — Session Laws 2006-247, s. 15(g), effective August 16, 2006, added subdivisions (b1)(6) and (7). For applicability provision, see Editor's note.

## ARTICLE 85.

### *Parole.*

### **§ 15A-1371. Parole eligibility, consideration, and refusal.**

(a) Eligibility. — Unless his sentence includes a minimum sentence, a prisoner serving a term of imprisonment for a conviction of impaired driving under G.S. 20-138.1 other than one included in a sentence of special probation imposed under authority of this Subchapter is eligible for release on parole at any time. A prisoner whose sentence includes a minimum term of imprisonment imposed under authority of this Subchapter is eligible for release on parole only upon completion of the service of that minimum term or one fifth of the maximum penalty allowed by law for the offense for which the prisoner is sentenced, whichever is less, less any credit allowed under G.S. 15A-1355(c) and Article 19A of Chapter 15 of the General Statutes.

(a1) Repealed by Session Laws 1994, Ex. Sess., c. 21, s. 3.

(b)(1), (2) Repealed by Session Laws 1993, c. 538, s. 22.

- (3) Whenever the Post-Release Supervision and Parole Commission will be considering for parole a prisoner serving a sentence of life imprisonment the Commission must notify, at least 30 days in advance of considering the parole, by first class mail at the last known address:
  - a. The prisoner;
  - b. The district attorney of the district where the prisoner was convicted;
  - c. The head of the law enforcement agency that arrested the prisoner and the sheriff of the county where the crime occurred;
  - d. Any of the victim's immediate family members who have requested in writing to be notified; and
  - e. Repealed by Session Laws 1993, c. 538, s. 22.
  - f. As many newspapers of general circulation and other media in the county where the defendant was convicted and if different, in the county where the prisoner was charged, as reasonable.

The Post-Release Supervision and Parole Commission must consider any information provided by any such parties before consideration of parole. The Commission must also give the district attorney, the head of the law enforcement agency who has requested in writing to be notified, the victim, any member of the victim's immediate family who has requested to be notified, and as many newspapers of general circulation and other media in the county or counties designated in sub-subdivision f. of this section as reasonable, written notice of its decision within 10 days of that decision. The Parole Commission shall not, however, include the name of any victim in its notification to the newspapers and other media.

(c) Repealed by Session Laws 1993, c. 538, s. 22.

(d) Criteria. — The Post-Release Supervision and Parole Commission may refuse to release on parole a prisoner it is considering for parole if it believes:

- (1) There is a substantial risk that he will not conform to reasonable conditions of parole; or
  - (2) His release at that time would unduly depreciate the seriousness of his crime or promote disrespect for law; or
  - (3) His continued correctional treatment, medical care, or vocational or other training in the institution will substantially enhance his capacity to lead a law-abiding life if he is released at a later date; or
  - (4) There is a substantial risk that he would engage in further criminal conduct.
- (e) Refusal of Parole. — A prisoner who has been granted parole may elect to refuse parole and to serve the remainder of his term of imprisonment.
- (f) Repealed by Session Laws 1993, c. 538, s. 22.

(g) Notwithstanding the provisions of subsection (a), a prisoner serving a sentence of not less than 30 days nor as great as 18 months for impaired driving may be released on parole when he completes service of one-third of his maximum sentence unless the Post-Release Supervision and Parole Commission finds in writing that:

- (1) There is a substantial risk that he will not conform to reasonable conditions of parole; or
- (2) His release at that time would unduly depreciate the seriousness of his crime or promote disrespect for law; or
- (3) His continued correctional treatment, medical care, or vocational or other training in the institution will substantially enhance his capacity to lead a law-abiding life if he is released at a later date; or
- (4) There is a substantial risk that he would engage in further criminal conduct.

If a prisoner is released on parole by operation of this subsection, the term of parole is the unserved portion of the sentence to imprisonment, and the conditions of parole, unless otherwise specified by the Post-Release Supervision and Parole Commission, are those authorized in G.S. 15A-1374(b)(4) through (10).

In order that the Post-Release Supervision and Parole Commission may have an adequate opportunity to make a determination whether parole under this section should be denied, no prisoner eligible for parole under this subsection shall be released from confinement prior to the fifth full working day after he shall have been placed in the custody of the Secretary of Correction or the custodian of a local confinement facility.

(h) Community Service Parole. — Notwithstanding the provisions of any other subsection herein, prisoners serving sentences for impaired driving shall be eligible for community service parole, in the discretion of the Post-Release Supervision and Parole Commission.

Community service parole is early parole for the purpose of participation in a program of community service under the supervision of a probation/parole officer. A parolee who is paroled under this subsection must perform as a condition of parole community service in an amount and over a period of time to be determined by the Post-Release Supervision and Parole Commission. However, the total amount of community service shall not exceed an amount equal to 32 hours for each month of active service remaining in his minimum sentence. The Post-Release Supervision and Parole Commission may grant early parole under this section without requiring the performance of community service if it determines that such performance is inappropriate to a particular case.

The probation/parole officer and the community service coordinator shall develop a program of community service for the parolee. The community service coordinator shall report any willful failure to perform community service work to the probation/parole officer. Parole may be revoked for any



parolee who willfully fails to perform community service work as directed by a community service coordinator. The provisions of G.S. 15A-1376 shall apply to this violation of a condition of parole.

Community service parole eligibility shall be available to a prisoner:

- (1) Who is serving an active sentence the term of which exceeds six months; and
- (2) Who, in the opinion of the Post-Release Supervision and Parole Commission, is unlikely to engage in further criminal conduct; and
- (3) Who agrees to complete service of his sentence as herein specified; and
- (4) Who has served one-half of his minimum sentence.

In computing the service requirements of subdivision (4) of this subsection, credit shall be given for good time and gain time credit earned pursuant to G.S. 148-13. Nothing herein is intended to create or shall be construed to create a right or entitlement to community service parole in any prisoner.

(i) A fee of two hundred dollars (\$200.00) shall be paid by all persons who participate in the Community Service Parole Program. That fee must be paid to the clerk of court in the county in which the parolee is released. The fee must be paid in full within two weeks unless the Post-Release Supervision and Parole Commission, upon a showing of hardship by the person, allows the person additional time to pay the fee. The parolee may not be required to pay the fee before the person begins the community service unless the Post-Release Supervision and Parole Commission specifically orders that the person do so. Fees collected under this subsection shall be deposited in the General Fund. The fee imposed under this subsection may be paid as prescribed by the supervising parole officer.

(j) The Post-Release Supervision and Parole Commission may terminate a prisoner's community service parole before the expiration of the term of imprisonment where doing so will not endanger the public, unduly depreciate the seriousness of the crime, or promote disrespect for the law. (1977, c. 711, s. 1; 1977, 2nd Sess., c. 1147, ss. 19A-22; 1979, c. 749, ss. 9, 10; 1979, 2nd Sess., c. 1316, s. 42; 1981, c. 63, s. 1; c. 179, s. 14; 1983 (Reg. Sess., 1984), c. 1098, s. 1; 1985, c. 453, ss. 1, 2; 1985 (Reg. Sess., 1986), c. 960, s. 2; c. 1012, ss. 2, 5; 1987, c. 47; c. 783, s. 7; 1989, c. 1, ss. 3, 4; 1991, c. 217, s. 3; c. 288, s. 2; 1993, c. 538, s. 22; 1994, Ex. Sess., c. 21, s. 3; c. 24, s. 14(b); c. 25, ss. 1, 2; 2002-126, s. 29A.1(a); 2006-264, s. 34.)

**Effect of Amendments.** — Session Laws 2006-264, s. 34, effective August 27, 2006, in subdivision (b)(3)c, substituted “and the sheriff

of the county where the crime occurred” for “if the head of the agency has requested in writing that he be notified.”

## CASE NOTES

### I. General Consideration.

#### I. GENERAL CONSIDERATION.

##### **Instruction on Parole Ineligibility in Capital Case. —**

Where a state prisoner, who was convicted of first-degree murder, first-degree rape, kidnapping, armed robbery, and the burning of personal property, in violation of G.S. 14-17, 14-27.2(a)(2), 14-39, 14-87, and 14-66, argued that the sentencing court erred by failing to provide a parole ineligibility instruction, the prisoner,

who was sentenced to death for the murder conviction, was not entitled to federal habeas corpus relief because the prisoner would have been eligible for parole under former G.S. 15A-1371(a1) if the jury had recommended life imprisonment; thus, because the prisoner was eligible for parole as a matter of law, the prisoner was not entitled to a parole ineligibility instruction. *Campbell v. Polk*, 447 F.3d 270, 2006 U.S. App. LEXIS 11591 (4th Cir. 2006).



## § 15A-1374. Conditions of parole.

(a) In General. — The Post-Release Supervision and Parole Commission may in its discretion impose conditions of parole it believes reasonably necessary to insure that the parolee will lead a law-abiding life or to assist him to do so. The Commission must provide as an express condition of every parole that the parolee not commit another crime during the period for which the parole remains subject to revocation. When the Commission releases a person on parole, it must give him a written statement of the conditions on which he is being released.

(a1) Required Conditions for Certain Offenders. — A person serving a term of imprisonment for an impaired driving offense sentenced pursuant to G.S. 20-179 that:

(1) Has completed any recommended treatment or training program required by G.S. 20-179(p)(3); and

(2) Is not being paroled to a residential treatment program; shall, as a condition of parole, receive community service parole pursuant to G.S. 15A-1371(h), or be required to comply with subdivision (b)(8a) of this section.

(b) Appropriate Conditions. — As conditions of parole, the Commission may require that the parolee comply with one or more of the following conditions:

(1) Work faithfully at suitable employment or faithfully pursue a course of study or vocational training that will equip him for suitable employment.

(2) Undergo available medical or psychiatric treatment and remain in a specified institution if required for that purpose.

(3) Attend or reside in a facility providing rehabilitation, instruction, recreation, or residence for persons on parole.

(4) Support his dependents and meet other family responsibilities.

(5) Refrain from possessing a firearm, destructive device, or other dangerous weapon unless granted written permission by the Commission or the parole officer.

(6) Report to a parole officer at reasonable times and in a reasonable manner, as directed by the Commission or the parole officer.

(7) Permit the parole officer to visit him at reasonable times at his home or elsewhere.

(8) Remain within the geographic limits fixed by the Commission unless granted written permission to leave by the Commission or the parole officer.

(8a) Remain in one or more specified places for a specified period or periods each day and wear a device that permits the defendant's compliance with the condition to be monitored electronically.

(9) Answer all reasonable inquiries by the parole officer and obtain prior approval from the parole officer for any change in address or employment.

(10) Promptly notify the parole officer of any change in address or employment.

(11) Submit at reasonable times to searches of his person by a parole officer for purposes reasonably related to his parole supervision. The Commission may not require as a condition of parole that the parolee submit to any other searches that would otherwise be unlawful. Whenever the search consists of testing for the presence of illegal drugs, the parolee may also be required to reimburse the Department of Correction for the actual cost of drug testing and drug screening, if the results are positive.

(11a) Make restitution or reparation to an aggrieved party as provided in G.S. 148-57.1.

(11b) Comply with an order from a court of competent jurisdiction regarding the payment of an obligation of the parolee in connection with any judgment rendered by the court.

(11c) In the case of a parolee who was attending a basic skills program during incarceration, continue attending a basic skills program in pursuit of a General Education Development Degree or adult high school diploma.

(12) Satisfy other conditions reasonably related to his rehabilitation.

(b1) **Mandatory Satellite-Based Monitoring Required as Condition of Parole for Certain Offenders.** — If a parolee is in a category described by G.S. 14-208.40(a)(1) or G.S. 14-208.40(a)(2), the Commission must require as a condition of parole that the parolee submit to satellite-based monitoring pursuant to Part 5 of Article 27A of Chapter 14 of the General Statutes.

(c) **Supervision Fee.** — The Commission must require as a condition of parole that the parolee pay a supervision fee of thirty dollars (\$30.00) per month. The Commission may exempt a parolee from this condition of parole only if it finds that requiring him to pay the fee will constitute an undue economic burden. The fee must be paid to the clerk of superior court of the county in which the parolee was convicted. The clerk must transmit any money collected pursuant to this subsection to the State to be deposited in the general fund of the State. In no event shall a person released on parole be required to pay more than one supervision fee per month. (1977, c. 711, s. 1; 1979, c. 749, s. 11; 1983, c. 562; 1985, c. 474, s. 6; 1987, c. 579, s. 3; c. 830, s. 17; 1989 (Reg. Sess., 1990), c. 1034, s. 2; 1991, c. 54, s. 1; 1991 (Reg. Sess., 1992), c. 1000, s. 2; 1993, c. 538, s. 39; 1994, Ex. Sess., c. 24, s. 14(b); 2002-126, s. 29A.2(c); 2006-247, s. 15(h); 2006-253, s. 27.)

**Editor's Note.** — Session Laws 2006-247, s. 1(a) provides: "This act shall be known as 'An Act To Protect North Carolina's Children/Sex Offender Law Changes'."

Session Laws 2006-247, s. 15(l) provides: "Unless otherwise provided in the section, this section is effective when it becomes law and applies to offenses committed on or after that date. This section also applies to any person sentenced to intermediate punishment on or after that date and to any person released from prison by parole or post-release supervision on or after that date. This section also applies to any person who completes his or her sentence on or after the effective date of this section who is not on post-release supervision or parole. However, the requirement to enroll in a satellite-based program is not mandatory until January 1, 2007, when the program is established."

Session Laws 2006-247, s. 21 is a severability clause.

Session Laws 2006-247, s. 22, provides, in part: "Prosecutions for offenses committed before the effective date of this act are not abated or affected by this act, and the statutes that would be applicable but for this act remain applicable to those prosecutions."

Session Laws 2006-253, s. 1, provides: "This act shall be known as 'The Motor Vehicle Driver Protection Act of 2006.'"

**Effect of Amendments.** — Session Laws 2006-247, s. 15(h), effective August 16, 2006, added subsection (b1). For applicability provision, see Editor's note.

Session Laws 2006-253, s. 27, effective December 1, 2006, and applicable to offenses committed on or after that date, added subsection (a1) and subdivision (b)(8a).

## SUBCHAPTER XIV. CORRECTION OF ERRORS AND APPEAL.

### ARTICLE 88.

#### *Post-Trial Motions and Appeal.*

#### **§ 15A-1401. Post-trial motions and appeal.**

Relief from errors committed in criminal trials and proceedings and other post-trial relief may be sought by:



- (1) Motion for appropriate relief, as provided in Article 89.
- (1a) Motion for innocence claim inquiry as provided in Article 92 of Chapter 15A of the General Statutes.
- (2) Appeal and trial de novo in misdemeanor cases, as provided in Article 90.
- (3) Appeal, as provided in Article 91. (1977, c. 711, s. 1; 2006-184, s. 2.)

**Effect of Amendments.** — Session Laws 2006-184, s. 2, effective August 3, 2006, and applicable to claims of factual innocence filed on or before December 31, 2010, added subsection (1a).

ARTICLE 89.

*Motion for Appropriate Relief and Other Post-Trial Relief.*

§ 15A-1411. Motion for appropriate relief.

- (a) Relief from errors committed in the trial division, or other post-trial relief, may be sought by a motion for appropriate relief. Procedure for the making of the motion is as set out in G.S. 15A-1420.
- (b) A motion for appropriate relief, whether made before or after the entry of judgment, is a motion in the original cause and not a new proceeding.
- (c) The relief formerly available by motion in arrest of judgment, motion to set aside the verdict, motion for new trial, post-conviction proceedings, *coram nobis* and all other post-trial motions is available by motion for appropriate relief. The availability of relief by motion for appropriate relief is not a bar to relief by writ of habeas corpus.
- (d) A claim of factual innocence asserted through the North Carolina Innocence Inquiry Commission does not constitute a motion for appropriate relief and does not impact rights or relief provided for in this Article. (1977, c. 711, s. 1; 2006-184, s. 4.)

**Effect of Amendments.** — Session Laws 2006-184, s. 4, effective August 3, 2006, and applicable to claims of factual innocence filed on or before December 31, 2010, added subsection (d).

CASE NOTES

**State Court’s Misapplication of Federal Law Principle.** — State death row prisoner was improperly denied a habeas corpus evidentiary hearing by a federal district court on the issue of whether a trial juror had lied about being closely related to a co-defendant who testified for the state; the doctrine of implied bias, a recognized federal law principle, was misapplied by a state post-conviction court that heard the prisoner’s motion for appropriate relief. *Conaway v. Polk*, 453 F.3d 567, 2006 U.S. App. LEXIS 17304 (4th Cir. 2006).

**Entitlement to a New Trial.** — Because the cumulative nature of the trial judge’s remarks to defense counsel regarding his speech pattern, along with a fine imposed for counsel’s use of the word “okay,” set a tone of fear in the trial and tainted the atmosphere of the same, prejudicing defendant’s rights, defendant was entitled to a new trial. *State v.*

*Wright*, 172 N.C. App. 464, 616 S.E.2d 366, 2005 N.C. App. LEXIS 1797 (2005).

Defendant’s conviction for possession of a firearm by a felon was vacated because the prior conviction upon which it was based was for a misdemeanor, not a felony. *State v. Hagans*, — N.C. App. —, 628 S.E.2d 776, 2006 N.C. App. LEXIS 719 (2006).

**Defendant Not Entitled to New Trial.** — Defendant was not entitled to a new trial because the trial court allowed the state to reopen the case and suggested to the state that it needed to make a motion to reopen the case as the trial court merely settled a legal dispute outside of the presence of the jury; the judge did not depart from his neutral role as a judicial officer by discussing the law with the attorneys or by permitting the state to reopen its case. *State v. Wise*, — N.C. App. —, 630 S.E.2d 732, 2006 N.C. App. LEXIS 1293 (2006).



## § 15A-1414. Motion by defendant for appropriate relief made within 10 days after verdict.

### CASE NOTES

#### **Refusal to Set Aside Verdict Within Court's Discretion. —**

After his murder conviction, defendant had no right to appropriate relief under G.S. 15A-1414 and G.S. 15A-1420, despite his claim that the trial judge committed reversible error by restoring peremptory challenges to both the State and to defendant after dismissing an entire group of prospective jurors for miscon-

duct. Defendant filed a motion to strike the entire venire when it was learned that they had been discussing among themselves how they could become disqualified to serve, and pursuant to G.S. 15A-1443(c), a defendant was not prejudiced by the granting of relief that he sought or by error that resulted from his own conduct. *State v. Elliott*, 360 N.C. 400, 628 S.E.2d 735, 2006 N.C. LEXIS 46 (2006).

## § 15A-1415. Grounds for appropriate relief which may be asserted by defendant after verdict; limitation as to time.

### CASE NOTES

**Failure to Preserve Issue for Review. —** Defendant, who argued that the indictments against him alleged insufficient time periods for the offenses with which he was charged, did not assert that the indictments failed to allege an essential element of each offense and he failed to either move for a bill of particulars or for appropriate relief. The reviewing court found that the indictments provided a person of ordinary intelligence a reasonable opportunity to know what the alleged conduct was prohibited, and defendant failed to preserve the issue

for review. *State v. Anderson*, — N.C. App. —, 627 S.E.2d 501, 2006 N.C. App. LEXIS 703 (2006).

**Applied** in *State v. Brown*, 170 N.C. App. 601, 613 S.E.2d 284, 2005 N.C. App. LEXIS 1069 (2005), cert. denied, 360 N.C. 68, 621 S.E.2d 882 (2005).

**Cited** in *State v. Brewington*, 170 N.C. App. 264, 612 S.E.2d 648, 2005 N.C. App. LEXIS 1011 (2005), cert. denied, 360 N.C. 67, 621 S.E.2d 881 (2005).

## § 15A-1417. Relief available.

(a) The following relief is available when the court grants a motion for appropriate relief:

- (1) New trial on all or any of the charges.
- (2) Dismissal of all or any of the charges.
- (3) The relief sought by the State pursuant to G.S. 15A-1416.
- (3a) For claims of factual innocence, referral to the North Carolina Innocence Inquiry Commission established by Article 92 of Chapter 15A of the General Statutes.
- (4) Any other appropriate relief.

(b) When relief is granted in the trial court and the offense is divided into degrees or necessarily includes lesser offenses, and the court is of the opinion that the evidence does not sustain the verdict but is sufficient to sustain a finding of guilty of a lesser degree or of a lesser offense necessarily included in the one charged, the court may, with consent of the State, accept a plea of guilty to the lesser degree or lesser offense.

(c) If resentencing is required, the trial division may enter an appropriate sentence. If a motion is granted in the appellate division and resentencing is required, the case must be remanded to the trial division for entry of a new sentence. (1977, c. 711, s. 1; 2006-184, s. 3.)

**Effect of Amendments.** — Session Laws 2006-184, s. 3, effective August 3, 2006, and applicable to claims of factual innocence filed

on or before December 31, 2010, added subdivision (a)(3a).

## § 15A-1418. Motion for appropriate relief in the appellate division.

(a) When a case is in the appellate division for review, a motion for appropriate relief based upon grounds set out in G.S. 15A-1415 must be made in the appellate division. For the purpose of this section a case is in the appellate division when the jurisdiction of the trial court has been divested as provided in G.S. 15A-1448, or when a petition for a writ of certiorari has been granted. When a petition for a writ of certiorari has been filed but not granted, a copy or written statement of any motion made in the trial court, and of any disposition of the motion, must be filed in the appellate division.

(b) When a motion for appropriate relief is made in the appellate division, the appellate court must decide whether the motion may be determined on the basis of the materials before it, whether it is necessary to remand the case to the trial division for taking evidence or conducting other proceedings, or, for claims of factual innocence, whether to refer the case for further investigation to the North Carolina Innocence Inquiry Commission established by Article 92 of Chapter 15A of the General Statutes. If the appellate court does not remand the case for proceedings on the motion, it may determine the motion in conjunction with the appeal and enter its ruling on the motion with its determination of the case.

(c) The order of remand must provide that the time periods for perfecting or proceeding with the appeal are tolled, and direct that the order of the trial division with regard to the motion be transmitted to the appellate division so that it may proceed with the appeal or enter an appropriate order terminating it. (1977, c. 711, s. 1; 2006-184, s. 5.)

**Effect of Amendments.** — Session Laws 2006-184, s. 5, effective August 3, 2006, and applicable to claims of factual innocence filed on or before December 31, 2010, in the first sentence of subsection (b), deleted “or” preceding “whether it” and added “or, for claims of

factual innocence, whether to refer the case for further investigation to the North Carolina Innocence Inquiry Commission established by Article 92 of Chapter 15A of the General Statutes” at the end.

### CASE NOTES

#### **Remand Required.** —

An evidentiary hearing was necessary in response to defendant’s motion for appropriate relief to determine whether there was a reasonable possibility that a different result would have been reached at trial had certain testimony been different or nonexistent. *State v. Brigman*, — N.C. App. —, 629 S.E.2d 307, 2006 N.C. App. LEXIS 1071 (2006).

Defendant’s motion for appropriate relief was remanded to the trial court for an evidentiary hearing as the appellate court could not determine the veracity of a mother’s testimony, nor could it discern whether there was a reasonable possibility that a different result would have been reached at trial had the mother’s testimony been different or non-existent. *State v. Brigman*, — N.C. App. —, 632 S.E.2d 498, 2006 N.C. App. LEXIS 1298 (2006).

**Motion Dismissed.** — Motion for appropriate relief based on failure to register as a convicted sex offender was dismissed because the evidence was insufficient to enable the court to render a decision. *State v. Verrier*, 173 N.C. App. 123, 617 S.E.2d 675, 2005 N.C. App. LEXIS 1899 (2005).

Defendant’s amended motion for appropriate relief did not amend the original motion for appropriate relief and alleged new grounds for relief based on ineffective assistance of counsel; the amended motion was untimely and was dismissed, without prejudice to defendant to file a new motion for appropriate relief in the trial court. *State v. Brigman*, — N.C. App. —, 632 S.E.2d 498, 2006 N.C. App. LEXIS 1298 (2006).

**Failure to Submit Aggravating Circumstance to Jury.** — Motion for appropriate

relief based on the alleged erroneous aggravation of defendant's sentence was granted where the trial court unilaterally found an aggravating circumstance without submitting that issue to the jury. *State v. Verrier*, 173 N.C. App. 123, 617 S.E.2d 675, 2005 N.C. App. LEXIS 1899 (2005).

**Appellate Court Proper Venue.** — Summary denial of defendant's motion for appropriate relief (MAR) was vacated as a timely-filed appeal was pending when the MAR was filed, so the trial court lacked jurisdiction to rule on

the MAR; the proper venue for filing the MAR would have been in the appellate court. *State v. Williams*, — N.C. App. —, 630 S.E.2d 216, 2006 N.C. App. LEXIS 1219 (2006).

**Applied** in *State v. Hadden*, — N.C. App. —, 624 S.E.2d 417, 2006 N.C. App. LEXIS 190 (2006).

**Cited** in *State v. Howell*, 169 N.C. App. 741, 611 S.E.2d 200, 2005 N.C. App. LEXIS 795 (2005), cert. denied, 360 N.C. 71, 622 S.E.2d 500 (2005).

## § 15A-1419. When motion for appropriate relief denied.

### CASE NOTES

#### **Ineffective assistance of counsel claims, etc. —**

In a prosecution for murder and related crimes, defendant raised the issue of ineffective assistance of counsel, even though he acknowledged he could not, on direct appeal, prove this claim from a cold record, because he had to raise the claim on direct appeal, under G.S.15A-1419(a)(3), to preserve it for collateral review. *State v. Wissink*, 172 N.C. App. 829, 617 S.E.2d 319, 2005 N.C. App. LEXIS 1776 (2005).

**Applied** in *State v. McNeill*, 360 N.C. 231, 624 S.E.2d 329, 2006 N.C. LEXIS 1 (2006); *Blackwell v. Cavanaugh*, — F. Supp. 2d —, 2005 U.S. Dist. LEXIS 28349 (W.D.N.C. Nov. 9, 2005).

**Cited** in *Carpenter v. Harkleroad*, — F. Supp. 2d —, 2005 U.S. Dist. LEXIS 38067 (W.D.N.C. Dec. 19, 2005); *Worthey v. York*, — F. Supp. 2d —, 2005 U.S. Dist. LEXIS 37263 (W.D.N.C. Sept. 13, 2005).

## § 15A-1420. Motion for appropriate relief; procedure.

### (a) Form, Service, Filing.

#### (1) A motion for appropriate relief must:

##### a. Be made in writing unless it is made:

1. In open court;
2. Before the judge who presided at trial;
3. Before the end of the session if made in superior court; and
4. Within 10 days after entry of judgment;

##### b. State the grounds for the motion;

##### c. Set forth the relief sought; and

##### d. Be timely filed.

#### (2) A written motion for appropriate relief must be served in the manner provided in G.S. 15A-951(b). When the written motion is made more than 10 days after entry of judgment, service of the motion and a notice of hearing must be made not less than five working days prior to the date of the hearing. When a motion for appropriate relief is permitted to be made orally the court must determine whether the matter may be heard immediately or at a later time. If the opposing party, or his counsel if he is represented, is not present, the court must provide for the giving of adequate notice of the motion and the date of hearing to the opposing party, or his counsel if he is represented by counsel.

#### (3) A written motion for appropriate relief must be filed in the manner provided in G.S. 15A-951(c).

#### (4) An oral or written motion for appropriate relief may not be granted in district court without the signature of the district attorney, indicating that the State has had an opportunity to consent or object to the motion. However, the court may grant a motion for appropriate relief without the district attorney's signature 10 business days after the



district attorney has been notified in open court of the motion, or served with the motion pursuant to G.S. 15A-951(c).

(b) Supporting Affidavits.

- (1) A motion for appropriate relief made after the entry of judgment must be supported by affidavit or other documentary evidence if based upon the existence or occurrence of facts which are not ascertainable from the records and any transcript of the case or which are not within the knowledge of the judge who hears the motion.
  - (2) The opposing party may file affidavits or other documentary evidence.
- (b1) Filing Motion With Clerk; Review of Motion by Judge.

- (1) The proceeding shall be commenced by filing with the clerk of superior court of the district wherein the defendant was indicted a motion, with service on the district attorney in noncapital cases, and service on both the district attorney and Attorney General in capital cases.
  - (2) The clerk, upon receipt of the motion, shall place the motion on the criminal docket. The clerk shall promptly bring the motion, or a copy of the motion, to the attention of the resident judge or any judge holding court in the county or district. In noncapital cases, the judge shall review the motion and enter an order whether the defendant should be allowed to proceed without the payment of costs, with respect to the appointment of counsel, and directing the State, if necessary, to file an answer. In capital cases, the judge shall review the motion and enter an order directing the State to file its answer within 60 days of the date of the order. If a hearing is necessary, the judge shall calendar the case for hearing without unnecessary delay.
- (c) Hearings, Showing of Prejudice; Findings.

- (1) Any party is entitled to a hearing on questions of law or fact arising from the motion and any supporting or opposing information presented unless the court determines that the motion is without merit. The court must determine, on the basis of these materials and the requirements of this subsection, whether an evidentiary hearing is required to resolve questions of fact. Upon the motion of either party, the judge may direct the attorneys for the parties to appear before him for a conference on any prehearing matter in the case.
- (2) An evidentiary hearing is not required when the motion is made in the trial court pursuant to G.S. 15A-1414, but the court may hold an evidentiary hearing if it is appropriate to resolve questions of fact.
- (3) The court must determine the motion without an evidentiary hearing when the motion and supporting and opposing information present only questions of law. The defendant has no right to be present at such a hearing where only questions of law are to be argued.
- (4) If the court cannot rule upon the motion without the hearing of evidence, it must conduct a hearing for the taking of evidence, and must make findings of fact. The defendant has a right to be present at the evidentiary hearing and to be represented by counsel. A waiver of the right to be present must be in writing.
- (5) If an evidentiary hearing is held, the moving party has the burden of proving by a preponderance of the evidence every fact essential to support the motion.
- (6) A defendant who seeks relief by motion for appropriate relief must show the existence of the asserted ground for relief. Relief must be denied unless prejudice appears, in accordance with G.S. 15A-1443.
- (7) The court must rule upon the motion and enter its order accordingly. When the motion is based upon an asserted violation of the rights of the defendant under the Constitution or laws or treaties of the United States, the court must make and enter conclusions of law and a

statement of the reasons for its determination to the extent required, when taken with other records and transcripts in the case, to indicate whether the defendant has had a full and fair hearing on the merits of the grounds so asserted.

(d) **Action on Court's Own Motion.** — At any time that a defendant would be entitled to relief by motion for appropriate relief, the court may grant such relief upon its own motion. The court must cause appropriate notice to be given to the parties. (1965, c. 352, s. 1; 1973, c. 47, s. 2; 1977, c. 711, s. 1; 1995 (Reg. Sess., 1996), c. 719, ss. 3, 4; 2006-253, s. 30.)

**Editor's Note.** — Session Laws 2006-253, s. 1, provides: "This act shall be known as 'The Motor Vehicle Driver Protection Act of 2006'."

**Effect of Amendments.** — Session Laws

2006-253, s. 30, effective December 1, 2006, and applicable to offenses committed on or after that date, added subdivision (a)(4).

## CASE NOTES

### **Motion Asserting Constitutional Violations.** —

There was insufficient evidence to show the asserted ground for relief as defendant maintained in his motion for appropriate relief under G.S. 15A-1420. That two jurors had prayed together outside the jury room in his death penalty case was not shown to have been misconduct defendant did not present documentary evidence, as G.S. 15A-1420(b) required, that those jurors had discussed the case while they prayed, and their prayers did not constitute "deliberation" outside of the jury room, such that would have violated defendant's right to have a jury of 12 jurors under N.C. Const. art. I, § 24. *State v. Elliott*, 360 N.C. 400, 628 S.E.2d 735, 2006 N.C. LEXIS 46 (2006).

**Defendant's Motion Under This Section Was Properly Denied.** — After his murder

conviction, defendant had no right to appropriate relief under G.S. 15A-1414 and G.S. 15A-1420, despite his claim that the trial judge committed reversible error by restoring peremptory challenges to both the State and to defendant after dismissing an entire group of prospective jurors for misconduct. Defendant filed a motion to strike the entire venire when it was learned that they had been discussing among themselves how they could become disqualified to serve, and pursuant to G.S. 15A-1443(c), a defendant was not prejudiced by the granting of relief that he sought or by error that resulted from his own conduct. *State v. Elliott*, 360 N.C. 400, 628 S.E.2d 735, 2006 N.C. LEXIS 46 (2006).

**Applied** in *Conaway v. Polk*, 453 F.3d 567, 2006 U.S. App. LEXIS 17304 (4th Cir. 2006).

## § 15A-1422. Review upon appeal.

## CASE NOTES

**Decision With Widespread Effect and Constitutional Magnitude.** — While G.S. 15A-1422(f) normally barred collateral review of a resentencing decision, the statute could not interfere with the court's power under N.C. Const. art. IV, § 12, cl. 1 to issue a decision where the lower appellate court's decision was of constitutional magnitude and widespread effect; since the lower appellate court's decision applied to hold unconstitutional provisions of a widely used statute that was used to aggravate sentences for crimes, discretionary review was granted. *State v. Allen*, 359 N.C. 425, 615 S.E.2d 256, 2005 N.C. LEXIS 695 (2005).

### **Appeal Following Remand.** —

Since the case addressed immediately important aspects of Blakely's application to North Carolina sentencing law, the North Carolina Supreme Court's general supervisory authority

permitted its review of the sentencing matter after a lower appellate court remanded the matter to the trial court. *State v. Blackwell*, 359 N.C. 814, 618 S.E.2d 213, 2005 N.C. LEXIS 846 (2005).

Supreme Court of North Carolina found that it could hear an appeal from a decision of the Court of Appeals of North Carolina that a defendant be resentenced because G.S. 7A-30(2) provided the state with an appeal of right as there was a dissent in the Court of Appeals; further, nothing in G.S. 15A-1422 prohibited the court from addressing the issues presented in defendant's brief to the Court of Appeals. *State v. Norris*, 360 N.C. 507, 630 S.E.2d 915, 2006 N.C. LEXIS 592 (2006).

**State's Right to Appeal From Order Granting Appropriate Relief.** — When, after defendant was convicted of possession of co-



caine and having attained the status of being an habitual felon, the trial court, sua sponte, granted a motion for appropriate relief, vacating the habitual felon conviction, and reducing defendant's sentence, finding the sentence violated defendant's rights under the Eighth and Fourteenth Amendments, the State's right to appeal, as it was not appealing a judgment entered on the jury's verdicts, was controlled by G.S. 15A-1422, and, under G.S. 15A-1422(b), it had to have a right to appeal the underlying judgment in an appeal regularly taken, but it did not have such a right because, while the

trial court might have effectively dismissed defendant's habitual felon charge or imposed an unauthorized prison term, given his habitual felon status, it did not have a right to appeal the underlying judgment, as that judgment did not dismiss a charge against defendant or impose an unauthorized prison term. *State v. Starkey*, — N.C. App. —, 628 S.E.2d 424, 2006 N.C. App. LEXIS 874 (2006).

**Applied** in *State v. Brown*, 170 N.C. App. 601, 613 S.E.2d 284, 2005 N.C. App. LEXIS 1069 (2005), cert. denied, 360 N.C. 68, 621 S.E.2d 882 (2005).

## ARTICLE 90.

### *Appeals from Magistrates and District Court Judges.*

## § 15A-1431. Appeals by defendants from magistrate and district court judge; trial de novo.

### CASE NOTES

**Defendant Entitled to Arraignment on Appeal for Trial De Novo In Superior Court.** — By immediately proceeding to trial without defendant's consent on an appeal de novo from a district court, a superior court violated G.S.15A-943(b), which defendant adequately invoked; as the superior court was not the court of original jurisdiction, the prosecutor never submitted a bill of indictment for defendant nor was defendant indicted, so there was no 21-day period from which defendant needed to file a written request for. A trial de novo in the superior court was a new trial from the beginning to the end, disregarding completely the plea below, and, therefore, since defendant's plea from the district court was completely disregarded, defendant was entitled to an arraignment in superior court. *State v. Vereen*, —

N.C. App. —, 628 S.E.2d 408, 2006 N.C. App. LEXIS 847 (2006).

**Probation Did Not Start While Appeal Was Pending.** — Despite a specific reference to probation in G.S. 15A-1451, and the absence of a corresponding reference to probation in G.S. 15A-1431, G.S. 15A-1431(e) provided that a defendant remained on pretrial release during an appeal from district court to superior court, so he or she was not also on probation; defendant's probation, imposed by a district court, did not start where defendant appealed to superior court, did not begin until he withdrew that appeal, and thus, a later violation report was timely filed. *State v. Smith*, 359 N.C. 618, 614 S.E.2d 279, 2005 N.C. LEXIS 635 (2005).

## § 15A-1432. Appeals by State from district court judge.

### CASE NOTES

**Cited** in *State v. Brown*, 170 N.C. App. 601, 613 S.E.2d 284, 2005 N.C. App. LEXIS 1069

(2005), cert. denied, 360 N.C. 68, 621 S.E.2d 882 (2005).

## ARTICLE 91.

### *Appeal to Appellate Division.*

## § 15A-1442. Grounds for correction of error by appellate division.

### CASE NOTES

**Prejudice from Delay in Preparation of Trial Transcript not Shown.** — Defendant

failed to show prejudice resulting from a six-year delay in the preparation of a trial tran-



script; a review of the record did not divulge any evidence to support defendant's allegation of experiencing "maximum anxiety," and defendant failed to provide any evidence that the

delay prevented any possibility of meaningful appellate review. *State v. Berryman*, 360 N.C. 209, 624 S.E.2d 350, 2006 N.C. LEXIS 8 (2006).

## § 15A-1443. Existence and showing of prejudice.

### CASE NOTES

- I. General Consideration.
- II. Prejudicial Error.
- III. Harmless Error.

#### I. GENERAL CONSIDERATION.

##### **Prejudice Not Found.** —

There was no error in the trial court's admission of testimony from the brother of defendant's sexual assault victim as to the victim's state of mind when she was talking to the police about the incident that resulted in the charges against defendant, as defendant failed to show that such testimony had any effect on the outcome of the trial or that there was a reasonable possibility that, without such admission, the outcome of the trial would have been different, pursuant to G.S. 15A-1443(a). *State v. Dorton*, 172 N.C. App. 759, 617 S.E.2d 97, 2005 N.C. App. LEXIS 1794 (2005), cert. denied, 360 N.C. 69, 623 S.E.2d 775 (2005).

**Defendant Was Not Prejudiced by Granting of Relief.** — After his murder conviction, defendant had no right to appropriate relief under G.S. 15A-1414 and G.S. 15A-1420, despite his claim that the trial judge committed reversible error by restoring peremptory challenges to both the State and to defendant after dismissing an entire group of prospective jurors for misconduct. Defendant filed a motion to strike the entire venire when it was learned that they had been discussing among themselves how they could become disqualified to serve, and pursuant to G.S. 15A-1443(c), a defendant was not prejudiced by the granting of relief that he sought or by error that resulted from his own conduct. *State v. Elliott*, 360 N.C. 400, 628 S.E.2d 735, 2006 N.C. LEXIS 46 (2006).

**Applied** in *State v. Bellamy*, 172 N.C. App. 649, 617 S.E.2d 81, 2005 N.C. App. LEXIS 1793 (2005); *State v. Scanlon*, — N.C. App. —, 626 S.E.2d 770, 2006 N.C. App. LEXIS 541 (2006); *State v. Browning*, — N.C. App. —, 629 S.E.2d 299, 2006 N.C. App. LEXIS 1079 (2006); *State v. Watson*, — N.C. App. —, 634 S.E.2d 231, 2006 N.C. App. LEXIS 1923 (2006).

**Cited** in *State v. Edwards*, — N.C. App. —, 621 S.E.2d 333, 2005 N.C. App. LEXIS 2487 (2005); *State v. Hocutt*, — N.C. App. —, 628 S.E.2d 832, 2006 N.C. App. LEXIS 966 (2006); *State v. Laney*, — N.C. App. —, 631 S.E.2d 522,

2006 N.C. App. LEXIS 1398 (2006); *State v. Mewborn*, — N.C. App. —, 631 S.E.2d 224, 2006 N.C. App. LEXIS 1411 (2006).

#### II. PREJUDICIAL ERROR.

**Improper Impeachment of Testimony by Extrinsic Evidence.** — Defendant was granted a new trial on his convictions involving the sexual abuse of his grandchildren; the trial court committed prejudicial error under G.S. 15A-1443(a) by allowing the State to impeach by extrinsic evidence testimony by defendant's son and two daughters that defendant had never sexually abused them, and the error was so highly prejudicial that it likely affected the verdict, and because the evidence of prior sexual misconduct was not admissible under a hearsay exception, G.S. 8C-1, N.C. R. Crim. P. 404(b). *State v. Mitchell*, 169 N.C. App. 417, 610 S.E.2d 260, 2005 N.C. App. LEXIS 682 (2005).

##### **Incorrect Instruction.** —

When, in instructing on the offense of keeping a dwelling for the sale of controlled substances, the trial court erroneously declined to include defendant's requested language that a possession of controlled substances occurred for a required duration of time, because defendant proffered evidence that he did not possess controlled substances for the required duration of time, the error was not prejudicial because defendant admitted that he controlled the dwelling in question and that he knew marijuana was sold from it; furthermore, the jury found defendant possessed diazepam, so the trial court's instruction was substantially correct in light of the evidence, and, in light of defendant's admissions, the trial court's error in failing to define "keeping" as possession "over a duration of time" was not prejudicial. *State v. Sanders*, 171 N.C. App. 46, 613 S.E.2d 708, 2005 N.C. App. LEXIS 1158 (2005), aff'd, 360 N.C. 170, 622 S.E.2d 492 (2005).

##### **Erroneously Admitted Character Evidence.** —

Although the admission of reputation testimony violated G.S. 8C-1, Rule 404(a), the error was not prejudicial because the evidence regarding one witness's possession of a crack pipe

was cumulative and there was ample evidence to convict defendant without the evidence of his brother's reputation as a dealer of drugs. *State v. McBride*, 173 N.C. App. 101, 618 S.E.2d 754, 2005 N.C. App. LEXIS 1897 (2005).

**Error Held Prejudicial. —**

Erroneous exclusion of testimony from a car dealership employee who saw defendant's victim breaking car windows at the dealership, which should have been admitted during defendant's murder trial as evidence of the victim's violent character, was prejudicial under G.S. 15A-1443(a) even though defendant testified to the same incident on direct and redirect examination. *State v. Everett*, — N.C. App. —, 630 S.E.2d 703, 2006 N.C. App. LEXIS 1302 (2006).

**Prejudicial Error from Improper Argument by Prosecution. —** Defendant, who alleged an insanity defense following shootings, was entitled to a new trial because the appellate court could not say beyond a reasonable doubt that the prosecutor's argument, which was improper and prejudicial, pursuant to G.S. 15A-1230, because of misleading characterizations and improper inferences did not contribute to defendant's conviction. *State v. Millsaps*, 169 N.C. App. 340, 610 S.E.2d 437, 2005 N.C. App. LEXIS 617 (2005).

**Erroneous Admission of Evidence Improperly Seized During Warrantless Search. —** First degree murder conviction was reversed because the trial court erroneously denied defendant's motion to suppress where the officer's warrantless entry into the victim's residence was impermissible under the exigent circumstances theory advanced by the state; defendant was entitled to a new trial because the state failed to produce overwhelming evidence to support defendant's conviction notwithstanding the evidence erroneously seized during the search. *State v. McKinney*, 174 N.C. App. 138, 619 S.E.2d 901, 2005 N.C. App. LEXIS 2307 (2005).

**Prejudicial Error Not Shown. —**

In a case involving felony malicious conduct by a prisoner, evidence regarding the treatment required for spitting if it went into an open wound, eyes, or mouth, even if erroneously admitted, did not constitute a prejudicial error. *State v. Crouse*, 169 N.C. App. 382, 610 S.E.2d 454, 2005 N.C. App. LEXIS 691 (2005).

Even assuming that videotapes from a food store were not properly admitted into evidence, reversal was not required because defendant was not prejudiced by their admission given the admittance of defendant's statement in which defendant confessed to using the victim's credit card to purchase beer and cigarettes at the food store. *State v. Brooks*, — N.C. App. —, 631 S.E.2d 54, 2006 N.C. App. LEXIS 1334 (2006).

**Erroneous Admission of Response to Routine Booking Question Intended to Produce Incriminating Response. —** De-

fendant's response to a routine booking question about his address violated Miranda, with respect to the maintaining a dwelling charge, because the officer who presented the question fully expected to produce an incriminating response. The error was not harmless because, without that evidence, it was apparent that the evidence was insufficient to support a conviction for maintaining a dwelling for the purpose of keeping or selling cocaine. *State v. Boyd*, — N.C. App. —, 628 S.E.2d 796, 2006 N.C. App. LEXIS 854 (2006).

### III. HARMLESS ERROR.

**No Reasonable Possibility of Affecting Verdict. —**

Appellate court erred in finding that defendant's right to confrontation pursuant to N.C. Const. art. I, § 23 was violated by allowing an officer to testify pursuant to G.S. 8C-1, N.C. R. Evid. 804(b)(5), that the deceased victim picked defendant from a lineup; although the hearsay statement was testimonial, and thus implicated the confrontation clause, the error was harmless pursuant to G.S. 15A-1443(b), as the outcome of the trial probably would have been the same if the lineup was excluded based on the victim's independent identification of defendant as the perpetrator. *State v. Lewis*, 360 N.C. 1, 619 S.E.2d 830, 2005 N.C. LEXIS 1000 (2005).

Although a trial court violated defendant's USCS Const. Amend. 6 confrontation rights by allowing a detective to testify that a deceased victim had identified defendant as her rapist, the error was harmless since another victim was able to identify defendant after her attack. *State v. Moore*, 173 N.C. App. 494, 620 S.E.2d 1, 2005 N.C. App. LEXIS 2103 (2005).

In a rape and kidnapping case, evidence of a criminal citation issued to defendant for drugs a few days before an attack was not relevant because it did not matter whether defendant actually possessed drugs; the admission of the evidence was harmless because the state could have proven the attack at any rate due to the testimony of the victim. *State v. Moore*, 173 N.C. App. 494, 620 S.E.2d 1, 2005 N.C. App. LEXIS 2103 (2005).

In a rape and kidnapping case, evidence that defendant possessed pornographic magazines was not relevant because it did not tend to make the existence of any fact that is of consequence more or less probable since they were not shown to the victim, and they were not used to show dominion and control over a motel room; however, the error was harmless since a different outcome in the case would not have resulted due to overwhelming evidence of guilt. *State v. Moore*, 173 N.C. App. 494, 620 S.E.2d 1, 2005 N.C. App. LEXIS 2103 (2005).



Even though three of a prosecutor's questions specifically referred to defendant's invocation of his right to an attorney during questioning, no new trial was required under G.S. 15A-1443 because the court found the error harmless in light of the overwhelming evidence of guilt presented against defendant. *State v. Rashidi*, 172 N.C. App. 628, 617 S.E.2d 68, 2005 N.C. App. LEXIS 1790 (2005), *aff'd*, 360 N.C. 166, 622 S.E.2d 493 (2005).

Appellate court erred in finding that defendant's right to confrontation pursuant to N.C. Const. art. I, § 23 was violated by allowing an officer to testify pursuant to G.S. 8C-1, N.C. R. Evid. 804(b)(5), that the deceased victim picked defendant from a lineup; although the hearsay statement was testimonial, and thus implicated the confrontation clause, the error was harmless pursuant to G.S. 15A-1443(b), as the outcome of the trial probably would have been the same if the lineup was excluded based on the victim's independent identification of defendant as the perpetrator. *State v. Lewis*, 360 N.C. 1, 619 S.E.2d 830, 2005 N.C. LEXIS 1000 (2005).

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Evidence that defendant, who shot a police officer with a shotgun, possessed a pistol was irrelevant because the pistol was not connected to the shooting in any way; the error was harmless under G.S. 15A-1443(a), however, because of the overwhelming evidence of defendant's guilt. *State v. Grant*, — N.C. App. —, 632 S.E.2d 258, 2006 N.C. App. LEXIS 1637 (2006).

**Erroneous admission of hearsay, etc. —**

Because there was no evidence that a conspiracy to rob a convenience store was in existence at the time statements in question were made, the trial court erred in admitting the hearsay statements as a statement by a co-conspirator under G.S. 8C-1, Rule 801(d); however, the error was harmless pursuant to G.S. 15A-1443(b) because the remaining evidence that defendant took part in the robbery was overwhelming. *State v. Stephens*, — N.C. App. —, 623 S.E.2d 610, 2006 N.C. App. LEXIS 50 (2006).

**Violation of Rights Held Harmless Error.**

While the admission into evidence of an accomplice's written statement made during his interrogation violated defendant's Sixth Amendment right to confrontation, the error was not prejudicial under G.S. 15A-1443(b)

where there was overwhelming evidence that defendant and his accomplices broke into a building in the early morning hours to steal a computer. *State v. Garcia*, — N.C. App. —, 621 S.E.2d 292, 2005 N.C. App. LEXIS 2493 (2005).

**Admission of Improper Testimony Held Harmless Error. —**

Although the trial court erred in admitting the hearsay statements of the witness, the error was harmless under G.S. 15A-1443(b) given the presence of overwhelming evidence of premeditation required for the conviction of first-degree murder; this evidence included the fact that defendant brought the murder weapon to the residence where the murder occurred, that defendant stabbed or lacerated the victim 51 times, and that the responding police officer saw that defendant's clothes were heavily blood stained. *State v. Champion*, 171 N.C. App. 716, 615 S.E.2d 366, 2005 N.C. App. LEXIS 1364 (2005).

**Instruction Not to Consider Evidence Held Sufficient. —**

Although the prosecutor improperly commented on defendant's failure to produce records of his alleged dental visit during which he received an intoxicating substance, the error was harmless because the jury received a curative instruction and defendant made no showing that the jury failed to follow that instruction. *State v. Highsmith*, 173 N.C. App. 600, 619 S.E.2d 586, 2005 N.C. App. LEXIS 2123 (2005).

**Erroneous Jury Instruction Not Harmless Beyond a Reasonable Doubt. —**

In a second degree rape charge under G.S. 14-27.3 where the victim alleged that she said no and that defendant engaged in sexual intercourse with her while she was asleep, and defendant alleged that the victim was awake and consented to intercourse, the State and defendant presented contradictory evidence on the elements of force and against the victim's will, but the trial court impermissibly instructed the jury that two elements — force and lack of consent — were established as a matter of law; the trial court's jury instruction created a reasonable likelihood that the jury did not deliberate upon the contradictory evidence, but rather understood the trial court's instruction to mean force and lack of consent had been established. Thus, there was a reasonable likelihood the jury concluded the victim was asleep by a standard less than beyond a reasonable doubt; therefore, pursuant to G.S. 15A-1443(b), the erroneous jury instruction was not harmless beyond a reasonable doubt, and defendant was entitled to a new trial. *State v. Smith*, 170 N.C. App. 461, 613 S.E.2d 304, 2005 N.C. App. LEXIS 1075 (2005).

**Admission of Hearsay Testimony Held Harmless Error. —**

Although victim's hearsay statement identifying perpetrator was erroneously admitted,



the error was harmless because there was sufficient undisputable evidence without the victim's hearsay statement identifying defendant as the perpetrator. *State v. Lawson*, 173 N.C. App. 270, 619 S.E.2d 410, 2005 N.C. App. LEXIS 2036 (2005).

**Overwhelming Evidence of Defendant's Guilt. —**

Defendant's conviction for first-degree murder was upheld on appeal, despite that the trial court erred by admitting the statements of two unavailable robbery victims with regard to their statements to police after the crime, which identified and implicated defendant and three others, without affording defendant the right to confrontation, because the evidence of defendant's guilt was overwhelming, which rendered the trial court's error harmless. *State*

*v. Allen*, 171 N.C. App. 71, 614 S.E.2d 361, 2005 N.C. App. LEXIS 1186 (2005), cert. dismissed, 360 N.C. 66, 621 S.E.2d 875 (2005), cert. denied, appeal dismissed, 360 N.C. 66, 621 S.E.2d 878 (2005).

**Error Held Harmless. —**

Officer's testimony was not improper on the issue of constructive possession of drugs; even if the trial court erred in allowing the officer's testimony after a question by the state linking constructive possession with being "next to" the drugs, defendant had failed to show that had the alleged error not been committed, a different result would have been reached, as required by G.S. 15A-1443(a). *State v. Hart*, — N.C. App. —, 633 S.E.2d 102, 2006 N.C. App. LEXIS 1675 (2006).

## § 15A-1444. When defendant may appeal; certiorari.

### CASE NOTES

**Writ of Certiorari Limited. —**

Defendant's claim of a *Blakely v. Washington*, 542 U.S. 296 (2004), violation was not reached as defendant was indicted on March 13, 1995, which was before the certification date of the *State v. Allen*, 615 S.E.2d 256 (2005), opinion, his appeal was not pending direct review, and his case was final; defendant did not appeal the trial court's acceptance of the plea agreement under which he entered his Alford pleas, the finding of aggravating and mitigating factors by the trial court, nor his sentence to 55 years of imprisonment and it was not until November 7, 2003, that defendant filed a petition for a writ of certiorari and was allowed a limited review of only those issues within his appeal of right pursuant to G.S. 15A-1444(a1) and (a2). *State v. Pender*, — N.C. App. —, 622 S.E.2d 664, 2005 N.C. App. LEXIS 2710 (2005).

Since none of the circumstances set out in G.S. 15A-1444(e) applied to defendant's guilty plea, the court was without authority under N.C. R. App. P. 21 to issue a writ of certiorari. *State v. Hadden*, — N.C. App. —, 624 S.E.2d 417, 2006 N.C. App. LEXIS 190 (2006).

**Defendant's Plea Was Improperly Conditioned upon Appellate Review of Issues He Was Not Entitled to Have Reviewed. —**

Since defendant made a procedural, constitutional argument about the determination of his sentence, he did not have a statutory right to appeal the issues of whether the trial court erred by determining, without a jury, that defendant had 10 prior record level points and whether the trial court erred by failing to consider mitigating factors at the sentencing hearing. *State v. Hadden*, — N.C. App. —, 624 S.E.2d 417, 2006 N.C. App. LEXIS 190 (2006).

**Dismissal of Appeal. —**

Where defendant entered a plea of *nolo contendere* under G.S. 15A-1444(a1), (a), (e), defendant was not entitled to appeal the habitual felon status determination, and the appeal of this issue was, therefore, dismissed; this matter did not deal with sentencing, and defendant did not file an unsuccessful motion to withdraw the no contest plea. *State v. Quick*, 170 N.C. App. 166, 611 S.E.2d 864, 2005 N.C. App. LEXIS 897 (2005).

**Appeal dismissed because defendant was not entitled to appellate review, etc. —**

Defendant had no statutory right to appeal because the sentence imposed by the trial court was in the presumptive range. *State v. Hill*, — N.C. App. —, 632 S.E.2d 777, 2006 N.C. App. LEXIS 1636 (2006).

**Post-Conviction Motion for DNA Testing. —** Defendant's appeal of the trial court's denial of his motion for post-conviction DNA testing was dismissed because neither G.S. 15A-269 nor G.S. 15A-270 allows a defendant an appeal as of right from a grant or denial of a motion for post-conviction DNA. Review by writ of certiorari was also not available to defendant because his conviction for attempted rape had already been entered and there was no statutory reason allowing a writ of certiorari regarding motions for post-conviction DNA testing. *State v. Brown*, 170 N.C. App. 601, 613 S.E.2d 284, 2005 N.C. App. LEXIS 1069 (2005), cert. denied, 360 N.C. 68, 621 S.E.2d 882 (2005).

**Applied in** *State v. Hagans*, — N.C. App. —, 628 S.E.2d 776, 2006 N.C. App. LEXIS 719 (2006).

**Cited in** *State v. Starkey*, — N.C. App. —,

628 S.E.2d 424, 2006 N.C. App. LEXIS 874 (2006).

## § 15A-1445. Appeal by the State.

### CASE NOTES

#### II. Appealable Orders and Judgments.

##### II. APPEALABLE ORDERS AND JUDGMENTS.

**Appeal from Judgment “Regularly Taken.”** — When, after defendant was convicted of possession of cocaine and having attained the status of being an habitual felon, the trial court, sua sponte, granted a motion for appropriate relief, vacating the habitual felon conviction, and reducing defendant’s sentence, finding the sentence violated defendant’s rights under the Eighth and Fourteenth Amendments, the State’s appeal from the trial court’s grant of appropriate relief was not from a judgment “regularly taken,” under G.S. 15A-

1445, because, while the relief the trial court granted might have been considered to have effectively dismissed defendant’s charge of having attained the status of an habitual felon or imposed an unauthorized prison term in light of defendant’s habitual felon status, the State had to have the right to appeal from the underlying judgment convicting defendant and not the order granting appropriate relief, and that underlying judgment did not dismiss a charge against defendant or impose an unauthorized prison term, so the State had no right to appeal from that judgment. *State v. Starkey*, — N.C. App. —, 628 S.E.2d 424, 2006 N.C. App. LEXIS 874 (2006).

## § 15A-1446. Requisites for preserving the right to appellate review.

### CASE NOTES

#### **Construction with N.C.R.A.P., Rule 10.** —

After considering defendant’s assignment of error regarding the trial court’s erroneous activation of his suspended sentences under G.S. 15A-1446(d)(18), where those sentences were unconstitutionally aggravated, because said sentences were imposed without his stipulation or by a submission to and finding by the jury beyond a reasonable doubt, said sentences were vacated and a new sentencing hearing was ordered, despite defendant’s failure to raise an objection at trial. *State v. McMahan*, — N.C. App. —, 621 S.E.2d 319, 2005 N.C. App. LEXIS 2477 (2005).

#### **Assignment of error dismissed for failure to make timely objection, etc.** —

Defendant’s contention that the trial court erred in denying a motion for a mistrial based on an improper identification was not properly preserved for review because defense counsel failed to raise an objection when the victim testified about the photo line-up. *State v. Summers*, — N.C. App. —, 629 S.E.2d 902, 2006 N.C. App. LEXIS 1188 (2006).

#### **Certain Errors Subject to Appellate Review Even Though No Objection, Exception or Motion Made.** —

Since no conclusion could be reached by reading the indictment other than that defendant

was in custody at the time he allegedly committed malicious conduct by a prisoner, the trial court had jurisdiction over his case, as the State adequately alleged the offense such that defendant was notified of the offense against which he was called to defend. *State v. Artis*, — N.C. App. —, 622 S.E.2d 204, 2005 N.C. App. LEXIS 2610 (2005).

#### **Sufficiency of the evidence may be raised on appeal, etc.** —

Enhanced sentence imposed on defendant’s drug convictions had to be remanded for resentencing, because error based on insufficient evidence as a matter of law does not require an objection at the sentencing hearing to be preserved for appellate review, G.S. 15A-1446(d)(5), (18), and the trial court failed to satisfy its burden under G.S. 15A-1340.14(e) to show that defendant’s Texas convictions were substantially similar to corresponding Class I North Carolina felony offenses. *State v. Huu The Cao*, — N.C. App. —, 626 S.E.2d 301, 2006 N.C. App. LEXIS 185 (2006).

#### **Plain Error Rule May Allow Relief Without Objection.** —

Appellate court applied a plain error review because defendant failed to preserve his assignment of error regarding the admission of letters into evidence for review; given the additional

evidence against defendant, the admission of the letters did not have a probable impact on the jury's finding of defendant's guilt. *State v. Curry*, 171 N.C. App. 568, 615 S.E.2d 327, 2005 N.C. App. LEXIS 1312 (2005).

Trial court erred in finding defendant to have the status of a habitual felon, as the trial court did not inform defendant of the nature of the charges and consequences of pleading guilty to such a status, as required by G.S. 15A-1022(a)(1)-(4); defendant could raise the failure to so inform him on appeal even though he did

not object at trial and apparently pled guilty to habitual felon status. *State v. Artis*, — N.C. App. —, 622 S.E.2d 204, 2005 N.C. App. LEXIS 2610 (2005).

**Applied** in *State v. Cummings*, — N.C. App. —, 622 S.E.2d 183, 2005 N.C. App. LEXIS 2618 (2005); *State v. Bauberger*, — N.C. App. —, 626 S.E.2d 700, 2006 N.C. App. LEXIS 523 (2006).

**Cited** in *State v. Verrier*, 173 N.C. App. 123, 617 S.E.2d 675, 2005 N.C. App. LEXIS 1899 (2005).

## § 15A-1448. Procedures for taking appeal.

### CASE NOTES

**Loss of Jurisdiction to Rule on Motion for Appropriate Relief.** — Summary denial of defendant's motion for appropriate relief (MAR) was vacated as a timely-filed appeal was pending when the MAR was filed, so the trial

court lacked jurisdiction to rule on the MAR; the proper venue for filing the MAR would have been in the appellate court. *State v. Williams*, — N.C. App. —, 630 S.E.2d 216, 2006 N.C. App. LEXIS 1219 (2006).

## § 15A-1451. Stay of sentence; bail; no stay when State appeals.

### CASE NOTES

**Stay of Probationary Sentence.** — Despite a specific reference to probation in G.S. 15A-1451, and the absence of a corresponding reference to probation in G.S. 15A-1431, G.S. 15A-1431(e) provided that a defendant remained on pretrial release during an appeal from district court to superior court, so

he or she was not also on probation; defendant's probation, imposed by a district court, did not start where defendant appealed to superior court, did not begin until he withdrew that appeal, and thus, a later violation report was timely filed. *State v. Smith*, 359 N.C. 618, 614 S.E.2d 279, 2005 N.C. LEXIS 635 (2005).

## § 15A-1453. Ancillary actions during appeal.

### CASE NOTES

**Cited** in *State v. Williams*, — N.C. App. —, 630 S.E.2d 216, 2006 N.C. App. LEXIS 1219 (2006).

§§ 15A-1454 through 15A-1459: Reserved for future codification purposes.

## ARTICLE 92.

### *North Carolina Innocence Inquiry Commission.*

## § 15A-1460. Definitions.

The following definitions apply in this Article:

- (1) "Claim of factual innocence" means a claim on behalf of a living person convicted of a felony in the General Court of Justice of the State of



North Carolina, asserting the complete innocence of any criminal responsibility for the felony for which the person was convicted and for any other reduced level of criminal responsibility relating to the crime, and for which there is some credible, verifiable evidence of innocence that has not previously been presented at trial or considered at a hearing granted through postconviction relief.

- (2) "Commission" means the North Carolina Innocence Inquiry Commission established by this Article.
- (3) "Director" means the Director of the North Carolina Innocence Inquiry Commission.
- (4) "Victim" means the victim of the crime, or if the victim of the crime is deceased, the next of kin of the victim. (2006-184, s. 1.)

**Cross References.** — As to the duties of the State Judicial Council, see G.S. 7A-409.1.

**Editor's Note.** — Session Laws 2006-184, s. 12, makes this article effective August 3, 2006, and applicable to claims of factual innocence filed on or before December 31, 2010.

The preamble to Session Laws 2006-184, provides: "Whereas, postconviction review of credible claims of factual innocence supported by verifiable evidence not previously presented at trial or at a hearing granted through postconviction relief should be addressed expeditiously to ensure the innocent as well as the guilty receive justice; and

"Whereas, public confidence in the justice system is strengthened by thorough and timely inquiry into claims of factual innocence; and

"Whereas, factual claims of innocence, which are determined to be credible, can most effectively and efficiently be evaluated through complete and independent investigation and review of the same; Now, therefore, The General Assembly of North Carolina enacts:"

Session Laws 2006-184, s. 11, provides: "The initial members of the North Carolina Innocence Inquiry commission shall be appointed not later than October 1, 2006. No claims of actual innocence may be filed with the Commission until November 1, 2006. No claims of actual innocence where the convicted person entered and was convicted on a plea of guilty may be filed with the Commission until November 1, 2008."

## § 15A-1461. Purpose of Article.

This Article establishes an extraordinary procedure to investigate and determine credible claims of factual innocence that shall require an individual to voluntarily waive rights and privileges as described in this Article. (2006-184, s. 1.)

## § 15A-1462. Commission established.

(a) There is established the North Carolina Innocence Inquiry Commission. The North Carolina Innocence Inquiry Commission shall be an independent commission under the Judicial Department for administrative purposes.

(b) The Administrative Office of the Courts shall provide administrative support to the Commission as needed. The Director of the Administrative Office of the Courts shall not reduce or modify the budget of the Commission or use funds appropriated to the Commission without the approval of the Commission. (2006-184, s. 1.)

## § 15A-1463. Membership; chair; meetings; quorum.

(a) The Commission shall consist of eight voting members as follows:

- (1) One shall be a superior court judge.
- (2) One shall be a prosecuting attorney.
- (3) One shall be a victim advocate.
- (4) One shall be engaged in the practice of criminal defense law.
- (5) One shall be a public member who is not an attorney and who is not an officer or employee of the Judicial Department.

- (6) One shall be a sheriff holding office at the time of his or her appointment.
- (7) The vocations of the two remaining appointed voting members shall be at the discretion of the Chief Justice.

The Chief Justice of the North Carolina Supreme Court shall make the initial appointment for members identified in subdivisions (4) through (6) of this subsection. The Chief Judge of the Court of Appeals shall make the initial appointment for members identified in subdivisions (1) through (3) of this subsection. After an appointee has served his or her first three-year term, the subsequent appointment shall be by the Chief Justice or Chief Judge who did not make the previous appointment. Thereafter, the Chief Justice or Chief Judge shall rotate the appointing power, except for the two discretionary appointments identified by subdivision (7) of this subsection which shall be appointed by the Chief Justice.

(b) The appointing authority shall also appoint alternate Commission members for the Commission members he or she has appointed to serve in the event of scheduling conflicts, conflicts of interest, disability, or other disqualification arising in a particular case. The alternate members shall have the same qualifications for appointment as the original member. In making the appointments, the appointing authority shall make a good faith effort to appoint members with different perspectives of the justice system. The appointing authority shall also consider geographical location, gender, and racial diversity in making the appointments.

(c) The superior court judge who is appointed as a member under subsection (a) of this section shall serve as Chair of the Commission. The Commission shall have its initial meeting no later than January 31, 2007, at the call of the Chair. The Commission shall meet a minimum of once every six months and may also meet more often at the call of the Chair. The Commission shall meet at such time and place as designated by the Chair. Notice of the meetings shall be given at such time and manner as provided by the rules of the Commission. A majority of the members shall constitute a quorum. All Commission votes shall be by majority vote. (2006-184, s. 1.)

**Editor's Note.** — Subsections (b) and (c) were codified as (a1) and (b) by Session Laws 2006-184, s. 1, and have been renumbered at the direction of the Revisor of Statutes.

Session Laws 2006-184, s. 8, provides: "In order to allow staggered terms of members of the North Carolina Innocence Inquiry Commission, as required by G.S. 15A-1464(a) as enacted by this act, the Commission members identified in G.S. 15A-1463(a)(1), (2), and (4) shall be appointed to initial terms of two years, the Commission members identified in G.S. 15A-1463(a)(3), (5), and (6) shall be appointed

to initial terms of three years, and the Commission members identified in G.S. 15A-1463(a)(7) shall be appointed to initial terms of one year."

Session Laws 2006-184, s. 11, provides: "The initial members of the North Carolina Innocence Inquiry Commission shall be appointed not later than October 1, 2006. No claims of 'actual innocence' may be filed with the Commission until November 1, 2006. No claims of 'actual innocence' where the convicted person entered and was convicted on a plea of guilty may be filed with the Commission until November 1, 2008."

## § 15A-1464. Terms of members; compensation; expenses.

(a) Of the initial members, two appointments shall be for one-year terms, three appointments shall be for two-year terms, and three appointments shall be for three-year terms. Thereafter, all terms shall be for three years. Members of the Commission shall serve no more than two consecutive three-year terms plus any initial term of less than three years. Unless provided otherwise by this act, all terms of members shall begin on January 1 and end on December 31.



Members serving by virtue of elective or appointive office, except for the sheriff, may serve only so long as the officeholders hold those respective offices. The Chief Justice may remove members, with cause. Vacancies occurring before the expiration of a term shall be filled in the manner provided for the members first appointed.

(b) The Commission members shall receive no salary for serving. All Commission members shall receive necessary subsistence and travel expenses in accordance with the provisions of G.S. 138-5 and G.S. 138-6, as applicable. (2006-184, s. 1.)

**Editor's Note.** — Session Laws 2006-184, s. 8, provides: "In order to allow staggered terms of members of the North Carolina Innocence Inquiry Commission, as required by G.S. 15A-1464(a) as enacted by this act, the Commission members identified in G.S. 15A-1463(a)(1), (2), and (4) shall be appointed to initial terms of two

years, the Commission members identified in G.S. 15A-1463(a)(3), (5), and (6) shall be appointed to initial terms of three years, and the Commission members identified in G.S. 15A-1463(a)(7) shall be appointed to initial terms of one year."

## § 15A-1465. Director and other staff.

(a) The Commission shall employ a Director. The Director shall be an attorney licensed to practice in North Carolina at the time of appointment and at all times during service as Director. The Director shall assist the Commission in developing rules and standards for cases accepted for review, coordinate investigation of cases accepted for review, maintain records for all case investigations, prepare reports outlining Commission investigations and recommendations to the trial court, and apply for and accept on behalf of the Commission any funds that may become available from government grants, private gifts, donations, or bequests from any source.

(b) Subject to the approval of the Chair, the Director shall employ such other staff and shall contract for services as is necessary to assist the Commission in the performance of its duties, and as funds permit.

(c) The Commission may, with the approval of the Legislative Services Commission, meet in the State Legislative Building or the Legislative Office Building, or may meet in an area provided by the Director of the Administrative Office of the Courts. The Director of the Administrative Office of the Courts shall provide office space for the Commission and the Commission staff. (2006-184, s. 1.)

**Editor's Note.** — The second and third paragraphs were designated as subsections (b)

and (c) at the direction of the Revisor of Statutes.

## § 15A-1466. Duties.

The Commission shall have the following duties and powers:

- (1) To establish the criteria and screening process to be used to determine which cases shall be accepted for review.
- (2) To conduct inquiries into claims of factual innocence, with priority to be given to those cases in which the convicted person is currently incarcerated solely for the crime for which he or she claims factual innocence.
- (3) To coordinate the investigation of cases accepted for review.
- (4) To maintain records for all case investigations.
- (5) To prepare written reports outlining Commission investigations and recommendations to the trial court at the completion of each inquiry.



- (6) To apply for and accept any funds that may become available for the Commission's work from government grants, private gifts, donations, or bequests from any source. (2006-184, s. 1.)

**§ 15A-1467. Claims of innocence; waiver of convicted person's procedural safeguards and privileges; formal inquiry; notification of the crime victim.**

(a) A claim of factual innocence may be referred to the Commission by any court, person, or agency. The Commission shall not consider a claim of factual innocence if the convicted person is deceased. The determination of whether to grant a formal inquiry regarding any other claim of factual innocence is in the discretion of the Commission. The Commission may informally screen and dismiss a case summarily at its discretion.

(b) No formal inquiry into a claim of innocence shall be made by the Commission unless the Director or the Director's designee first obtains a signed agreement from the convicted person in which the convicted person waives his or her procedural safeguards and privileges, agrees to cooperate with the Commission, and agrees to provide full disclosure regarding all inquiry requirements of the Commission. The waiver under this subsection does not apply to matters unrelated to a convicted person's claim of innocence. The convicted person shall have the right to advice of counsel prior to the execution of the agreement and, if a formal inquiry is granted, throughout the formal inquiry. If counsel represents the convicted person, then the convicted person's counsel must be present at the signing of the agreement. If counsel does not represent the convicted person, the Commission Chair shall determine the convicted person's indigency status and, if appropriate, enter an order for the appointment of counsel for the purpose of advising on the agreement.

(c) If a formal inquiry regarding a claim of factual innocence is granted, the Director shall use all due diligence to notify the victim in the case and explain the inquiry process. The Commission shall give the victim notice that the victim has the right to present his or her views and concerns throughout the Commission's investigation.

(d) The Commission may use any measure provided in Chapter 15A of the General Statutes and the Rules of Civil Procedure as set out in G.S. 1A-1 to obtain information necessary to its inquiry. The Commission may also do any of the following: issue process to compel the attendance of witnesses and the production of evidence, administer oaths, petition the Superior Court of Wake County or of the original jurisdiction for enforcement of process or for other relief, and prescribe its own rules of procedure. All challenges with regard to the Commission's authority or the Commission's access to evidence shall be heard by the Commission Chair in the Chair's judicial capacity, including any in camera review required by G.S. 15A-908.

(e) While performing duties for the Commission, the Director or the Director's designee may serve subpoenas or other process issued by the Commission throughout the State in the same manner and with the same effect as an officer authorized to serve process of the General Court of Justice.

(f) All State discovery and disclosure statutes in effect at the time of formal inquiry shall be enforceable as if the convicted person were currently being tried for the charge for which the convicted person is claiming innocence.

(g) If, at any point during an inquiry, the convicted person refuses to comply with requests of the Commission or is otherwise deemed to be uncooperative by the Commission, the Commission shall discontinue the inquiry. (2006-184, s. 1.)

**Editor's Note.** — Session Laws 2006-184, s. 11 provides: "The initial members of the North Carolina Innocence Inquiry Commission shall be appointed not later than October 1, 2006. No claims of 'actual innocence' may be filed with

the Commission until November 1, 2006. No claims of 'actual innocence' where the convicted person entered and was convicted on a plea of guilty may be filed with the Commission until November 1, 2008."

## § 15A-1468. Commission proceedings.

(a) At the completion of a formal inquiry, all relevant evidence shall be presented to the full Commission. As part of its proceedings, the Commission may conduct public hearings. The determination as to whether to conduct public hearings is solely in the discretion of the Commission. Any public hearing held in accordance with this section shall be subject to the Commission's rules of operation.

(b) The Director shall use all due diligence to notify the victim at least 30 days prior to any proceedings of the full Commission held in regard to the victim's case. The Commission shall notify the victim that the victim is permitted to attend proceedings otherwise closed to the public, subject to any limitations imposed by this Article. If the victim plans to attend proceedings otherwise closed to the public, the victim shall notify the Commission at least 10 days in advance of the proceedings of his or her intent to attend. If the Commission determines that the victim's presence may interfere with the investigation, the Commission may close any portion of the proceedings to the victim.

(c) After hearing the evidence, the full Commission shall vote to establish further case disposition as provided by this subsection. All eight voting members of the Commission shall participate in that vote.

Except in cases where the convicted person entered and was convicted on a plea of guilty, if five or more of the eight voting members of the Commission conclude there is sufficient evidence of factual innocence to merit judicial review, the case shall be referred to the senior resident superior court judge in the district of original jurisdiction by filing with the clerk of court the opinion of the Commission with supporting findings of fact, as well as the record in support of such opinion, with service on the district attorney in noncapital cases and service on both the district attorney and Attorney General in capital cases. In cases where the convicted person entered and was convicted on a plea of guilty, if all of the eight voting members of the Commission conclude there is sufficient evidence of factual innocence to merit judicial review, the case shall be referred to the senior resident superior court judge in the district of original jurisdiction.

If less than five of the eight voting members of the Commission, or in cases where the convicted person entered and was convicted on a guilty plea less than all of the eight voting members of the Commission, conclude there is sufficient evidence of factual innocence to merit judicial review, the Commission shall conclude there is insufficient evidence of factual innocence to merit judicial review. The Commission shall document that opinion, along with supporting findings of fact, and file those documents and supporting materials with the clerk of superior court in the district of original jurisdiction, with a copy to the district attorney and the senior resident superior court judge.

The Director of the Commission shall use all due diligence to notify immediately the victim of the Commission's conclusion in a case.

(d) Evidence of criminal acts, professional misconduct, or other wrongdoing disclosed through formal inquiry or Commission proceedings shall be referred to the appropriate authority. Evidence favorable to the convicted person disclosed through formal inquiry or Commission proceedings shall be disclosed to the convicted person and the convicted person's counsel, if the convicted person has counsel.



(e) All proceedings of the Commission shall be recorded and transcribed as part of the record. All Commission member votes shall be recorded in the record. All records and proceedings of the Commission are confidential and are exempt from public record and public meeting laws except that the supporting records for the Commission's conclusion that there is sufficient evidence of factual innocence to merit judicial review, including all files and materials considered by the Commission and a full transcript of the hearing before the Commission, shall become public at the time of referral to the superior court. Commission records for conclusions of insufficient evidence of factual innocence to merit judicial review shall remain confidential, except as provided in subsection (d) of this section. (2006-184, s. 1.)

### **§ 15A-1469. Postcommission three-judge panel.**

(a) If the Commission concludes there is sufficient evidence of factual innocence to merit judicial review, the Chair of the Commission shall request the Chief Justice to appoint a three-judge panel, not to include any trial judge that has had substantial previous involvement in the case, and issue commissions to the members of the three-judge panel to convene a special session of the superior court of the original jurisdiction to hear evidence relevant to the Commission's recommendation. The senior judge of the panel shall preside.

(b) The senior resident superior court judge shall enter an order setting the case for hearing at the special session of superior court for which the three-judge panel is commissioned and shall require the State to file a response to the Commission's opinion within 60 days of the date of the order.

(c) The district attorney of the district of conviction, or the district attorney's designee, shall represent the State at the hearing before the three-judge panel.

(d) The three-judge panel shall conduct an evidentiary hearing. At the hearing, the court may compel the testimony of any witness, including the convicted person. The convicted person may not assert any privilege or prevent a witness from testifying. The convicted person has a right to be present at the evidentiary hearing and to be represented by counsel. A waiver of the right to be present shall be in writing.

(e) The senior resident superior court judge shall determine the convicted person's indigency status and, if appropriate, enter an order for the appointment of counsel. The court may also enter an order relieving an indigent convicted person of all or a portion of the costs of the proceedings.

(f) The clerk of court shall provide written notification to the victim 30 days prior to any case-related hearings.

(g) Upon the motion of either party, the senior judge of the panel may direct the attorneys for the parties to appear before him or her for a conference on any matter in the case.

(h) The three-judge panel shall rule as to whether the convicted person has proved by clear and convincing evidence that the convicted person is innocent of the charges. Such a determination shall require a unanimous vote. If the vote is unanimous, the panel shall enter dismissal of all or any of the charges. If the vote is not unanimous, the panel shall deny relief. (2006-184, s. 1.)

### **§ 15A-1470. No right to further review of decision by Commission or three-judge panel; convicted person retains right to other postconviction relief.**

(a) Unless otherwise authorized by this Article, the decisions of the Commission and of the three-judge panel are final and are not subject to further review by appeal, certification, writ, motion, or otherwise.



(b) A claim of factual innocence asserted through the Innocence Inquiry Commission shall not adversely affect the convicted person's rights to other postconviction relief. (2006-184, s. 1.)

**§§ 15A-1471 through 15A-1474:** Reserved for future codification purposes.

## **§ 15A-1475. Reports.**

Beginning January 1, 2008, and annually thereafter, the North Carolina Innocence Inquiry Commission shall report on its activities to the Joint Legislative Corrections, Crime Control, and Juvenile Justice Oversight Committee and the State Judicial Council. The report may contain recommendations of any needed legislative changes related to the activities of the Commission. The report shall recommend the funding needed by the Commission, the district attorneys, and the State Bureau of Investigation in order to meet their responsibilities under S.L. 2006-184. Recommendations concerning the district attorneys or the State Bureau of Investigation shall only be made after consultations with the North Carolina Conference of District Attorneys and the Attorney General. (2006-184, s. 9.)

**Cross References.** — As to the duties of the State Judicial Council, see G.S. 7A-409.1. 9, was codified as this section at the direction of the Revisor of Statutes.

**Editor's Note.** — Session Laws 2006-184, s.

## ARTICLES 93 TO 99.

**§§ 15A-1476 through 15A-1999:** Reserved for future codification purposes.

## SUBCHAPTER XV. CAPITAL PUNISHMENT.

### ARTICLE 100.

#### *Capital Punishment.*

**§ 15A-2000. Sentence of death or life imprisonment for capital felonies; further proceedings to determine sentence.**

#### CASE NOTES

- I. General Consideration.
- II. Review of Judgment and Sentence.
- III. Aggravating Circumstances.
  - A. In General.
  - B. Prior Convictions.
  - D. Felony Murder.
  - E. Especially Heinous, Atrocious, or Cruel Act.
  - G. Course of Conduct.
- IV. Mitigating Circumstances.
  - A. In General.
  - B. No Significant Prior Criminal Activity.

- D. Duress.
- E. Impaired Capacity.
- F. Age of Defendant.

## I. GENERAL CONSIDERATION.

### **Constitutionality of Instruction on Weighing of Factors. —**

G.S. 15A-2000(c) does not violate a defendant's constitutional rights. *State v. Duke*, 360 N.C. 110, 623 S.E.2d 11, 2005 N.C. LEXIS 1314 (2005).

**No Right to Sit Jurors. —** In his murder trial, defendant had no right to seek to sit two jurors during the guilt-innocence proceeding who were opposed to imposing the death penalty under any circumstances and to substitute two alternate jurors during the penalty proceeding who were "death-qualified." G.S. 15A-2000(a)(2) permitted alternate jurors to serve during the sentencing phase in extraordinary circumstances involving the death, incapacitation or disqualification of an empaneled juror, but did not provide for the exchange of jurors for the sentencing phase based upon their convictions concerning the death penalty, and the Supreme Court of North Carolina and the United States Supreme Court have held that the death qualification of a jury is not unconstitutional. *State v. Elliott*, 360 N.C. 400, 628 S.E.2d 735, 2006 N.C. LEXIS 46 (2006).

In his murder trial, defendant had no right to seek to sit two jurors during the guilt-innocence proceeding who were opposed to imposing the death penalty under any circumstances and to substitute two alternate jurors during the penalty proceeding who were "death-qualified." Selecting a jury composed both of those opposed and unopposed to capital punishment for the purpose of determining guilt and then, at the sentencing phase, replacing those opposed by alternates who were unopposed to the death penalty, contravened G.S. 15A-2000(a)(2), which contemplated that the same jury that determined guilt also recommended the sentence. *State v. Elliott*, 360 N.C. 400, 628 S.E.2d 735, 2006 N.C. LEXIS 46 (2006).

**Habeas Relief Was Denied Where Petitioner Did Not Prove His Counsel Was Ineffective. —** Where a state prisoner, who was sentenced to death for committing first-degree murder, in violation of G.S. 14-17, argued that his attorneys were ineffective because they failed to adequately present mitigating evidence concerning his life history and his mental health, the prisoner was not entitled to federal habeas corpus relief because (1) the prisoner's sisters testified at sentencing about the prisoner's dysfunctional childhood; (2) the prisoner instructed the attorneys not to introduce further evidence of his background; and (3) a doctor testified at sentencing that the prisoner's mental disorders impaired his ability

to control his behavior; furthermore, the prisoner could not demonstrate prejudice because the additional evidence identified by the prisoner was largely cumulative and the jury found that four severe aggravating circumstances under G.S. 15A-2000 outweighed any mitigating circumstances. *Campbell v. Polk*, 447 F.3d 270, 2006 U.S. App. LEXIS 11591 (4th Cir. 2006).

**Cited in** *Buckner v. Polk*, 453 F.3d 195, 2006 U.S. App. LEXIS 16062 (4th Cir. 2006);

## II. REVIEW OF JUDGMENT AND SENTENCE.

### **Proportionality Review Required. —**

Although the North Carolina Supreme Court compares a case at bar with the cases in which it has found the death penalty to be proportionate, it will not undertake to discuss or cite all of those cases each time it carries out that duty. *State v. Duke*, 360 N.C. 110, 623 S.E.2d 11, 2005 N.C. LEXIS 1314 (2005).

### **Death Penalty Was Appropriate. —**

Conviction for double murder was proper and two consecutive death sentences were not disproportionate. Jury found three aggravators, prior violent felony, especially heinous, atrocious, or cruel, and that the crime involved crimes against other persons, under G.S. 15A-2000(e)(3), (9), (11), outweighed no statutory mitigators. *State v. Duke*, 360 N.C. 110, 623 S.E.2d 11, 2005 N.C. LEXIS 1314 (2005).

Death penalty was upheld in defendant's conviction of murder for the stabbing death of the owner of a store during a robbery where the jury found all four of the aggravating circumstances submitted, three of which related to defendant's having been previously convicted of a felony involving the use or threat of violence to the person, the jury did not find the two submitted statutory mitigating circumstances to exist, and the jury found 12 of the 19 non-statutory mitigating circumstances submitted; additionally, the case was not substantially similar to any of the cases in which the death sentence was found disproportionate. *State v. al-Bayyinah*, 359 N.C. 741, 616 S.E.2d 500, 2005 N.C. LEXIS 844 (2005).

### **Sentence Held Not Excessive or Disproportionate. —**

Jury's finding of two distinct aggravating circumstances submitted was supported by the evidence, and nothing in the record suggested defendant's death sentence was imposed under the influence of passion, prejudice, or any other arbitrary factor; defendant killed the victim in the victim's home and defendant was convicted based on premeditation, deliberation, and under the felony murder rule. *State v. Campbell*,



359 N.C. 644, 617 S.E.2d 1, 2005 N.C. LEXIS 842 (2005).

The North Carolina Supreme Court has never found a death sentence disproportionate in a double-murder case. *State v. Duke*, 360 N.C. 110, 623 S.E.2d 11, 2005 N.C. LEXIS 1314 (2005).

### III. AGGRAVATING CIRCUMSTANCES.

#### A. In General.

**Double Jeopardy Considerations.** — Imposition of death penalty in the defendant's second trial did not violate double jeopardy or Ring because the jury in the first trial had found at least one statutory aggravator and the jury in the second trial had also found at least one statutory aggravator. *State v. Duke*, 360 N.C. 110, 623 S.E.2d 11, 2005 N.C. LEXIS 1314 (2005).

**Aggravating Factors Supported Death Sentence.** — There was support in the record of defendant's rape and murder trial that supported the aggravating circumstances that the jury found, the sentence of death was not imposed under the influence of passion, prejudice, or any other arbitrary factor, and the death sentence was not excessive or disproportionate to the penalty imposed in similar cases, considering the crime and defendant, pursuant to G.S. 15A-2000(d)(2). The jury found two aggravating circumstances to each of the three murders; one murder was committed while he was engaged in committing a burglary pursuant to G.S. 15A-2000(e)(5), the murder was part of a course of conduct that included defendant's commission of other violent crimes against other persons, pursuant to G.S. 15A-2000(e)(11), his murder of a married couple was committed while he was engaged in committing arson, pursuant to G.S. 15A-2000(e)(5), and the murder of one of his elderly female victims was especially heinous, atrocious, or cruel, pursuant to G.S. 15A-2000(e)(9). *State v. Forte*, 360 N.C. 427, 629 S.E.2d 137, 2006 N.C. LEXIS 45 (2006).

**State's Argument of Victim's Perceptions Properly Admitted.** — Since arguments addressing the victim's perceptions as defendant shot him were relevant to the G.S. 15A-2000(e)(9) aggravator, the State's argument was proper and the trial court had no grounds to intervene ex mero motu. *State v. Hurst*, 360 N.C. 181, 624 S.E.2d 309, 2006 N.C. LEXIS 7 (2006).

**Two Aggravating Circumstances Found by Jury.** — Defendant's death sentence was proportionate, pursuant to G.S. 15A-2000(d)(2). The jury found two aggravating circumstances, that the murder was committed while defendant was committing a first-degree burglary, as contemplated by G.S. 15A-2000(e)(5), and the murder was especially heinous, atrocious, or

cruel under G.S. 15A-2000(e)(9). *State v. Elliott*, 360 N.C. 400, 628 S.E.2d 735, 2006 N.C. LEXIS 46 (2006).

#### B. Prior Convictions.

##### Acts Sufficient to Show Use or Threat of Violence. —

Trial court did not abuse its discretion in allowing testimony regarding the circumstances surrounding defendant's prior conviction of second-degree kidnapping; the trial court determined that evidence concerning the alleged domestic violence and rapes was necessary to show that the victim was terrorized by defendant and that her fear was well founded at the time of the actual kidnapping. *State v. Campbell*, 359 N.C. 644, 617 S.E.2d 1, 2005 N.C. LEXIS 842 (2005).

#### D. Felony Murder.

**Two Aggravating Circumstances to Each of Three Murders.** — G.S. 15A-2000(d)(2) there was support in the record of defendant's rape and murder trial that supported the aggravating circumstances that the jury found, the sentence of death was not imposed under the influence of passion, prejudice, or any other arbitrary factor, and the death sentence was not excessive or disproportionate to the penalty imposed in similar cases, considering the crime and defendant. The jury found two aggravating circumstances to each of the three murders; one murder was committed while he was engaged in committing a burglary pursuant to G.S. 15A-2000(e)(5), the murder was part of a course of conduct that included defendant's commission of other violent crimes against other persons, pursuant to G.S. 15A-2000(e)(11), his murder of a married couple was committed while he was engaged in committing arson, pursuant to G.S. 15A-2000(e)(5), and the murder of one of his elderly female victims was especially heinous, atrocious, or cruel, pursuant to G.S. 15A-2000(e)(9). *State v. Forte*, 360 N.C. 427, 629 S.E.2d 137, 2006 N.C. LEXIS 45 (2006).

#### E. Especially Heinous, Atrocious, or Cruel Act.

##### Factor Is Constitutional. —

Heinous, atrocious, or cruel aggravating circumstance under G.S. 15A-2000(e)(9) was argued to be unconstitutionally vague and overbroad, and that that vagueness could not be cured through appellate narrowing after Ring; although the issue was not raised in the lower court so as to be properly addressed on appeal, the highest court found the issue to be in the public interest, addressed the issue to further develop its jurisprudence under N.C. R. App. P. 2, and determined that the circumstance was constitutional under the Sixth Amendment be-



cause (1) the pattern jury instructions included language approved by the Court that narrowed the definition of the circumstance, and (2) the appellate review of the circumstance as submitted to the jury did not make the appellate court a “co-finder of fact” with the jury. *State v. Duke*, 360 N.C. 110, 623 S.E.2d 11, 2005 N.C. LEXIS 1314 (2005).

**Evidence Held Sufficient. —**

State presented sufficient evidence, including the multiplicity of gun shots inflicted in rapid succession, defendant’s disregard of the victim’s plea for life, the victim’s realization she was about to be killed, and defendant’s calmness and lack of regret, to support submission of the especially heinous, atrocious, or cruel aggravating circumstance to the jury. *State v. McNeill*, 360 N.C. 231, 624 S.E.2d 329, 2006 N.C. LEXIS 1 (2006).

**Two Aggravating Circumstances to Each of Three Murders. —** There was support in the record of defendant’s rape and murder trial that supported the aggravating circumstances that the jury found, the sentence of death was not imposed under the influence of passion, prejudice, or any other arbitrary factor, and the death sentence was not excessive or disproportionate to the penalty imposed in similar cases, considering the crime and defendant. The jury found two aggravating circumstances to each of the three murders; one murder was committed while he was engaged in committing a burglary pursuant to G.S. 15A-2000(e)(5), the murder was part of a course of conduct that included defendant’s commission of other violent crimes against other persons, pursuant to G.S. 15A-2000(e)(11), his murder of a married couple was committed while he was engaged in committing arson, pursuant to G.S. 15A-2000(e)(5), and the murder of one of his elderly female victims was especially heinous, atrocious, or cruel, pursuant to G.S. 15A-2000(e)(9). *State v. Forte*, 360 N.C. 427, 629 S.E.2d 137, 2006 N.C. LEXIS 45 (2006).

**Felony Murder Supported By Aggravating Circumstances. —** There was support in the record of defendant’s rape and murder trial that supported the aggravating circumstances that the jury found, the sentence of death was not imposed under the influence of passion, prejudice, or any other arbitrary factor, and the death sentence was not excessive or disproportionate to the penalty imposed in similar cases, considering the crime and defendant. The jury found two aggravating circumstances to each of the three murders; one murder was committed while he was engaged in committing a burglary pursuant to G.S. 15A-2000(e)(5), the murder was part of a course of conduct that included defendant’s commission of other violent crimes against other persons, pursuant to G.S. 15A-2000(e)(11), his murder of a married couple was committed while he was engaged in committing arson, pursuant to G.S. 15A-2000(e)(5), and the

murder of one of his elderly female victims was especially heinous, atrocious, or cruel, pursuant to G.S. 15A-2000(e)(9). *State v. Forte*, 360 N.C. 427, 629 S.E.2d 137, 2006 N.C. LEXIS 45 (2006).

With regard to the use of the “especially heinous, atrocious, or cruel aggravating circumstance in the court did not err in overruling defendant’s objections to the use of that aggravating circumstance as set forth in G.S. 15A-2000(e)(9), even though he claimed that it was unconstitutionally vague and failed to narrow the class of persons eligible for the death penalty, the Supreme Court of North Carolina had already held that the subject aggravating circumstance was constitutional. *State v. Forte*, 360 N.C. 427, 629 S.E.2d 137, 2006 N.C. LEXIS 45 (2006).

**G. Course of Conduct.**

**Two Aggravating Circumstances to Each of Three Murders. —** There was support in the record of defendant’s rape and murder trial that supported the aggravating circumstances that the jury found, the sentence of death was not imposed under the influence of passion, prejudice, or any other arbitrary factor, and the death sentence was not excessive or disproportionate to the penalty imposed in similar cases, considering the crime and defendant. The jury found two aggravating circumstances to each of the three murders; one murder was committed while he was engaged in committing a burglary pursuant to G.S. 15A-2000(e)(5), the murder was part of a course of conduct that included defendant’s commission of other violent crimes against other persons, pursuant to G.S. 15A-2000(e)(11), his murder of a married couple was committed while he was engaged in committing arson, pursuant to G.S. 15A-2000(e)(5), and the murder of one of his elderly female victims was especially heinous, atrocious, or cruel, pursuant to G.S. 15A-2000(e)(9). *State v. Forte*, 360 N.C. 427, 629 S.E.2d 137, 2006 N.C. LEXIS 45 (2006).

**IV. MITIGATING CIRCUMSTANCES.**

**A. In General.**

**Statutory Versus Nonstatutory Mitigating Circumstances. —** If any error occurred in the re-instruction concerning mitigators, the error was to the defendant’s benefit because it implied all the listed circumstances had some mitigating value, rather than instructing the jury it should not find a nonstatutory mitigating circumstance unless it deemed that circumstance to exist and have mitigating value. *State v. Duke*, 360 N.C. 110, 623 S.E.2d 11, 2005 N.C. LEXIS 1314 (2005).

**Right to Peremptory Instruction. —**

It was not error for the trial court in the capital case to refuse to give preemptive instructions on a mitigating circumstance since defendant’s counsel failed to submit the in-

structions to the trial court in writing; and, even if the requested instructions had been submitted in writing the evidence supporting the G.S. 15A-2000(f)(2), (f)(6) mitigating circumstances was not uncontroverted. *State v. Duke*, 360 N.C. 110, 623 S.E.2d 11, 2005 N.C. LEXIS 1314 (2005).

**Refusal to Give Peremptory Instruction Not Error.** — It was not error for the trial court in defendant's trial for multiple rapes and murders to refuse to give his requested peremptory instructions on the statutory mitigating circumstances that the murders were committed while defendant was under the influence of a mental or emotional disturbance, pursuant to G.S. 15A-2000(f)(2), and that the capacity of defendant to conform his conduct to the requirements of the law was impaired, pursuant to G.S. 15A-2000(f)(6). If asked, a court had to give a peremptory instruction for any statutory or nonstatutory mitigating circumstance that uncontroverted and manifestly credible evidence supported, but the testimony of defendant's expert, who had no contact with him until after his arrest, was not manifestly credible, and the evidence supporting a possible submission of mitigating circumstances under G.S. 15A-2000(f)(1) and (2) was not uncontroverted. *State v. Forte*, 360 N.C. 427, 629 S.E.2d 137, 2006 N.C. LEXIS 45 (2006).

## **B. No Significant Prior Criminal Activity.**

### **Significant Criminal Activity Shown.** —

Since no rational jury could find that defendant's criminal activity was insignificant where defendant had been convicted of "several" breaking and entering charges and had been charged with driving under the influence, the trial court did not err in deciding not to instruct pursuant to G.S. 15A-2000(f)(1). *State v. Hurst*, 360 N.C. 181, 624 S.E.2d 309, 2006 N.C. LEXIS 7 (2006).

*State v. Rouse*, 339 N.C. 59 is overruled to the extent it conflicts with other decisions by implying that if the evidence pertaining to defendant's criminal history is offered in a context other than for the purpose of determining whether a G.S. 15A-2000(f)(1) instruction should be given the defendant might not be entitled to the instruction, it is overruled. *State v. Hurst*, 360 N.C. 181, 624 S.E.2d 309, 2006 N.C. LEXIS 7 (2006).

**Refusal to Submit Criminal History Not Error.** — It was not error in defendant's rape and murder trial to refuse to submit his criminal history as a mitigating factor under G.S. 15A-2000(f)(1); his record before the murders showed many prior convictions. Thus, while it was error to consider his criminal history that amassed after the murders, the error was harmless in light of the other, substantial, competent evidence presented to the court and because the test was whether a rational juror would conclude that defendant had no significant history of prior criminal activity. *State v. Forte*, 360 N.C. 427, 629 S.E.2d 137, 2006 N.C. LEXIS 45 (2006).

## **D. Duress.**

### **Issues of Provocation or Lack of Intent Not to be Relitigated at Sentencing Phase.**

— Jury decided during the guilt-innocence proceeding that defendant was guilty of first-degree murder, rejecting his contention he acted under perceived provocation; the defendant was properly not allowed to put provocation back into issue during the sentencing phase. *State v. Duke*, 360 N.C. 110, 623 S.E.2d 11, 2005 N.C. LEXIS 1314 (2005).

## **E. Impaired Capacity.**

**No Right to Peremptory Instruction.** — G.S. 15A-2000(f)(6) mitigating circumstance was not uncontroverted for the purpose of giving a preemptive jury instruction because evidence that the defendant tried to make the murders look like a robbery-murder could cause a reasonable jury to conclude that he knew and appreciated the criminality of his actions. *State v. Duke*, 360 N.C. 110, 623 S.E.2d 11, 2005 N.C. LEXIS 1314 (2005).

## **F. Age of Defendant.**

### **Age Properly Not Considered.** —

Trial court did not err in failing to submit the age mitigator under G.S. 15A-2000(f)(7) in the death penalty case where evidence of defendant's emotional immaturity was counterbalanced by other factors such as defendant's chronological age, defendant's apparently normal intellectual and physical development, and defendant's lifetime experience. *State v. Hurst*, 360 N.C. 181, 624 S.E.2d 309, 2006 N.C. LEXIS 7 (2006).

# **§ 15A-2004. Prosecutorial discretion.**

## **CASE NOTES**

**Cited** in *State v. Scanlon*, — N.C. App. —, 626 S.E.2d 770, 2006 N.C. App. LEXIS 541 (2006).

## § 15A-2005. Mentally retarded defendants; death sentence prohibited.

### CASE NOTES

**Relationship Between Mental Retardation, Competency to Stand Trial, and Forming Requisite Intent to Kill.** — Murder defendant was mentally retarded so he was not sentenced to death under G.S. 15A-2005(a)(1); but (1) experts testified he was competent under G.S. 15A-1001(a) to stand trial; and (2) evidence and his girlfriend's opinion testimony under G.S. 8C-1, N.C. R. Evid. 701, that he was "fine" and "not mentally retarded," indicated he was able to form the requisite "deliberation" and "cool state of blood" (as defined *State v. Ruof*) jury instructions and which were properly given to the jury in response to a deliberation question under G.S. 15A-1234(a)(1)) when he shot a coworker who teased him about being mentally retarded. *State v. McClain*, 169 N.C.

App. 657, 610 S.E.2d 783, 2005 N.C. App. LEXIS 804 (2005).

**Federal Habeas Corpus Review.** — State death row prisoner was properly denied an evidentiary hearing by a federal district court on the issue of whether he was mentally retarded and therefore precluded from being executed under state law; a federal appellate court deferred to a state post-conviction court's factual finding that the prisoner failed to show that he suffered from significantly sub-average general intellectual functioning, existing concurrently with significant limitations in adaptive functioning, both manifesting before the age of 18, as required by G.S. 15A-2005(a)(1)(a), (a)(1)(c). *Conaway v. Polk*, 453 F.3d 567, 2006 U.S. App. LEXIS 17304 (4th Cir. 2006).



## Chapter 15B. Victims Compensation.

### Article 1.

#### Crime Victims Compensation Act.

Sec.

15B-2. Definitions.

Sec.

15B-4. Award of compensation.

15B-11. Grounds for denial of claim or reduction of award.

### ARTICLE 1.

#### *Crime Victims Compensation Act.*

### § 15B-2. Definitions.

As used in this Article, unless the context requires otherwise:

- (1) "Allowable expense" means reasonable charges incurred for reasonably needed products, services, and accommodations, including those for medical care, rehabilitation, medically-related property, and other remedial treatment and care.

Allowable expense includes a total charge not in excess of five thousand dollars (\$5,000) for expenses related to funeral, cremation, and burial, including transportation of a body, but excluding expenses for flowers, gravestone, and other items not directly related to the funeral service.

Allowable expense for medical care, counseling, rehabilitation, medically-related property, and other remedial treatment and care of a victim shall be limited to sixty-six and two-thirds percent (66 2/3%) of the amount usually charged by the provider for the treatment or care. By accepting the compensation paid as allowable expense pursuant to this subdivision, the provider agrees that the compensation is payment in full for the treatment or care and shall not charge or otherwise hold a claimant financially responsible for the cost of services in addition to the amount of allowable expense.

- (2) "Claimant" means any of the following persons who claims an award of compensation under this Article:

- a. A victim;
- b. A dependent of a deceased victim;
- c. A third person who is not a collateral source and who provided benefit to the victim or his family other than in the course or scope of his employment, business, or profession;
- d. A person who is authorized to act on behalf of a victim, a dependent, or a third person described in subdivision c.

The claimant, however, may not be the offender or an accomplice of the offender who committed the criminally injurious conduct.

- (3) "Collateral source" means a source of benefits or advantages for economic loss otherwise compensable that the victim or claimant has received or that is readily available to the victim or the claimant from any of the following sources:

- a. The offender.
- b. The government of the United States or any of its agencies, a state or any of its political subdivisions, or an instrumentality of two or more states.
- c. Social Security, Medicare, or Medicaid.

- d. State-required, temporary, nonoccupational disability insurance.
  - e. Worker's compensation.
  - f. Wage continuation programs of any employer.
  - g. Proceeds of a contract of insurance payable to the victim for loss that the victim sustained because of the criminally injurious conduct.
  - h. A contract providing prepaid hospital and other health care services, or benefits for disability.
  - i. A contract of insurance that will pay for expenses directly related to a funeral, cremation, and burial, including transportation of a body.
- (4) "Commission" means the Crime Victims Compensation Commission established by G.S. 15B-3.
- (5) "Criminally injurious conduct" means conduct that by its nature poses a substantial threat of personal injury or death, and is punishable by fine or imprisonment or death, or would be so punishable but for the fact that the person engaging in the conduct lacked the capacity to commit the crime under the laws of this State. Criminally injurious conduct includes conduct that amounts to an offense involving impaired driving as defined in G.S. 20-4.01(24a), and conduct that amounts to a violation of G.S. 20-166 if the victim was a pedestrian or was operating a vehicle moved solely by human power or a mobility impairment device. For purposes of this Article, a mobility impairment device is a device that is designed for and intended to be used as a means of transportation for a person with a mobility impairment, is suitable for use both inside and outside a building, and whose maximum speed does not exceed 12 miles per hour when the device is being operated by a person with a mobility impairment. Criminally injurious conduct does not include conduct arising out of the ownership, maintenance, or use of a motor vehicle when the conduct is punishable only as a violation of other provisions of Chapter 20 of the General Statutes. Criminally injurious conduct shall also include an act of terrorism, as defined in 18 U.S.C. § 2331, that is committed outside of the United States against a citizen of this State.
- (6) "Dependent" means an individual wholly or substantially dependent upon the victim for care and support and includes a child of the victim born after his death.
- (7) "Dependent's economic loss" means loss after a victim's death of contributions of things of economic value to his dependents, not including services they would have received from the victim if he had not suffered the fatal injury, less expenses of the dependents avoided by reason of the victim's death.
- (8) "Dependent's replacement service loss" means loss reasonably incurred by dependents after a victim's death in obtaining ordinary and necessary services in lieu of those the victim would have performed for their benefit if he had not suffered the fatal injury, less expenses of the dependents avoided by reason of the victim's death and not subtracted in calculating dependent's economic loss.
- Dependent's replacement service loss will be limited to a 26-week period commencing from the date of the injury and compensation shall not exceed two hundred dollars (\$200.00) per week.
- (9) "Director" means the Director of the Commission appointed under G.S. 15B-3(g).
- (10) "Economic loss" means economic detriment consisting only of allowable expense, work loss, replacement services loss, and household support loss. If criminally injurious conduct causes death, economic



loss includes a dependent's economic loss and a dependent's replacement service loss. Noneconomic detriment is not economic loss, but economic loss may be caused by pain and suffering or physical impairment.

- (10a) "Household support loss" means the loss of support that a victim would have received from the victim's spouse for the purpose of maintaining a home or residence for the victim and the victim's dependents. A victim may be compensated fifty dollars (\$50.00) per week for each dependent child. Compensation for household support loss shall not exceed three hundred dollars (\$300.00) per week and shall be limited to 26 weeks commencing from the date of the injury. A victim may receive only one compensation for household support loss. Household support loss is only available to an unemployed victim whose spouse is the offender who committed the criminally injurious conduct that is the basis of the victim's claim under this act.
- (11) "Noneconomic detriment" means pain, suffering, inconvenience, physical impairment, or other nonpecuniary damage.
- (12) "Replacement services loss" means expenses reasonably incurred in obtaining ordinary and necessary services in lieu of those the injured person would have performed, not for income but for the benefit of himself or his family, if he had not been injured.

Replacement service loss will be limited to a 26-week period commencing from the date of the injury, and compensation may not exceed two hundred dollars (\$200.00) per week.

- (12a) "Substantial evidence" means relevant evidence that a reasonable mind might accept as adequate to support a conclusion.
- (13) "Victim" means a person who suffers personal injury or death proximately caused by criminally injurious conduct.
- (14) "Work loss" means loss of income from work that the injured person would have performed if he had not been injured and expenses reasonably incurred by him to obtain services in lieu of those he would have performed for income, reduced by any income from substitute work actually performed by him, or by income he would have earned in available appropriate substitute work that he was capable of performing but unreasonably failed to undertake.

Compensation for work loss will be limited to 26 weeks commencing from the date of the injury, and compensation shall not exceed three hundred dollars (\$300.00) per week. A claim for work loss will be paid only upon proof that the injured person was gainfully employed at the time of the criminally injurious conduct and, by physician's certificate, that the injured person was unable to work. (1983, c. 832, s. 1; 1987, c. 819, ss. 1-8; 1989, c. 322, s. 1; c. 679, s. 1; 1991, c. 301, s. 1; 1997-227, ss. 1, 2; 1998-212, s. 19.4(1); 2004-124, s. 18.1; 2004-159, s. 1; 2006-183, ss. 1, 2.)

**Effect of Amendments. —**

Session Laws 2006-183, ss. 1 and 2, effective July 1, 2006, and applicable to claims filed on or after that date, substituted "five thousand dollars (\$5,000)" for "three thousand five hundred dollars (\$3,500)" near the beginning of the second undesignated paragraph in subdivision (1);

in subdivision (3), substituted "the victim or the claimant" for "him" near the end of the introductory paragraph, substituted "the victim" for "he" in the middle of subdivision (3)(g), added subdivision (3)(i), and made related stylistic and punctuation changes.

## § 15B-4. Award of compensation.

(a) Subject to the limitations in G.S. 15B-22, compensation for criminally injurious conduct shall be awarded to a claimant if substantial evidence



establishes that the requirements for an award have been met. Compensation shall only be paid for economic loss and not for noneconomic detriment. The Commission shall follow the rules of liability applicable to civil tort law in North Carolina.

(b) Compensation shall only be awarded for criminally injurious conduct that occurs or is attempted in this State except that criminally injurious conduct that occurs or is attempted against a resident of this State while in another state which does not have a victims compensation program of any type may be a basis of compensation. (1983, c. 832, s. 1; 1987, c. 819, s. 11; 1989, c. 322, s. 2; 1991, c. 301, s. 1; 2004-159, s. 1; 2006-183, s. 3.)

**Effect of Amendments.** — Session Laws 2006-183, s. 3, effective July 1, 2006, and applicable to claims filed on or after that date,

substituted “detriment” for “loss” at the end of the second sentence in subsection (a).

## **§ 15B-11. Grounds for denial of claim or reduction of award.**

(a) An award of compensation shall be denied if:

- (1) The claimant fails to file an application for an award within two years after the date of the criminally injurious conduct that caused the injury or death for which the claimant seeks the award;
- (2) The economic loss is incurred after one year from the date of the criminally injurious conduct that caused the injury or death for which the victim seeks the award, except in the case where the victim for whom compensation is sought was 10 years old or younger at the time the injury occurred. In that case an award of compensation will be denied if the economic loss is incurred after two years from the date of the criminally injurious conduct that caused the injury or death for which the victim seeks the award;
- (3) The criminally injurious conduct was not reported to a law enforcement officer or agency within 72 hours of its occurrence, and there was no good cause for the delay;
- (4) The award would benefit the offender or the offender’s accomplice, unless a determination is made that the interests of justice require that an award be approved in a particular case;
- (5) The criminally injurious conduct occurred while the victim was confined in any State, county, or city prison, correctional, youth services, or juvenile facility, or local confinement facility, or half-way house, group home, or similar facility; or
- (6) The victim was participating in a felony at or about the time that the victim’s injury occurred.

(b) A claim may be denied or an award of compensation may be reduced if:

- (1) The victim was participating in a nontraffic misdemeanor at or about the time that the victim’s injury occurred; or
- (2) The claimant or a victim through whom the claimant claims engaged in contributory misconduct.

The Commission shall use its discretion in determining whether to deny a claim under this subsection. In exercising its discretion, the Commission may consider whether any proximate cause exists between the injury and the misdemeanor or contributory misconduct.

(c) A claim may be denied, an award of compensation may be reduced, and a claim that has already been decided may be reconsidered upon finding that the claimant or victim, without good cause, has not fully cooperated with appropriate law enforcement agencies or in the prosecution of criminal cases with regard to the criminally injurious conduct that is the basis for the award.

(c1) A claim may be denied upon a finding that the claimant has been convicted of any felony classified as a Class A, B1, B2, C, D, or E felony under the laws of the State of North Carolina and that such felony was committed within 3 years of the time the victim's injury occurred.

(d) After reaching a decision to approve an award of compensation, but before notifying the claimant, the Director shall require the claimant to submit current information as to collateral sources on forms prescribed by the Commission.

An award that has been approved shall nevertheless be denied or reduced to the extent that the economic loss upon which the claim is based is or will be recouped from a collateral source. If an award is reduced or a claim is denied because of the expected recoupment of all or part of the economic loss of the claimant from a collateral source, the amount of the award or the denial of the claim shall be conditioned upon the claimant's economic loss being recouped by the collateral source. If it is thereafter determined that the claimant will not receive all or part of the expected recoupment, the claim shall be reopened and an award shall be approved in an amount equal to the amount of expected recoupment that it is determined the claimant will not receive from the collateral source, subject to the limitations set forth in subsections (f) and (g).

(e) Repealed by Session Laws 1998-212, s. 19.4(m), effective December 1, 1998.

(f) Compensation for replacement services loss, dependent's economic loss, and dependent's replacement services loss may not exceed two hundred dollars (\$200.00) per week. Compensation for work loss and household support loss may not exceed three hundred dollars (\$300.00) per week.

(g) Compensation payable to a victim and to all other claimants sustaining economic loss because of injury to, or the death of, that victim may not exceed thirty thousand dollars (\$30,000) in the aggregate in addition to allowable funeral, cremation, and burial expenses.

(h) The right to reconsider or reopen a claim does not affect the finality of its decision for the purpose of judicial review. (1983, c. 832, s. 1; 1987, c. 819, ss. 17-21; 1989 (Reg. Sess., 1990), c. 898, s. 1; c. 1066, s. 131; 1991, c. 301, s. 1; 1994, Ex. Sess., c. 3, s. 1; 1997-227, s. 3; 1998-212, s. 19.4(m); 1999-269, s. 3; 2004-159, s. 1; 2006-183, ss. 4, 5.)

**Effect of Amendments.** — Session Laws 2006-183, ss. 4 and 5, effective July 1, 2006, and applicable to claims filed on or after that date, in the middle of subsection (c), inserted "without good cause," and inserted "or in the prosecution of criminal cases"; and deleted the former last sentence of subsection (d) which

read: "The existence of a collateral source that would pay expenses directly related to a funeral, cremation, and burial, including transportation of a body, shall not constitute grounds for the denial or reduction of an award of compensation."

## Chapter 17C.

# North Carolina Criminal Justice Education and Training Standards Commission.

<p>Sec. 17C-3. North Carolina Criminal Justice Education and Training Standards</p>	<p>Commission established; members; terms; vacancies.</p>
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## § 17C-2. Definitions.

### CASE NOTES

**Forest Ranger Was Not a Law Enforcement Officer.** — Negligence complaints against the Division of Forest Resources, alleging negligence in failing to extinguish a forest fire which caused smoke and fog to obscure the vision of drivers on a highway, were not barred by the public duty doctrine, because the forest ranger alleged to have been negligent was not a

law enforcement officer, as defined by the Tort Claims Act, and no allegations were made that the forest ranger failed to detect and prevent misconduct of others through improper inspections. *Myers v. McGrady*, 170 N.C. App. 501, 613 S.E.2d 334, 2005 N.C. App. LEXIS 1087 (2005).

## § 17C-3. North Carolina Criminal Justice Education and Training Standards Commission established; members; terms; vacancies.

(a) There is established the North Carolina Criminal Justice Education and Training Standards Commission, hereinafter called "the Commission." The Commission shall be composed of 33 members as follows:

- (1) Police Chiefs. — Three police chiefs selected by the North Carolina Association of Chiefs of Police and one police chief appointed by the Governor.
- (2) Police Officers. — Three police officials appointed by the North Carolina Police Executives Association and two criminal justice officers certified by the Commission as selected by the North Carolina Law-Enforcement Officers' Association.
- (3) Departments. — The Attorney General of the State of North Carolina; the Secretary of Crime Control and Public Safety; the Secretary of Correction; the President of the North Carolina Community Colleges System; the Secretary of Juvenile Justice and Delinquency Prevention.
- (3a) Repealed by Session Laws 2001-440, s. 1.2, effective June 30, 2001.
- (4) At-large Groups. — One individual representing and appointed by each of the following organizations: one mayor selected by the League of Municipalities; one law-enforcement training officer selected by the North Carolina Law-Enforcement Training Officers' Association; one criminal justice professional selected by the North Carolina Criminal Justice Association; one sworn law-enforcement officer selected by the North State Law-Enforcement Officers' Association; one member selected by the North Carolina Law-Enforcement Women's Association; and one District Attorney selected by the North Carolina Association of District Attorneys.
- (5) Citizens and Others. — The President of The University of North Carolina; the Dean of the School of Government at the University of North Carolina at Chapel Hill; and two citizens, one of whom shall be



selected by the Governor and one of whom shall be selected by the Attorney General. The General Assembly shall appoint four persons, two upon the recommendation of the Speaker of the House of Representatives and two upon the recommendation of the President Pro Tempore of the Senate. Appointments by the General Assembly shall be made in accordance with G.S. 120-122. Appointments by the General Assembly shall be for two-year terms to conclude on June 30th in odd-numbered years.

- (6) **Correctional Officers.** — Four correctional officers in management positions employed by the Department of Correction shall be appointed, two from the Division of Community Corrections upon the recommendation of the Speaker of the House of Representatives and two from the Division of Prisons upon the recommendation of the President Pro Tempore of the Senate. Appointments by the General Assembly shall be made in accordance with G.S. 120-122. Appointments by the General Assembly shall serve two-year terms to conclude on June 30th in odd-numbered years. The Governor shall appoint one correctional officer employed by the Department of Correction and assigned to the Office of Staff Development and Training. The Governor's appointment shall serve a three-year term.

(b) The members shall be appointed for staggered terms. The initial appointments shall be made prior to September 1, 1983, and the appointees shall hold office until July 1 of the year in which their respective terms expire and until their successors are appointed and qualified as provided hereafter:

For the terms of one year: one member from subdivision (1) of subsection (a) of this section, serving as a police chief; three members from subdivision (2) of subsection (a) of this section, one serving as a police official, and two criminal justice officers; one member from subdivision (4) of subsection (a) of this section, appointed by the North Carolina Law-Enforcement Training Officers' Association; and two members from subdivision (5) of subsection (a) of this section, one appointed by the Governor and one appointed by the Attorney General.

For the terms of two years: one member from subdivision (1) of subsection (a) of this section, serving as a police chief; one member from subdivision (2) of subsection (a) of this section, serving as a police official; and two members from subdivision (4) of subsection (a) of this section, one appointed by the League of Municipalities and one appointed by the North Carolina Association of District Attorneys.

For the terms of three years: two members from subdivision (1) of subsection (a) of this section, one police chief appointed by the North Carolina Association of Chiefs of Police and one police chief appointed by the Governor; one member from subdivision (2) of subsection (a) of this section, serving as a police official; and three members from subdivision (4) of subsection (a) of this section, one appointed by the North Carolina Law-Enforcement Women's Association, one appointed by the North Carolina Criminal Justice Association, and one appointed by the North State Law-Enforcement Officers' Association.

Thereafter, as the term of each member expires, his successor shall be appointed for a term of three years. Notwithstanding the appointments for a term of years, each member shall serve at the will of the appointing authority.

The Attorney General, the Secretary of Crime Control and Public Safety, the Secretary of Correction, the President of The University of North Carolina, the Dean of the School of Government at the University of North Carolina at Chapel Hill, the President of the North Carolina Community Colleges System, and the Secretary of Juvenile Justice and Delinquency Prevention shall be continuing members of the Commission during their tenure. These members of the Commission shall serve *ex officio* and shall perform their duties on the

Commission in addition to the other duties of their offices. The ex officio members may elect to serve personally at any or all meetings of the Commission or may designate, in writing, one member of their respective office, department, university or agency to represent and vote for them on the Commission at all meetings the ex officio members are unable to attend.

Vacancies in the Commission occurring for any reason shall be filled, for the unexpired term, by the authority making the original appointment of the person causing the vacancy. A vacancy may be created by removal of a Commission member by majority vote of the Commission for misconduct, incompetence, or neglect of duty. A Commission member may be removed only pursuant to a hearing, after notice, at which the member subject to removal has an opportunity to be heard. (1971, c. 963, s. 3; 1977, c. 70, ss. 29, 30; 1979, c. 763, s. 1; 1981 (Reg. Sess., 1982), c. 1191, s. 31; 1983, c. 558, s. 3; c. 618, ss. 1, 2; c. 807, ss. 1, 2; 1987, c. 282, s. 4; 1989, c. 757, s. 2; 1995, c. 490, s. 15; 1997-443, s. 11A.118(a); 1998-202, s. 4(c); 2000-137, s. 4(d); 2000-140, s. 38.1(a); 2001-487, s. 5; 2001-490, s. 1.2; 2006-264, ss. 29(c), 29(d).)

**Effect of Amendments.** — Session Laws 2006-264, ss. 29(c) and (d), effective August 27, 2006, substituted “Dean of the School of Government at the University of North Carolina at

Chapel Hill” for “Director of the Institute of Government” in subdivision (a)(5) and in the second to last paragraph of subsection (b).

## Chapter 17D.

### North Carolina Justice Academy.

Sec.

17D-4. Application of State highway and motor vehicles laws at the academy; au-

thority of Department of Justice to regulate traffic, etc.

#### **§ 17D-4. Application of State highway and motor vehicles laws at the academy; authority of Department of Justice to regulate traffic, etc.**

(a) Except as otherwise provided in this section, all of the provisions of Chapter 20 of the General Statutes relating to the use of highways of the State and the operation of vehicles thereon are applicable to all streets, alleys, driveways, and parking lots on academy property. Nothing in this section modifies any rights of ownership or control of academy property, now or hereafter vested in the State of North Carolina ex rel., Department of Justice.

(b) The Department of Justice may by ordinance prohibit, regulate, divert, control, and limit pedestrian or vehicular traffic and the parking of vehicles and other modes of conveyance on the campus. In fixing speed limits, the Department of Justice is not subject to G.S. 20-141(f) or (g), but may fix any speed limit reasonable and safe under the circumstances as conclusively determined by the Department of Justice. The Department of Justice may not regulate traffic on streets open to the public as of right, except as specifically provided in this section.

(c) The Department of Justice may by ordinance provide for the registration of vehicles maintained or operated on the campus by any student, faculty member, or employee of the academy and may fix fees for such registration. The ordinance may make it unlawful for any person to operate an unregistered vehicle on the campus when the vehicle is required by the ordinance to be registered.

(d) The Department of Justice may by ordinance set aside parking lots on the campus for use by students, faculty, and employees of the academy and members of the general public attending schools, conferences, or meetings at the academy, visiting or making use of any academy facilities, or attending to official business with the academy. The Department of Justice may issue permits to park in these lots and may charge a fee therefor. The Department of Justice may also by ordinance make it unlawful for any person to park a vehicle in any lot or other parking facility without procuring the requisite permit and displaying it on the vehicle.

(e) The Department of Justice may by ordinance provide for the issuance of stickers, decals, permits or other indicia representing the registration of vehicles or the eligibility of vehicles to park on the campus and may by ordinance prohibit the forgery, counterfeiting, unauthorized transfer, or unauthorized use of such stickers, decals, permits or other indicia.

(f) Violation of an ordinance adopted under any portion of this section is a Class 3 misdemeanor. An ordinance may provide that certain acts prohibited thereby shall not be enforced by criminal sanctions, and in such cases a person committing any such act shall not be guilty of a misdemeanor.

(g) An ordinance adopted under this section may provide that a violation will subject the offender to a civil penalty. Penalties may be graduated according to the seriousness of the offense or the number of prior offenses committed by the person charged. The Department of Justice may establish procedure for the collection of these penalties and may enforce the penalties by civil action in the nature of debt. The Department of Justice may also provide



for appropriate administrative sanctions if an offender does not pay a validly due penalty or has committed repeated offenses. Appropriate administrative sanctions include, but are not limited to, revocation of parking permits, termination of vehicle registration, and termination or suspension of enrollment in or employment by the academy.

(h) An ordinance adopted under this section may provide that any vehicle illegally parked may be removed to a storage area, in which case the person so removing the vehicle shall be deemed a legal possessor within the meaning of G.S. 44A-2(d).

(i) Evidence that a vehicle was found parked or unattended in violation of a council ordinance is prima facie evidence that the vehicle was parked by:

- (1) The person holding an academy parking permit for the vehicle;
- (2) If no academy parking permit has been issued for the vehicle, the person in whose name the vehicle is registered with the academy pursuant to subsection (c); or
- (3) If no academy parking permit has been issued for the vehicle and the vehicle is not registered with the academy, the person in whose name it is registered with the North Carolina Department of Motor Vehicles or the corresponding agency of another state or nation.

The rule of evidence established by this subsection applies only in civil, criminal, or administrative actions or proceedings concerning violations of ordinances of the Department of Justice. G.S. 20-162.1 does not apply to such actions or proceedings.

(j) The Department of Justice shall cause to be posted appropriate notice to the public of applicable traffic and parking restrictions.

(k) All ordinances adopted under this section shall be filed in the offices of the North Carolina Attorney General and the Secretary of State. The Department of Justice shall provide for printing and distributing copies of its traffic and parking ordinances.

(l) **(Effective until July 1, 2007)** All moneys received pursuant to this section shall be State funds as defined in G.S. 143-1.

(l) **(Effective July 1, 2007)** All moneys received pursuant to this section shall be State funds as defined in G.S. 143C-1-1. (1977, c. 831, s. 2; 1979, c. 763, s. 2; 1993, c. 539, s. 309; 1994, Ex. Sess., c. 24, s. 14(c); 2006-203, s. 12.)

**Subsection (l) Set Out Twice.** — The first version of subsection (l) set out above is effective until July 1, 2007. The second version of subsection (l) set out above is effective July 1, 2007.

**Editor's Note.** — Session Laws 2006-203, s. 126, provides in part: "Prosecutions for offenses committed before the effective date of this act [July 1, 2007] are not abated or affected by this

act, and the statutes that would be applicable but for this act remain applicable to those prosecutions."

**Effect of Amendments.** — Session Laws 2006-203, s. 12, effective July 1, 2007, and applicable to the budget for the 2007-2009 biennium and each subsequent biennium thereafter, substituted "G.S. 143C-1-1" for "G.S. 143-1" in subsection (l).

## Chapter 17E.

### North Carolina Sheriffs' Education and Training Standards Commission.

Sec.

17E-3. North Carolina Sheriffs' Education and Training Standards Commission

established; members; terms; vacancies.

#### § 17E-3. North Carolina Sheriffs' Education and Training Standards Commission established; members; terms; vacancies.

(a) There is hereby established the North Carolina Sheriffs' Education and Training Standards Commission. The Commission shall be composed of 17 members as follows:

- (1) Sheriffs. — Twelve sheriffs appointed by the North Carolina Sheriffs' Association, 10 representing each of the Commission Districts established in this section, and two appointed at large in such manner as shall be prescribed by the Constitution or bylaws of the Association.
- (2) Appointees of the General Assembly. — One person appointed by the Speaker of the House of Representatives pursuant to G.S. 120-121 and one person appointed by the General Assembly upon the recommendation of the President Pro Tempore of the Senate pursuant to G.S. 120-121.
- (3) County Commissioners. — One county commissioner appointed by the Governor as recommended from three nominees from the North Carolina Association of County Commissioners.
- (4) Others. — The President of the Community Colleges System or the President's designee and the Dean of the School of Government at the University of North Carolina at Chapel Hill or the Dean's designee shall be ex officio, nonvoting members of the Commission.

(b) Terms. — Members shall be appointed for staggered terms. Beginning September 1, 1995, sheriffs representing Commission Districts 3, 6, and 9 shall be appointed to three-year terms; sheriffs representing Commission Districts 1, 4, and 7 shall be appointed to one-year terms; sheriffs representing Commission Districts 2, 5, 8, and 10 and the two at-large sheriffs, shall be appointed to two-year terms. The appointee of the House of Representatives shall serve a term of two years. The appointee of the Senate shall serve a term of two years. The county commissioner appointed by the North Carolina Association of County Commissioners shall serve a term of two years. After the initial terms established herein have expired, all sheriffs appointed to the Commission shall be appointed to terms of three years.

If an individual ceases to be a sheriff then his seat on the Commission becomes vacated upon his ceasing to be qualified to hold that seat. Any individual appointed or designated to serve on this Commission shall serve until his successor is appointed and qualified.

(c) Vacancies. — If any vacancy occurs in the membership of the Commission, the appointing authority shall appoint another person to fill the unexpired term of the vacating member.

(d) Compensation. — None of the members of the Commission shall receive compensation for serving on the Commission. However, if the North Carolina Department of Justice has funds available, then members of the Commission who are State officers or employees may be reimbursed for their expenses in accordance with G.S. 138-6; members of the Commission who are full-time

salaried public officers or employees other than State officers or employees may be reimbursed for their expenses in accordance with G.S. 138-5(b). All other members of the Commission may receive compensation and reimbursement for expenses in accordance with G.S. 138-5.

(e) Officers. — The chairman shall be elected from among the membership. The Commission shall select its other officers from among the membership as it deems necessary. All officers serve for one year, or until successors are qualified.

(f) Removal. — The Commission may remove a member for misfeasance, malfeasance, nonfeasance or neglect of duty.

(g) The Commission has power to adopt its own rules of procedure. The Commission shall meet no less than four times a year. It shall also meet on the call of the chairman or vice-chairman, or any four members of the Commission.

(h) The Commission may appoint any resident of the State to an adjunct or special committee created or appointed by it to study or make recommendations or reports on any subject matter related to its duties or the office of sheriff.

(i) Members of the Commission shall have the authority to designate, in writing, one member of his office to represent them and, if the member possesses voting authority, vote for them on the Commission at all meetings the voting member is unable to attend. This voting authority shall extend to all matters brought before the Commission which require a vote, to include the entry of final agency decisions and the adoption of administrative rules.

(j) The State is divided into 10 Commission Districts established for the appointment of members of the North Carolina Sheriffs' Education and Training Standards Commission as follows:

District 1: The Counties of Bertie, Camden, Chowan, Currituck, Gates, Hertford, Pasquotank, Perquimans, Tyrrell, and Washington.

District 2: The Counties of Caswell, Edgecombe, Franklin, Granville, Halifax, Nash, Northampton, Person, Vance, and Warren.

District 3: The Counties of Beaufort, Craven, Dare, Duplin, Hyde, Jones, Lenoir, Martin, Pamlico, and Pitt.

District 4: The Counties of Chatham, Durham, Greene, Harnett, Johnston, Lee, Orange, Wake, Wayne, and Wilson.

District 5: The Counties of Alleghany, Alexander, Ashe, Catawba, Gaston, Lincoln, Surry, Watauga, Wilkes, and Yadkin.

District 6: The Counties of Alamance, Davidson, Davie, Forsyth, Guilford, Iredell, Randolph, Rockingham, Rowan, and Stokes.

District 7: The Counties of Bladen, Brunswick, Carteret, Columbus, Cumberland, New Hanover, Onslow, Pender, Robeson, and Sampson.

District 8: The Counties of Anson, Cabarrus, Hoke, Mecklenburg, Montgomery, Moore, Richmond, Scotland, Stanly, and Union.

District 9: The Counties of Avery, Burke, Caldwell, Cleveland, Madison, McDowell, Mitchell, Polk, Rutherford, and Yancey.

District 10: The Counties of Buncombe, Cherokee, Clay, Graham, Haywood, Henderson, Jackson, Macon, Swain, and Transylvania. (1983, c. 558, s. 1; 1991 (Reg. Sess., 1992), c. 1005, ss. 1, 2; 1993 (Reg. Sess., 1994), c. 562, s. 1; c. 767, s. 33; 1995, c. 103, s. 3; c. 490, s. 48; 2006-264, s. 29(e).)

**Effect of Amendments.** — Session Laws 2006-264, s. 29(e), effective August 27, 2006, substituted "Community Colleges System" for "Department of Community Colleges" and

"Dean of the School of Government at the University of North Carolina at Chapel Hill" for "Director of the Institute of Government" and made related changes in subdivision (a)(4).



**Chapter 18B.**  
**Regulation of Alcoholic Beverages.**

<b>Article 1.</b>
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18B-101. Definitions.
18B-108. Sales on trains.
<b>Article 2.</b>
<b>State Administration.</b>
18B-203. Powers and duties of the Commission.
18B-208. (Effective July 1, 2007) ABC Commission bonds and funds.
<b>Article 3.</b>
<b>Sale, Possession, and Consumption.</b>
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18B-303. Amounts of alcoholic beverages that may be purchased.
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18B-403.1. Purchase-transportation permit for keg or kegs of malt beverages.
<b>Article 5.</b>
<b>Law Enforcement.</b>
18B-500. Alcohol law-enforcement agents.

<b>Article 9.</b>
<b>Issuance of Permits.</b>
Sec.
18B-902. Application for permit; fees.
<b>Article 10.</b>
<b>Retail Activity.</b>
18B-1001. Kinds of ABC permits; places eligible.
18B-1001.1. Authorization of wine shipper permit.
18B-1001.2. Additional wine shipping requirements.
18B-1001.3. Authorization of wine shipper packager permit.
18B-1003. Responsibilities of permittee.
18B-1006. Miscellaneous provisions on permits.
<b>Article 11.</b>
<b>Commercial Activity.</b>
18B-1106. Authorization of wine importer permit.
18B-1107. Authorization of wine wholesaler permit.
18B-1114. Authorization of nonresident wine vendor permit.

**ARTICLE 1.**  
*General Provisions.*

**§ 18B-101. Definitions.**

- As used in this Chapter, unless the context requires otherwise:
- (1) “ABC law” or “ABC laws” means any statute or statutes in this Chapter or in Article 2C of Chapter 105, and the rules issued by the Commission under the authority of this Chapter.
  - (2) “ABC permit” or “permits” means any written or printed authorization issued by the Commission pursuant to the provisions of this Chapter, other than a purchase-transportation permit. Unless the context clearly requires otherwise, as in the provisions concerning applications for permits, “ABC permit” or “permit” means a presently valid permit.
  - (3) “ABC system” means a local board and all ABC stores operated by it, its law-enforcement branch, and all its employees.
  - (4) “Alcoholic beverage” means any beverage containing at least one-half of one percent (0.5%) alcohol by volume, including malt beverages, unfortified wine, fortified wine, spirituous liquor, and mixed beverages.
  - (5) “ALE Division” means the Alcohol Law Enforcement Division of the Department of Crime Control and Public Safety.
  - (5a) “Bailment surcharge” means the charge imposed on each case of

liquor shipped from a Commission warehouse as provided in G.S. 18B-208. This bailment surcharge is in addition to the bailment charge imposed by G.S. 18B-804(b)(2).

- (6) "Commission" means the North Carolina Alcoholic Beverage Control Commission established under G.S. 18B-200.
- (7) "Fortified wine" means any wine, of more than sixteen percent (16%) and no more than twenty-four percent (24%) alcohol by volume, made by fermentation from grapes, fruits, berries, rice, or honey; or by the addition of pure cane, beet, or dextrose sugar; or by the addition of pure brandy from the same type of grape, fruit, berry, rice, or honey that is contained in the base wine and produced in accordance with the regulations of the United States.
- (7a) "Historic ABC establishment" means a restaurant or hotel that meets all of the following requirements:
  - a. Is on the national register of historic places or located within a State historic district.
  - b. Is a property designed to attract local, State, national, and international tourists located on a State Route (SR) and with a property line located within 1.5 miles of the intersection of a designated North Carolina scenic byway as defined in G.S. 136-18(31).
  - c. Is located within 15 miles of a national scenic highway.
  - d. Is located in a county in which the on-premises sale of malt beverages or unfortified wine is authorized in two or more cities in the county.
- (7b) "Keg" means a portable container designed to hold and dispense 7.75 gallons or more of malt beverage.
- (8) "Local board" means a city or county ABC board, or local board created pursuant to the provisions of G.S. 18B-703. A local board is an independent local political subdivision of the State. Nothing in this Chapter shall be construed as constituting a local board the agency of a city or county or of the Commission.
- (8a) "Lottery law" or "lottery laws" means any provision of Chapter 18C of the General Statutes and the rules issued by the Lottery Commission under the authority of Chapter 18C of the General Statutes.
- (9) "Malt beverage" means beer, lager, malt liquor, ale, porter, and any other brewed or fermented beverage except unfortified or fortified wine as defined by this Chapter, containing at least one-half of one percent (0.5%), and not more than fifteen percent (15%), alcohol by volume. Any malt beverage containing more than six percent (6%) alcohol by volume shall bear a label clearly indicating the alcohol content of the malt beverage.
- (10) "Mixed beverage" means either of the following:
  - a. A drink composed in whole or in part of spirituous liquor and served in a quantity less than the quantity contained in a closed package.
  - b. A premixed cocktail served from a closed package containing only one serving.
- (11) "Nontaxpaid alcoholic beverage" means any alcoholic beverage upon which the taxes imposed by the United States, this State, or any other territorial jurisdiction in which the alcoholic beverage was purchased have not been paid.
- (12) "Person" means an individual, firm, partnership, association, corporation, limited liability company, other organization or group, or other combination of individuals acting as a unit.
- (12a) "Premises" means all areas, whether inside or outside the licensed premises, where the permittee has control of the property through a lease, deed, or other legal process.

(13) “Sale” means any transfer, trade, exchange, or barter, in any manner or by any means, for consideration.

(13a) (**See note**) “Special ABC area” means an area that meets the following requirements:

Either:

- a. The area has fewer than 500 permanent residents, and the area:
    1. Is located in a county that borders another state, that has at least one city that has approved the operation of an ABC store, and in which the sale of unfortified wine and malt beverages is permitted countywide or in one city; and
    2. Contains more than 500 contiguous acres made up of privately-owned land and land owned by an association or a club that is exempt from income tax on its membership income under Article 4 of Chapter 105 of the General Statutes, has more than 200 members, was created for municipal and recreational purposes, and, for three or more years, has levied assessments or dues and provided municipal services; or
  - b. The area has more than 500 permanent residents, and the area:
    1. Is located in a county:
      - I. Where ABC stores have heretofore been established but in which the sale of mixed beverages has not been approved;
      - II. That borders on a county that has approved the sale of alcoholic beverages countywide and contains an international airport; and
      - III. Borders on a county where ABC stores have heretofore been established by petition pursuant to law; and
    2. Contains more than 500 contiguous acres made up of privately-owned land and land owned by an association or a club that is exempt from income tax on its membership income under Article 4 of Chapter 105 of the General Statutes, has more than 200 members, was created for municipal and recreational purposes, and, for three or more years, has levied assessments or dues and provided municipal services; or
  - c. The area is an area of a county where the following requirements are met:
    1. The county borders on the Atlantic Ocean and has a seaport supporting oceangoing vessels;
    2. ABC stores have been established in the county and the sale of mixed beverages is allowed in six or more municipalities;
    3. The population of the county, according to the 2000 census, exceeds 52,000;
    4. The tourism economy of the county is made up of more than 3,000 tourism-related jobs; and
    5. Tourism expenditures within the county exceed two hundred million dollars (\$200,000,000) annually.
- (14) “Spirituos liquor” or “liquor” means distilled spirits or ethyl alcohol, including spirits of wine, whiskey, rum, brandy, gin and all other distilled spirits and mixtures of cordials, liqueur, and premixed cocktails, in closed containers for beverage use regardless of their dilution.
- (14a) “Tourism ABC establishment” means a restaurant or hotel that meets both of the following requirements:
- a. Is located on property, a property line of which is located within 1.5 miles of the end of an entrance or exit ramp of a junction on a



national scenic parkway designed to attract local, State, national, and international tourists between the State line and Milepost 460.

- b. Is located in a county in which the on-premises or off-premises sale of malt beverages or unfortified wine is authorized in at least one city.

(14b) "Tourism resort" means:

- a. Any restaurant and lodging facility, whether public or private, owned and operated as a resort property offering food, beverage, lodging, and meeting facilities to travelers and tourists and featuring one or more golf courses and two or more tennis courts along with other recreational and sporting activities, or
- b. Any restaurant, whether public or private, owned and operated as a resort property offering food and beverage to travelers and tourists and featuring an equestrian center and two or more tennis courts along with other recreational and sporting activities.

Receipts from sporting and recreational activities of a tourism resort shall be at least twenty-five percent (25%) of total gross receipts. Receipts from the sale of alcoholic beverages shall not exceed fifty percent (50%) of total gross receipts. A tourism resort open to the public shall advertise at least quarterly in a regional or national travel or sports industry publication, or in the State travel guide published by the North Carolina Department of Commerce.

- (15) "Unfortified wine" means any wine of sixteen percent (16%) or less alcohol by volume made by fermentation from grapes, fruits, berries, rice, or honey; or by the addition of pure cane, beet, or dextrose sugar; or by the addition of pure brandy from the same type of grape, fruit, berry, rice, or honey that is contained in the base wine and produced in accordance with the regulations of the United States. (1981, c. 412, s. 2; 1981 (Reg. Sess., 1982), c. 1262, s. 2; c. 1285, s. 1; 1983, c. 435, s. 41; 1985, c. 69; 1987, c. 443, s. 1; 1989, c. 629, s. 1; 1989 (Reg. Sess., 1990), c. 1024, s. 5; 1991 (Reg. Sess., 1992), c. 920, ss. 1, 10; 1993, c. 415, ss. 1, 2; 1995, c. 466, s. 1; 1997-443, s. 16.27(b); 1999-461, s. 1; 1999-462, ss. 1, 13; 2001-515, s. 1; 2004-135, s. 1; 2004-203, s. 23; 2005-276, s. 31.1(x); 2005-277, s. 1; 2005-344, s. 10.1(a); 2005-392, s. 1; 2005-435, s. 25(a); 2006-253, s. 2; 2006-264, s. 95.)

**Editor's Note. —**

Session Laws 2006-253, s. 1, provides: "This act shall be known as 'The Motor Vehicle Driver Protection Act of 2006.'"

**Effect of Amendments. —**

Session Laws 2006-253, s. 2, effective December 1, 2006, and applicable to offenses commit-

ted on or after that date, added subdivision (7b).

Session Laws 2006-264, s. 95, effective August 27, 2006, inserted "except unfortified or fortified wine as defined by this Chapter," in subdivision (9).

## § 18B-102. Manufacture, sale, etc., forbidden except as expressly authorized.

### CASE NOTES

**Classification of Offense. —** Trial court did not err in assigning one point in defendant's prior record level calculation under G.S. 15A-1340.14(b)(5) for conviction of purchase or possession of beer or wine under G.S. 18B-302, as

any person who violated any provision of the chapter at issue was guilty of a class one misdemeanor. *State v. Frady*, — N.C. App. —, 623 S.E.2d 346, 2006 N.C. App. LEXIS 53 (2006).

## § 18B-108. Sales on trains.

Alcoholic beverages may be sold on railroad trains in this State upon compliance with Article 2C of Chapter 105 of the General Statutes. Malt beverages, unfortified wine, and fortified wine may be sold and delivered by any wholesaler or retailer licensed in this State to an officer or agent of a rail line that carries at least 60,000 passengers annually. (1981, c. 412, s. 2; c. 747, s. 37; 1985, c. 114, s. 5; 2000-140, s. 39; 2006-227, s. 8.)

**Effect of Amendments.** — Session Laws 2006-227, s. 8, effective August 10, 2006, added the last sentence.

## ARTICLE 2.

### *State Administration.*

## § 18B-203. Powers and duties of the Commission.

(a) Powers. — The Commission shall have authority to:

- (1) Administer the ABC laws;
- (2) Provide for enforcement of the ABC laws, in conjunction with the ALE Division;
- (3) Set the prices of alcoholic beverages sold in local ABC stores as provided in Article 8;
- (4) Require reports and audits from local boards as provided in G.S. 18B-205;
- (5) Determine what brands of alcoholic beverages may be sold in this State;
- (6) Contract for State ABC warehousing, as provided in G.S. 18B-204;
- (7) Dispose of damaged alcoholic beverages, as provided in G.S. 18B-806;
- (8) Remove for cause any member or employee of a local board;
- (9) Supervise or disapprove purchasing by any local board and inspect all records of purchases by local boards;
- (10) Approve or disapprove rules adopted by any local board;
- (11) Approve or disapprove the opening and location of ABC stores, as provided in Article 8;
- (12) Issue ABC permits, and impose sanctions against permittees;
- (13) Provide for the testing of alcoholic beverages, as provided in G.S. 18B-206;
- (14) Fix the amount of bailment charges and bailment surcharges to be assessed on liquor shipped from a Commission warehouse;
- (15) Collect bailment charges and bailment surcharges from local boards;
- (16) Notwithstanding any law to the contrary, enter into contracts for design and construction of a warehouse or warehouses and supervise work and materials used in the construction, as provided in G.S. 18B-204;
- (17) Provide for the distribution of spirituous liquor to armed forces installations within this State for resale on the installation;
- (18) Provide for the distribution and posting of warning signs to local ABC boards regarding the dangers of alcohol consumption during pregnancy as required under G.S. 18B-808;
- (19) Recognize the holder of a wine importer permit or nonresident wine vendor permit as a primary American source of supply for the wine of a winery. To be considered a primary American source of supply, a wine importer must establish that it has lawfully purchased the wine

from the winery, or from an agent of the winery, and by written contract or otherwise has been authorized by the winery to distribute the wine to wholesalers in the United States.

(b) Implied Powers. — The Commission shall have all other powers which may be reasonably implied from the granting of the express powers stated in subsection (a), or which may be incidental to, or convenient for, performing the duties given to the Commission. (1937, c. 49, s. 4; cc. 237, 411; 1945, c. 954; 1949, c. 974, s. 9; 1961, c. 956; 1963, c. 426, s. 12; c. 916, s. 2; c. 1119, s. 1; 1965, c. 1063; c. 1102, s. 3; 1967, c. 222, s. 2; c. 1240, s. 1; 1971, c. 872, s. 1; 1973, c. 28; c. 473, s. 1; c. 476, s. 133; c. 606; c. 1288, s. 1; cc. 1369, 1396; 1975, cc. 240, 453, 640; 1977, c. 70, ss. 15.1, 15.2, 16; c. 176, ss. 2, 6; 1977, 2nd Sess., c. 1138, ss. 3, 4, 18; 1979, c. 384, s. 1; c. 445, s. 5; c. 482; c. 801, s. 4; 1981, c. 412, s. 2; c. 747, s. 38; 1981 (Reg. Sess., 1982), c. 1285, s. 2; 1987, c. 136, s. 1; 2003-339, s. 1; 2006-227, s. 10.)

**Effect of Amendments.** — Session Laws 2006-227, s. 10, effective August 10, 2006, added subdivision (a)(19).

## § 18B-208. (Effective July 1, 2007) ABC Commission bonds and funds.

(a) Issuance of Bonds. — As a means of raising the funds needed from time to time in the design, acquisition, construction, equipping, maintenance and operation of a warehouse under G.S. 18B-204(a)(3), the Commission may, with the approval of the Governor, at one time or from time to time issue negotiable revenue bonds of the Commission. The issuance of revenue bonds shall not directly or indirectly or contingently obligate the State to levy or to pledge any form of taxation or to make any appropriation for their payment. Revenue bonds issued pursuant to this subsection shall be repaid from the bailment surcharge as provided in subsection (b). These bonds and the income from them are exempt from all taxation within the State.

(b) Special Fund. — A special fund in the office of the State Treasurer, the ABC Commission Fund, is created. On and after November 1, 1982, all moneys derived from the collection of bailment charges and bailment surcharges shall be deposited in the ABC Commission Fund for the purpose of carrying out the provisions of this Chapter. The ABC Commission Fund shall be subject to the provisions of the State Budget Act except that no unexpended surplus of this fund shall revert to the General Fund. The Commission shall fix the level of the bailment surcharges at an amount calculated to cover operating expenses of the Commission and the retirement of bonds issued for construction of a Commission warehouse and offices. Upon payment of the bonds issued pursuant to this section, the Commission shall reduce the bailment surcharge to an amount no greater than necessary to pay operating expenses of the Commission as authorized by the General Assembly.

All moneys credited to the ABC Commission Fund shall be used to carry out the intent and purposes of the ABC law in accordance with plans approved by the North Carolina ABC Commission and the Director of the Budget, and all these funds are appropriated, reserved, set aside, and made available until expended for the administration of the ABC law. (1981 (Reg. Sess., 1982), c. 1285, s. 4; 1983, c. 761, s. 133; 1987, c. 832, s. 1; 1989, c. 800 s. 6; 2006-203, s. 13.)

**Section Set Out Twice.** — The section as in effect until July 1, 2007, see the main above is effective July 1, 2007. For the section volume.



**Effect of Amendments.** — Session Laws 2006-203, s. 13, effective July 1, 2007, substituted “Governor” for “Governor after receiving the advice of the Advisory Budget Commission”

in the first sentence of subsection (a); and substituted “State Budget Act” for “Executive Budget Act” in the second sentence of the first paragraph of subsection (b).

### ARTICLE 3.

#### *Sale, Possession, and Consumption.*

#### **§ 18B-302. Sale to or purchase by underage persons.**

- (a) Sale. — It shall be unlawful for any person to:
- (1) Sell or give malt beverages or unfortified wine to anyone less than 21 years old; or
  - (2) Sell or give fortified wine, spirituous liquor, or mixed beverages to anyone less than 21 years old.
- (b) Purchase, Possession, or Consumption. — It shall be unlawful for:
- (1) A person less than 21 years old to purchase, to attempt to purchase, or to possess malt beverages or unfortified wine; or
  - (2) A person less than 21 years old to purchase, to attempt to purchase, or to possess fortified wine, spirituous liquor, or mixed beverages; or
  - (3) A person less than 21 years old to consume any alcoholic beverage.
- (c) Aider and Abettor.
- (1) By Underage Person. — Any person who is under the lawful age to purchase and who aids or abets another in violation of subsection (a) or (b) of this section shall be guilty of a Class 2 misdemeanor.
  - (2) By Person over Lawful Age. — Any person who is over the lawful age to purchase and who aids or abets another in violation of subsection (a) or (b) of this section shall be guilty of a Class 1 misdemeanor.
- (d) Defense. — It shall be a defense to a violation of subsection (a) of this section if the seller:
- (1) Shows that the purchaser produced a driver’s license, a special identification card issued under G.S. 20-37.7, a military identification card, or a passport, showing his age to be at least the required age for purchase and bearing a physical description of the person named on the card reasonably describing the purchaser; or
  - (2) Produces evidence of other facts that reasonably indicated at the time of sale that the purchaser was at least the required age.
  - (3) Shows that at the time of purchase, the purchaser utilized a biometric identification system that demonstrated (i) the purchaser’s age to be at least the required age for the purchase and (ii) the purchaser had previously registered with the seller or seller’s agent a drivers license, a special identification card issued under G.S. 20-377.7, a military identification card, or a passport showing the purchaser’s date of birth and bearing a physical description of the person named on the document.
- (e) Fraudulent Use of Identification. — It shall be unlawful for any person to enter or attempt to enter a place where alcoholic beverages are sold or consumed, or to obtain or attempt to obtain alcoholic beverages, or to obtain or attempt to obtain permission to purchase alcoholic beverages, in violation of subsection (b) of this section, by using or attempting to use any of the following:
- (1) A fraudulent or altered drivers license.
  - (2) A fraudulent or altered identification document other than a drivers license.
  - (3) A drivers license issued to another person.
  - (4) An identification document other than a drivers license issued to another person.

(5) Any other form or means of identification that indicates or symbolizes that the person is not prohibited from purchasing or possessing alcoholic beverages under this section.

(f) **Allowing Use of Identification.** — It shall be unlawful for any person to permit the use of the person's drivers license or any other form of identification of any kind issued or given to the person by any other person who violates or attempts to violate subsection (b) of this section.

(g) **Conviction Report Sent to Division of Motor Vehicles.** — The court shall file a conviction report with the Division of Motor Vehicles indicating the name of the person convicted and any other information requested by the Division if the person is convicted of:

- (1) A violation of subsection (e) or (f) of this section; or
- (2) A violation of subdivision (c)(1) of this section; or
- (3) A violation of subsection (b) of this section, if the violation occurred while the person was purchasing or attempting to purchase an alcoholic beverage.

Upon receipt of a conviction report, the Division shall revoke the person's license as required by G.S. 20-17.3.

(h) **Handling in Course of Employment.** — Nothing in this section shall be construed to prohibit an underage person from selling, transporting, possessing or dispensing alcoholic beverages in the course of employment, if the employment of the person for that purpose is lawful under applicable youth employment statutes and Commission rules.

(i) **Purchase, Possession, or Consumption by 19 or 20-Year Old.** — A violation of subdivision (b)(1) or (b)(3) of this section by a person who is 19 or 20 years old is a Class 3 misdemeanor.

(j) Notwithstanding any other provisions of law, a law enforcement officer may require any person the officer has probable cause to believe is under age 21 and has consumed alcohol to submit to an alcohol screening test using a device approved by the Department of Health and Human Services. The results of any screening device administered in accordance with the rules of the Department of Health and Human Services shall be admissible in any court or administrative proceeding. A refusal to submit to an alcohol screening test shall be admissible in any court or administrative proceeding.

(k) Notwithstanding the provisions in this section, it shall not be unlawful for a person less than 21 years old to consume unfortified wine or fortified wine during participation in an exempted activity under G.S. 18B-103(4), (8), or (11). (1933, c. 216, s. 8; 1959, c. 745, s. 1; 1967, c. 222, s. 3; 1969, c. 998; 1971, c. 872, s. 1; 1973, c. 27; 1977, 2nd Sess., c. 1138, s. 2; 1979, c. 683, s. 2; 1981, c. 412, s. 2; c. 747, ss. 40, 41; 1983, c. 435, ss. 32, 35; c. 740, ss. 1, 2; Ex. Sess., c. 5; 1985, c. 141, ss. 2-3; 1993, c. 539, s. 311; 1994, Ex. Sess., c. 24, s. 14(c); 1999-406, s. 7; 2001-461, ss. 2, 3; 2001-487, s. 42(b); 2005-350, s. 6(a); 2006-253, s. 26.)

#### **Editor's Note.** —

Session Laws 2006-253, s. 1, provides: "This act shall be known as 'The Motor Vehicle Driver Protection Act of 2006.'"

#### **Effect of Amendments.** —

Session Laws 2006-253, s. 26, effective December 1, 2006, and applicable to offenses com-

mitted on or after that date, inserted "or Consumption" in the subsection catchlines for subsections (b) and (i) and made a related change; added subdivision (b)(3); inserted "or (b)(3)" in subsection (i); and added subsections (j) and (k).

### **CASE NOTES**

**Classification of Offense.** — Trial court did not err in assigning one point in defendant's prior record level calculation under G.S. 15A-

1340.14(b)(5) for conviction of purchase or possession of beer or wine under G.S. 18B-302, as any person who violated any provision of the

chapter at issue was guilty of a class one 623 S.E.2d 346, 2006 N.C. App. LEXIS 53  
 misdemeanor. State v. Frady, — N.C. App. —, (2006).

### § 18B-303. Amounts of alcoholic beverages that may be purchased.

(a) Purchases Allowed. — Without a permit, a person may purchase at one time:

- (1) Not more than 80 liters of malt beverages, except draft malt beverages in kegs for off-premises consumption. For purchase of a keg or kegs of malt beverages for off-premises consumption, the permit required by G.S. 18B-403.1(a) must first be obtained;
- (2) Any amount of draft malt beverages by a permittee in kegs for on-premise consumption;
- (3) Not more than 50 liters of unfortified wine;
- (4) Not more than eight liters of either fortified wine or spirituous liquor, or eight liters of the two combined.

(b) Unlawful Purchase. — Except as provided in subsection (c) and in Article 11, it shall be unlawful for any person to purchase, or for any person to sell, an amount of alcoholic beverages greater than that stated in subsection (a).

(c) Greater Amounts. — Amounts of alcoholic beverages greater than those listed in subdivisions (a)(3) and (a)(4) may be purchased with a purchase-transportation permit under G.S. 18B-403. (1905, c. 498, ss. 6-8; Rev., ss. 3526, 3534; C.S., s. 3371; 1937, c. 49, ss. 12, 16, 22; c. 411; 1955, c. 999; 1967, c. 222, ss. 1, 8; c. 1256, s. 3; 1969, c. 1018; 1971, c. 872, s. 1; 1973, c. 1226; 1977, c. 176, s. 1; 1977, 2nd Sess., c. 1138, ss. 8-12, 18; 1979, c. 384, s. 3; c. 609, s. 2; c. 718; c. 893, s. 10; 1981, c. 412, s. 2; 1989, c. 553, s. 1; 1993, c. 508, s. 2; 2001-262, s. 5; 2006-253, s. 3.2.)

**Editor's Note.** — Session Laws 2006-253, s. 1, provides: "This act shall be known as 'The Motor Vehicle Driver Protection Act of 2006.'"

**Effect of Amendments.** — Session Laws 2006-253, s. 3.2, effective December 1, 2006, and applicable to offenses committed on or after

that date, in subdivision (a)(1), added the exception in the first sentence and added the second sentence; and substituted "by a permittee in kegs for on-premises consumption" for "in kegs" in subdivision (a)(2).

### § 18B-307. Manufacturing offenses.

(a) Offenses. — It shall be unlawful for any person, except as authorized by this Chapter, to:

- (1) Sell or possess equipment or ingredients intended for use in the manufacture of any alcoholic beverage, except equipment and ingredients provided under a Brew on Premises permit or a Winemaking on Premises permit; or
- (2) Knowingly allow real or personal property owned or possessed by him to be used by another person for the manufacture of any alcoholic beverage, except pursuant to a Brew on Premises permit or a Winemaking on Premises permit.

(b) Unlawful Manufacturing. — Except as provided in G.S. 18B-306, it shall be unlawful for any person to manufacture any alcoholic beverage, except at an establishment with a Brew on Premises permit or a Winemaking on Premises permit, without first obtaining the applicable ABC permit and revenue licenses.

(c) Second Offense of Manufacturing. — A second offense of unlawful manufacturing of alcoholic beverage shall be a Class I felony. (1905, c. 498, s. 2; Rev., s. 3533; 1923, c. 1, ss. 4, 6, 26; C.S., ss. 3407, 3411(d), (f), (z); 1937, c. 49, s. 13; 1945, c. 635; 1951, c. 850; 1955, c. 560; 1957, c. 984; c. 1235, s. 1; 1969,



c. 789; 1971, c. 872, s. 1; 1979, c. 699, s. 1; 1981, c. 412, s. 2; c. 747, s. 44; 1997-467, s. 1; 2006-222, s. 2.2; 2006-227, s. 2.)

**Effect of Amendments.** — Session Laws 2006-222, s. 2.2, effective August 10, 2006, added “permit or a Winemaking on Premises” in subdivisions (a)(1) and (a)(2), and in subsection (b).

Session Laws 2006-227, s. 2, effective August 10, 2006, added “permit or a Winemaking on Premises” in subdivisions (a)(1) and (a)(2), and in subsection (b).

## ARTICLE 4.

### *Transportation.*

#### **§ 18B-403.1. Purchase-transportation permit for keg or kegs of malt beverages.**

(a) **Purchase-Transportation.** — A person who is not a permittee may purchase and transport for off-premises consumption a keg or kegs as defined in G.S. 18B-101(7b) after obtaining a purchase-transportation permit. Failure to obtain a purchase-transportation permit according to this section is a violation of G.S. 18B-303(b).

(b) **Issuance.** — A person holding a permit (permittee) pursuant to G.S. 18B-1001(2) shall issue a purchase-transportation permit for a keg or kegs of malt beverage to a purchaser. A copy of the purchase-transportation permit shall be maintained by the permittee for 90 days. Upon request by any person, the permittee shall maintain the permit for a requested period in excess of 90 days.

(c) **Form.** — A purchase-transportation permit shall be issued on a printed form adopted and provided by the Commission. The Commission shall adopt rules specifying the content of the permit form.

(d) **Restrictions on Permit.** — A purchase may be made only from the store named on the permit. One copy of the permit shall be kept by the purchaser and one by the permittee from whom the purchase is made. The purchaser shall display his copy of the permit to any law enforcement officer upon request.

(e) **Violation.** — The first violation of this section by a permittee shall result in a warning to the permittee. (2006-253, s. 3.1.)

**Editor’s Note.** — Session Laws 2006-253, s. 1, provides: “This act shall be known as ‘The Motor Vehicle Driver Protection Act of 2006.’”

Session Laws 2006-253, s. 33, made this

section effective December 1, 2006, and applicable to offenses committed on or after that date.

## ARTICLE 5.

### *Law Enforcement.*

#### **§ 18B-500. Alcohol law-enforcement agents.**

(a) **Appointment.** — The Secretary of Crime Control and Public Safety shall appoint alcohol law-enforcement agents and other enforcement personnel. The Secretary of Crime Control and Public Safety may also appoint regular employees of the Commission as alcohol law-enforcement agents. Alcohol law-enforcement agents shall be designated as “alcohol law-enforcement agents”. Persons serving as reserve alcohol law-enforcement agents are considered employees of the Division of Alcohol Law Enforcement for workers’

compensation purposes while performing duties assigned or approved by the Director of Alcohol Law Enforcement or the Director's designee.

(b) **Subject Matter Jurisdiction.** — After taking the oath prescribed for a peace officer, an alcohol law-enforcement agent shall have authority to arrest and take other investigatory and enforcement actions for any criminal offense. The primary responsibility of an agent shall be enforcement of the ABC laws, lottery laws, and Article 5 of Chapter 90 (The Controlled Substances Act); however, an agent may perform any law-enforcement duty assigned by the Secretary of Crime Control and Public Safety or the Governor.

(c) **Territorial Jurisdiction.** — An alcohol law-enforcement agent is a State officer with jurisdiction throughout the State.

(d) **Service of Commission Orders.** — Alcohol law-enforcement agents may serve and execute notices, orders, or demands issued by the Alcoholic Beverage Control Commission or the North Carolina State Lottery Commission for the surrender of permits or relating to any administrative proceeding. While serving and executing such notices, orders, or demands, alcohol law-enforcement agents shall have all the power and authority possessed by law-enforcement officers when executing an arrest warrant.

(e) **Discharge.** — Alcohol law-enforcement agents are subject to the discharge provisions of G.S. 18B-202.

(f) Repealed by Session Laws 1995, c. 507, s. 6.2(a). (1939, c. 158, s. 514; 1943, c. 400, s. 6; 1949, c. 974, ss. 11, 14; c. 1251, s. 4; 1951, c. 1056, s. 1; c. 1186, ss. 1, 2; 1953, c. 1207, ss. 2-4; 1957, c. 1440; 1961, c. 645; 1963, c. 426, ss. 1, 2, 4, 5, 12; 1967, c. 868; 1971, c. 872, s. 1; 1977, c. 70, s. 17; 1981, c. 412, s. 2; 1983, c. 629, s. 1; c. 768, ss. 25.1, 25.2; 1995, c. 466, s. 2; c. 507, s. 6.2(a); 2005-276, ss. 31.1(y), 31.1(z); 2005-344, ss. 10.1(b), 10.1(c); 2006-264, s. 35.)

**Effect of Amendments.** —

Session Laws 2006-264, s. 35, effective Au-

gust 27, 2006, added the last sentence in subsection (a).

## ARTICLE 7.

### *Local ABC Boards.*

#### § 18B-700. Appointment and organization of local ABC boards.

**Local Modification.** — Cumberland: 1981 (Reg. Sess., 1982), c. 1251, s. 1; city of High Point: 2006-90, s. 2 (as to subsection (a)); city of

Shelby: 2006-9, s. 2 (as to subsection (a)); town of Kenansville: 2005-13, s. 2 (as to subsection (a)); town of Maxton: 1987, c. 15.

#### § 18B-702. Financial operations of local boards.

#### CASE NOTES

**Applicability of Criminal Statutes.** — As a local alcoholic beverage control board employee, defendant should have been charged with embezzlement under G.S. 14-90; a trial court lacked jurisdiction to hear the case where defendant was charged with violation of G.S.

14-92. State v. Jones, 172 N.C. App. 161, 615 S.E.2d 896, 2005 N.C. App. LEXIS 1438 (2005), cert. denied, stay denied, 360 N.C. 72, 624 S.E.2d 365 (2005), cert. dismissed, 360 N.C. 72, 624 S.E.2d 366 (2005).

## ARTICLE 8.

*Operation of ABC Stores.***§ 18B-801. Location, opening, and closing of stores.**

**Local Modification.** — Brunswick: 1991, c. 372; 1991 (Reg. Sess., 1992), c. 776; 2005-305 (But see 2006-97, s. 1); town of Navassa: 1993, c. 17, s. 1.

## ARTICLE 9.

*Issuance of Permits.***§ 18B-902. Application for permit; fees.**

(a) Form. — An application for an ABC permit shall be on a form prescribed by the Commission and shall be notarized. Each person required to qualify under G.S. 18B-900(c) shall sign and swear to the application and shall submit a full set of fingerprints with the application.

(b) Investigation. — Before issuing a new permit, the Commission, with the assistance of the ALE Division, shall investigate the applicant and the premises for which the permit is requested. The Commission may request the assistance of local ABC officers in investigating applications. An applicant shall cooperate fully with the investigation.

The Department of Justice may provide a criminal record check to the ALE Division for a person who has applied for a permit through the Commission. The ALE Division shall provide to the Department of Justice, along with the request, the fingerprints of the applicant, any additional information required by the Department of Justice, and a form signed by the applicant consenting to the check of the criminal record and to the use of the fingerprints and other identifying information required by the State or national repositories. The applicant's fingerprints shall be forwarded to the State Bureau of Investigation for a search of the State's criminal history record file, and the State Bureau of Investigation shall forward a set of the fingerprints to the Federal Bureau of Investigation for a national criminal history check. The ALE Division and the Commission shall keep all information pursuant to this subsection privileged, in accordance with applicable State law and federal guidelines, and the information shall be confidential and shall not be a public record under Chapter 132 of the General Statutes.

The Department of Justice may charge each applicant a fee for conducting the checks of criminal history records authorized by this subsection.

(c) False Information. — Knowingly making a false statement in an application for an ABC permit shall be grounds for denying, suspending, revoking or taking other action against the permit as provided in G.S. 18B-104 and shall also be unlawful.

(d) Fees. — An application for an ABC permit shall be accompanied by payment of the following application fee:

- (1) On-premises malt beverage permit — \$400.00.
- (2) Off-premises malt beverage permit — \$400.00.
- (3) On-premises unfortified wine permit — \$400.00.
- (4) Off-premises unfortified wine permit — \$400.00.
- (5) On-premises fortified wine permit — \$400.00.
- (6) Off-premises fortified wine permit — \$400.00.
- (7) Brown-bagging permit — \$400.00, unless the application is for a restaurant seating less than 50, in which case the fee shall be \$200.00.
- (8) Special occasion permit — \$400.00.
- (9) Limited special occasion permit — \$50.00.
- (10) Mixed beverages permit — \$1,000.



- (11) Culinary permit — \$200.00.
- (12) Unfortified winery permit — \$300.00.
- (13) Fortified winery permit — \$300.00.
- (14) Limited winery permit — \$300.00.
- (15) Brewery permit — \$300.00.
- (16) Distillery permit — \$300.00.
- (17) Fuel alcohol permit — \$100.00.
- (18) Wine importer permit — \$300.00.
- (19) Wine wholesaler permit — \$300.00.
- (20) Malt beverage importer permit — \$300.00.
- (21) Malt beverage wholesaler permit — \$300.00.
- (22) Bottler permit — \$300.00.
- (23) Salesman permit — \$100.00.
- (24) Vendor representative permit — \$50.00.
- (25) Nonresident malt beverage vendor permit — \$100.00.
- (26) Nonresident wine vendor permit — \$100.00.
- (27) Any special one-time permit under G.S. 18B-1002 — \$50.00.
- (28) Winery special event permit — \$200.00.
- (29) Mixed beverages catering permit — \$200.00.
- (30) Guest room cabinet permit — \$1,000.
- (31) Liquor importer/bottler permit — \$500.00.
- (32) Cider and vinegar manufacturer permit — \$200.00.
- (33) Brew on premises permit — \$400.00.
- (34) Wine producer permit — \$300.00.
- (35) Wine tasting permit — \$100.00.
- (36) Repealed by Session Laws 2005-380, s. 1, effective September 8, 2005, and applicable to wine shipper permit applications submitted on or after that date.
- (37) Wine shop permit — \$100.00.
- (38) Winemaking on premises permit — \$400.00.
- (39) Wine shipper packager permit — \$100.00.
- (e) Repealed by Session Laws 1998-95, s. 29, effective May 1, 1999.
- (f) Fee Not Refundable. — The fee required by subsection (d) shall not be refunded.
- (g) Fees to Treasurer. — All fees collected by the Commission under this or any other section of this Chapter shall be remitted to the State Treasurer for the General Fund. (1949, c. 974, ss. 1, 2; 1963, c. 119; c. 426, s. 12; 1965, c. 326; 1971, c. 872, s. 1; 1973, c. 758, s. 2; c. 1012; 1975, c. 19, s. 5; 1977, c. 70, s. 19.1; c. 668, s. 3; c. 977, ss. 1, 2; 1979, c. 286, s. 4; 1981, c. 412, s. 2; c. 747, ss. 55, 56; 1983, c. 713, s. 105; 1989, c. 737, s. 3; c. 800, s. 7; 1991, c. 267, s. 2; c. 565, ss. 2, 7; c. 669, s. 2; c. 689, ss. 307, 308; 1991 (Reg. Sess., 1992), c. 920, s. 5; 1993, c. 415, s. 11; 1993 (Reg. Sess., 1994), c. 745, s. 28; 1995, c. 404, s. 2; c. 466, s. 7; 1997-134, s. 3; 1997-467, s. 2; 1998-95, s. 29; 2001-262, s. 6; 2001-487, s. 49(f); 2002-147, s. 1; 2003-402, s. 1; 2005-350, s. 2(b); 2005-380, s. 1; 2006-222, s. 2.3; 2006-227, s. 3.)

**Effect of Amendments.** — Session Laws 2006-227, s. 3, effective August 10, 2006, added subdivisions (d)(38) and (d)(39).  
 Session Laws 2006-222, s. 2.3, effective August 10, 2006, added subdivision (d)(38).

## ARTICLE 10.

### *Retail Activity.*

#### **§ 18B-1001. Kinds of ABC permits; places eligible.**

When the issuance of the permit is lawful in the jurisdiction in which the

premises are located, the Commission may issue the following kinds of permits:

- (1) On-Premises Malt Beverage Permit. — An on-premises malt beverage permit authorizes the retail sale of malt beverages for consumption on the premises and the retail sale of malt beverages in the manufacturer's original container for consumption off the premises. It also authorizes the holder of the permit to ship malt beverages in closed containers to individual purchasers inside and outside the State. The permit may be issued for any of the following:
  - a. Restaurants;
  - b. Hotels;
  - c. Eating establishments;
  - d. Food businesses;
  - e. Retail businesses;
  - f. Private clubs;
  - g. Convention centers;
  - h. Community theatres.The permit may also be issued to certain breweries as authorized by G.S. 18B-1104(7).
- (2) Off-Premises Malt Beverage Permit. — An off-premises malt beverage permit authorizes the retail sale of malt beverages in the manufacturer's original container for consumption off the premises and it authorizes the holder of the permit to ship malt beverages in closed containers to individual purchasers inside and outside the State. The permit may be issued for any of the following:
  - a. Restaurants;
  - b. Hotels;
  - c. Eating establishments;
  - d. Food businesses;
  - e. Retail businesses.
- (3) On-Premises Unfortified Wine Permit. — An on-premises unfortified wine permit authorizes the retail sale of unfortified wine for consumption on the premises, either alone or mixed with other beverages, and the retail sale of unfortified wine in the manufacturer's original container for consumption off the premises. It also authorizes the holder of the permit to ship unfortified wine in closed containers to individual purchasers inside and outside the State. Orders received by a winery by telephone, Internet, mail, facsimile, or other off-premises means of communication shall be shipped pursuant to a wine shipper permit and not pursuant to this subdivision. The permit may be issued for any of the following:
  - a. Restaurants;
  - b. Hotels;
  - c. Eating establishments;
  - d. Private clubs;
  - e. Convention centers;
  - f. Cooking schools;
  - g. Community theatres;
  - h. Wineries;
  - i. Wine producers.
- (4) Off-Premises Unfortified Wine Permit. — An off-premises unfortified wine permit authorizes the retail sale of unfortified wine in the manufacturer's original container for consumption off the premises and it authorizes the holder of the permit to ship unfortified wine in closed containers to individual purchasers inside and outside the State. The permit may be issued for retail businesses. The permit may

also be issued for a winery for sale of its own unfortified wine. Orders received by a winery by telephone, Internet, mail, facsimile, or other off-premises means of communication shall be shipped pursuant to a wine shipper permit and not pursuant to this subdivision.

- (5) **On-Premises Fortified Wine Permit.** — An on-premises fortified wine permit authorizes the retail sale of fortified wine for consumption on the premises, either alone or mixed with other beverages, and the retail sale of fortified wine in the manufacturer's original container for consumption off the premises. It also authorizes the holder of the permit to ship fortified wine in closed containers to individual purchasers inside and outside the State. Orders received by a winery by telephone, Internet, mail, facsimile, or other off-premises means of communication shall be shipped pursuant to a wine shipper permit and not pursuant to this subdivision. The permit may be issued for any of the following:
  - a. Restaurants;
  - b. Hotels;
  - c. Private clubs;
  - d. Community theatres;
  - e. Wineries;
  - f. Convention centers.
- (6) **Off-Premises Fortified Wine Permit.** — An off-premises fortified wine permit authorizes the retail sale of fortified wine in the manufacturer's original container for consumption off the premises and it authorizes the holder of the permit to ship fortified wine in closed containers to individual purchasers inside and outside the State. The permit may be issued for food businesses. The permit may also be issued for a winery for sale of its own fortified wine. Orders received by a winery by telephone, Internet, mail, facsimile, or other off-premises means of communication shall be shipped pursuant to a wine shipper permit and not pursuant to this subdivision.
- (7) **Brown-Bagging Permit.** — A brown-bagging permit authorizes each individual patron of an establishment, with the permission of the permittee, to bring up to eight liters of fortified wine or spirituous liquor, or eight liters of the two combined, onto the premises and to consume those alcoholic beverages on the premises. The permit may be issued for any of the following:
  - a. Restaurants;
  - b. Hotels;
  - c. Private clubs;
  - d. Community theatres;
  - e. Congressionally chartered veterans organizations.
- (8) **Special Occasion Permit.** — A special occasion permit authorizes the host of a reception, party or other special occasion, with the permission of the permittee, to bring fortified wine and spirituous liquor onto the premises of the business and to serve the same to his guests. The permit may be issued for any of the following:
  - a. Restaurants;
  - b. Hotels;
  - c. Eating establishments;
  - d. Private clubs;
  - e. Convention centers.
- (9) **Limited Special Occasion Permit.** — A limited special occasion permit authorizes the permittee to bring fortified wine and spirituous liquor onto the premises of a business, with the permission of the owner of that property, and to serve those alcoholic beverages to the permittee's



guests at a reception, party, or other special occasion being held there. The permit may be issued to any individual other than the owner or possessor of the premises. An applicant for a limited special occasion permit shall have the written permission of the owner or possessor of the property on which the special occasion is to be held.

- (10) Mixed Beverages Permit. — A mixed beverages permit authorizes the retail sale of mixed beverages for consumption on the premises. The permit also authorizes a mixed beverages permittee to obtain a purchase-transportation permit under G.S. 18B-403 and 18B-404, and to use for culinary purposes spirituous liquor lawfully purchased for use in mixed beverages. The permit may be issued for any of the following:

- a. Restaurants;
- b. Hotels;
- c. Private clubs;
- d. Convention centers;
- e. Community theatres;
- f. Nonprofit organizations; and
- g. Political organizations.

- (11) Culinary Permit. — A culinary permit authorizes a permittee to possess up to 12 liters of either fortified wine or spirituous liquor, or 12 liters of the two combined, in the kitchen of a business and to use those alcoholic beverages for culinary purposes. The permit may be issued for either of the following:

- a. Restaurants;
- b. Hotels.
- c. Cooking schools.

A culinary permit may also be issued to a catering service to allow the possession of the amount of fortified wine and spirituous liquor stated above at the business location of that service and at the cooking site. The permit shall also authorize the caterer to transport those alcoholic beverages to and from the business location and the cooking site, and use them in cooking.

- (12) Mixed Beverages Catering Permit. — A mixed beverages catering permit authorizes a hotel or a restaurant that has a mixed beverages permit to bring spirituous liquor onto the premises where the hotel or restaurant is catering food for an event and to serve the liquor to guests at the event.

- (13) Guest Room Cabinet Permit. — A guest room cabinet permit authorizes a hotel having a mixed beverages permit or a private club having a mixed beverages permit and management contracts for the rental of living units to sell to its room guests, from securely locked cabinets, malt beverages, unfortified wine, fortified wine, and spirituous liquor. A permittee shall designate and maintain at least ten percent (10%) of the permittee's guest rooms as rooms that do not have a guest room cabinet. A permittee may dispense alcoholic beverages from a guest room cabinet only in accordance with written policies and procedures filed with and approved by the Commission. A permittee shall provide a reasonable number of vending machines, coolers, or similar machines on premises for the sale of soft drinks to hotel guests.

A guest room cabinet permit may be issued for any of the following:

- a. A hotel located in a county subject to G.S. 18B-600(f).
- b. A hotel located in a county that has a population in excess of 150,000 by the last federal census.
- c. A qualifying private club located in a county defined in G.S. 18B-101(13a)b.2.

- (14) **Brew on Premises Permit.** — A permit may be issued to a business, located in a jurisdiction where the sale of malt beverages is allowed, where individual customers who are 21 years old or older may purchase ingredients and rent the equipment, time, and space to brew malt beverages for personal use in amounts set forth in 27 C.F.R. § 25.205. The customer must do all of the following:
- a. Select a recipe and kettle.
  - b. Weigh out the proper ingredients and add them to the kettle.
  - c. Transfer the wort to the fermenter.
  - d. Add the yeast.
  - e. Place the ingredients in a fermentation room.
  - f. Filter, carbonate, and bottle the malt beverage.
- A permittee may transfer the ingredients from the fermentation room to the cold room and may assist the customer in all the steps involved in brewing a malt beverage except adding the yeast. A malt beverage produced under this subdivision may not contain more than six percent (6%) alcohol by volume.
- (15) **Wine-Tasting Permit.** — A wine-tasting permit authorizes wine tastings on a premises holding a retail permit, by the retail permit holder or his employee. A wine tasting consists of the offering of a sample of one or more unfortified wine products, in amounts of no more than one ounce for each sample, without charge, to customers of the business. Any person pouring wine at a wine tasting shall be at least 21 years of age.
- a. Representatives of the winery, which produced the wine, the wine producer, a wholesaler, or a wholesaler's employee may assist with the tasting. Assisting with a wine tasting includes:
    1. Pouring samples for customers.
    2. Checking the identification of patrons being served at the wine tasting.
  - b. When a representative of the winery that produced the wine, the wine producer, a wine wholesaler, or a wine wholesaler's employee assists in a wine tasting conducted by a retail permit holder:
    1. The retail permit holder shall designate an employee to actively supervise the wine tasting.
    2. A retail permit holder's employee shall not supervise more than three wine-tasting areas.
    3. No more than six wines may be tasted at any one tasting area.
    4. The wine tasting shall not last longer than four hours from the time designated as the starting time by the retail permit holder.
  - c. The retail permit holder shall be solely liable for any violations of this Chapter occurring in connection with the wine tasting. The Commission shall adopt rules to assure that the tastings are limited to samplings and not a subterfuge for the unlawful sale or distribution of wine, and that the tastings are not used by industry members for unlawful inducements to retail permit holders. Except for purposes of this subsection, the holder of a wine-tasting permit shall not be construed to hold a permit for the on-premises sale or consumption of alcoholic beverages. Any food business is eligible for a wine-tasting permit.
- (16) **Wine Shop Permit.** — A wine shop permit authorizes the retail sale of malt beverages, unfortified wine, and fortified wine in the manufacturer's original container for consumption off the premises, and authorizes wine tastings on the premises conducted and supervised by

the permittee in accordance with subdivision (15) of this section. It also authorizes the holder of the permit to ship malt beverages, unfortified wine, and fortified wine in closed containers to individual purchasers inside and outside the State. The permit may be issued for retail businesses whose primary purpose is selling malt beverages and wine for consumption off the premises and regularly and customarily educating consumers through tastings, classes, and seminars about the selection, serving, and storing of wine. The holder of the permit is authorized to sell unfortified wine for consumption on the premises, provided that the sale of wine for consumption on the premises does not exceed forty percent (40%) of the establishment's total sales for any 30-day period. The holder of a wine-tasting permit not engaged in the preparation or sale of food on the premises is not subject to Part 6 of Article 8 of Chapter 130A of the General Statutes.

- (17) Winemaking on Premises Permit. — A permit may be issued to a business, located in a jurisdiction where the sale of unfortified wine is allowed, where individual customers who are 21 years old or older may purchase ingredients and rent the equipment, time, and space to make unfortified wine for personal use in amounts set forth in 27 C.F.R. § 24.75. Except for wine produced for testing equipment or recipes and samples pursuant to this subdivision, the permit holder shall not engage in the actual production or manufacture of wine. Samples may be consumed on the premises only by a person who has a nonrefundable contract to ferment at the premises, and the samples may not exceed one ounce per sample. All wine produced at a winemaking on premises facility shall be removed from the premises by the customer and may only be used for home consumption and the personal use of the customer. (1945, c. 903, s. 1; 1947, c. 1098, ss. 2, 3; 1949, c. 974, s. 1; 1957, cc. 1048, 1448; 1963, c. 426, ss. 10, 12; c. 460, s. 1; 1971, c. 872, s. 1; 1973, c. 476, s. 128; 1975, c. 586, s. 1; c. 654, ss. 1, 2; c. 722, s. 1; 1977, c. 70, s. 19; c. 182, s. 1; c. 669, ss. 1, 2; c. 676, ss. 1, 2; c. 911; 1979, c. 348, ss. 2, 3; c. 683, ss. 5, 6, 11, 12; 1981, c. 412, s. 2; 1981 (Reg. Sess., 1982), c. 1262, ss. 16, 17, 22; 1983, c. 457, s. 3; c. 583, ss. 2-5; 1985, c. 89, ss. 1-3; c. 596, s. 1; 1987, c. 391, s. 2; c. 434, s. 1; 1989, c. 800, ss. 11, 12; 1991, c. 459, ss. 5, 6; c. 565, ss. 1, 7; c. 669, s. 1; 1991 (Reg. Sess., 1992), c. 920, s. 7; 1993, c. 508, s. 5; 1995, c. 466, s. 10; c. 509, ss. 16-18; 1997-443, s. 16.28; 1997-467, s. 3; 2001-262, s. 1; 2001-487, s. 49(a); 2003-402, s. 5; 2005-350, ss. 1, 2(a); 2006-222, s. 2.1; 2006-227, ss. 1, 9; 2006-264, s. 35.3.)

**Effect of Amendments. —**

Session Laws 2006-222, s. 2.1, effective August 10, 2006, added subdivision (17).

Session Laws 2006-227, ss. 1 and 9, effective August 10, 2006, rewrote the last sentence in

subdivision (16), and added subdivision (17).

Session Laws 2006-264, s. 35.3, effective August 27, 2006, added subdivision (3)(i) and made a minor stylistic change.

## § 18B-1001.1. Authorization of wine shipper permit.

(a) A winery holding a federal basic wine manufacturing permit located within or outside of the State may apply to the Commission for issuance of a wine shipper permit that shall authorize the shipment of brands of fortified and unfortified wines identified in the application. The applicant shall not be required to pay an application fee for the wine shipper permit. A wine shipper permittee may amend the brands of wines identified in the permit application but shall file any amendment with the Commission. Any winery that applies for a wine shipper permit shall notify in writing any wholesalers that have been authorized to distribute the winery's brands within the State that an



application has been filed for a wine shipper permit. A wine shipper permittee may sell and ship not more than two cases of wine per month to any person in North Carolina to whom alcoholic beverages may be lawfully sold. All sales and shipments shall be for personal use only and not for resale. A case of wine shall mean any combination of packages containing not more than nine liters of wine.

(b) A wine shipper permittee that ships to addresses in the State more than 1,000 cases of wine in a calendar year must appoint at least one wholesaler to offer and sell the products of the wine shipper permittee under Article 12 of this Chapter if the wine shipper permittee is contacted by a wholesaler that wishes to sell the products of the wine shipper permittee. This provision shall not be construed to require the wine shipper permittee to appoint the wholesaler that originally contacted the wine shipper permittee. Wine purchased by a resident of the State at the premises of the wine shipper permittee and shipped to an address in the State under G.S. 18B-109(d) shall not be included in calculating the total of 1,000 cases per year.

(c) A wine shipper permittee may contract with the holder of a wine shipper packager permit for the packaging and shipment of wine pursuant to this section. The direct shipment of wine by wine shipper or wine shipper packager permittees pursuant to this section shall be made by approved common carrier only. Each common carrier shall apply to the Commission for approval to provide common carriage of wines shipped by holders of permits issued pursuant to this section.

Each common carrier making deliveries pursuant to this section shall:

- (1) Require the recipient, upon delivery, to demonstrate that the recipient is at least 21 years of age by providing a form of identification specified in G.S. 18B-302(d)(1).
- (2) Require the recipient to sign an electronic or paper form or other acknowledgment of receipt as approved by the Commission.
- (3) Refuse delivery when the proposed recipient appears to be under the age of 21 years and refuses to present valid identification as required by subdivision (1) of this subsection.
- (4) Submit any other information that the Commission shall require.

All wine shipper and wine shipper packager permittees shipping wines pursuant to this section shall affix a notice in 26-point type or larger to the outside of each package of wine shipped within or to the State in a conspicuous location stating: "CONTAINS ALCOHOLIC BEVERAGES; SIGNATURE OF PERSON AGED 21 YEARS OR OLDER REQUIRED FOR DELIVERY". Any delivery of wines to a person under 21 years of age by a common carrier shall constitute a violation of G.S. 18B-302(a)(1) by the common carrier. The common carrier and the wine shipper or wine shipper packager permittee shall be liable only for their independent acts.

(d) A wine shipper permittee shall be subject to jurisdiction of the North Carolina courts by virtue of applying for a wine shipper permit and shall comply with any audit or other compliance requirements of the Commission and the Department of Revenue. (2003-402, s. 2; 2004-203, s. 26(a); 2005-380, s. 2; 2006-227, s. 4.)

**Effect of Amendments. —**

Session Laws 2006-227, s. 4, effective August 10, 2006, in subsection (c), rewrote the first

paragraph, inserted "wine shipper packager" twice in the third paragraph, and made related changes.

## § 18B-1001.2. Additional wine shipping requirements.

(a) A wine shipper permittee shall:

- (1) Compile and submit to the Commission quarterly a summary indicating all wine products shipped, including brand and price of each

product, date of each shipment, quantity of each shipment, and amount of excise and sales tax remitted to the Department of Revenue. The report shall include all wine products shipped on the permittee's behalf under contract with a wine shipper packager.

- (2) Register with the Department of Revenue as a wine shipper permittee and provide any additional information required by the Department.

(b) The Commission may adopt rules to carry out the provisions of this section and other related provisions governing the direct shipping of wine. (2003-402, s. 3; 2006-227, s. 5.)

**Effect of Amendments.** — Session Laws 2006-227, s. 5, effective August 10, 2006, added the last sentence in subdivision (a)(1).

### **§ 18B-1001.3. Authorization of wine shipper packager permit.**

The holder of a wine shipper packager permit may provide services for the warehousing, packaging, and shipment of wine on behalf of a winery holding a wine shipper permit. A wine shipper packager permit authorizes the holder to receive, in closed containers, wine produced by and belonging to a wine shipper permittee and to place the unopened wine in containers or packaging materials as a service to the wine shipper permittee in connection with the marketing and sale of its wine products. A wine shipper packager may package and return wine products to the wine shipper permittee or, on behalf of the wine shipper permittee, may package and ship wine products in closed containers to individual purchasers inside and outside this State in accordance with the provisions of G.S. 18B-1001.1. The permit may be issued to a USDA-approved company specializing in warehousing and contract packaging. (2006-227, s. 6.)

**Editor's Note.** — Session Laws 2006-227, s. 15, made this section effective August 10, 2006.

### **§ 18B-1003. Responsibilities of permittee.**

(a) Premises. — For purposes of this Chapter, a permittee shall be responsible for the entire premises for which the permit is issued. The permittee shall keep the premises clean, well-lighted and orderly.

(b) Employees. — For purposes of this Chapter, a permittee shall be responsible for the actions of all employees of the business for which the permit is issued. Each holder of a salesman's permit shall be responsible for all sales and deliveries made by his helpers.

(c) Certain Employees Prohibited. — A permittee shall not knowingly employ in the sale or distribution of alcoholic beverages any person who has been:

- (1) Convicted of a felony within three years;
- (2) Convicted of a felony more than three years previously and has not had his citizenship restored;
- (3) Convicted of an alcoholic beverage offense within two years; or
- (4) Convicted of a misdemeanor controlled substances offense within two years; [or]
- (5) A past permit holder under Chapter 18B of the General Statutes whose permit had been revoked within the last 18 months and who had been the permit holder at the location where the person would be employed.



For purposes of this subsection, “conviction” has the same meaning as in G.S. 18B-900(b). To avoid undue hardship, the Commission may, in its discretion, exempt persons on a case-by-case basis from this subsection.

(d) Financial Responsibility. — A permittee shall pay all judgments rendered against him under the provisions of Article 1A of this Chapter. When the Commission is informed, under the provisions of G.S. 18B-127 that there is an outstanding unsatisfied judgment against a permittee, the Commission shall suspend all of the permittee’s permits. Notice and hearing are not required for a suspension under this subsection, and the suspension shall become effective immediately upon the Commission’s receipt of the report. The suspension shall remain in effect until the permittee demonstrates that he has satisfied the judgment by payment in full. Nothing in this section relieves the permittee of the obligation to pay any applicable fees as a precondition of the reinstatement of his permit. (1981, c. 412, s. 2; 1983, c. 435, s. 40; 2006-253, s. 28.)

**Editor’s Note.** — Session Laws 2006-253, s. 1, provides: “This act shall be known as ‘The Motor Vehicle Driver Protection Act of 2006.’”

2006-253, s. 28, effective December 1, 2006, and applicable to offenses committed on or after that date, added subdivision (c)(5).

**Effect of Amendments.** — Session Laws

## § 18B-1005.1. Sexually explicit conduct on licensed premises.

### CASE NOTES

**In an overbreadth challenge based on the First Amendment, etc.**

Law restricting certain erotic dancing in establishments that had state liquor licenses was unconstitutionally overbroad on its face because it was too burdensome on the expressive elements of erotic dancing since it prohibited

erotic movements and gestures regardless of whether a dancer was nude, and it burdened a substantial amount of mainstream musical, theatrical, and dance activity. *Giovani Carandola, Ltd. v. Fox*, 396 F. Supp. 2d 630, 2005 U.S. Dist. LEXIS 25981 (M.D.N.C. 2005).

## § 18B-1006. Miscellaneous provisions on permits.

(a) School and College Campuses. — No permit for the sale of malt beverages, unfortified wine, or fortified wine shall be issued to a business on the campus or property of a public school or college, other than at a regional facility as defined by G.S. 160A-480.2 operated by a facility authority under Part 4 of Article 20 of Chapter 160A of the General Statutes except for a public school or college function, unless that business is a hotel or a nonprofit alumni organization with a mixed beverages permit or a special occasion permit. This subsection shall not apply on property owned by a local board of education which was leased for 99 years or more to a nonprofit auditorium authority created prior to 1991 whose governing board is appointed by a city board of aldermen, a county board of commissioners, or a local school board. This subsection shall also not apply to the constituent institutions of The University of North Carolina with respect to the sale of beer and wine at performing arts centers located on property owned or leased by the institutions if the seating capacity does not exceed 2,000 seats, or to any golf courses owned or leased by the institutions and open to the public for use.

(b) Lockers at Clubs. — A private club or congressionally-chartered veterans organization which has been issued a brown-bagging permit may, but is not required to, provide lockers for its members to store their alcoholic beverages. If lockers are provided, however, they shall not be shared but shall be for individual members. Each locker and each bottle of alcoholic beverages on the premises shall be labelled with the name of the member to whom it



belongs. No more than eight liters each of malt beverages or unfortified wine may be stored by a member at one time. No more than eight liters of either fortified wine or spirituous liquor, or eight liters of the two combined, may be stored by a member at one time.

(c) Wine Sales. — Holders of retail or wholesale permits for the sale of unfortified or fortified wine may buy and sell only wines on the Commission's approved list. The Commission may authorize the importation and purchase of wines not on the approved list by permittees and others. An authorization shall state the kind and amount of wine that may be imported and purchased and the time within which the transaction shall be completed.

(d) Unlawful Possession or Consumption. — It shall be unlawful for a permittee to possess or consume, or allow any other person to possess or consume, on the licensed premises, any fortified wine or spirituous liquor, the possession or consumption of which is not authorized either by the permits issued to him for the premises or by any other provision of the ABC law.

(e) Facsimile Permit. — It shall be unlawful for any person to produce or possess any false or facsimile permit, or for a permittee to display any false or facsimile permit on his licensed premises.

(f) Failure to Surrender Permit. — It shall be unlawful for any person to refuse to surrender any permit to the Commission upon lawful demand of the Commission or its agents.

(g) Restrictions on Sales at Cooking Schools. — Retail sales of food or alcoholic beverages to be consumed on the premises of a cooking school are restricted to bona fide enrolled students of that school. Violation of this subsection is a ground for administrative action under G.S. 18B-104.

(h) Purchase Restrictions. — A retail permittee may purchase malt beverages, unfortified wine, or fortified wine only from a wholesaler who maintains a place of business in this State and has the proper permit.

(i) Tour Boats. — The Commission may issue permits to boats that conduct regularly scheduled tours upon the rivers or waterways of this State under the following conditions:

- (1) A boat shall serve meals on each tour and shall have a dining area with seating for at least 36 people;
- (2) A boat's gross receipts from food and non-alcoholic beverages shall be greater than its gross receipts from alcoholic beverages;
- (3) A boat may hold the permits listed in G.S. 18B-1001(1), (3), (5), (7), and (10), but no off-premises sales may be made pursuant to those permits;
- (4) A boat shall have a home port in an area where issuance of any of the permits listed in subdivision (3) is legal, and all passengers shall enter the boat at the home port or at other ports listed on a preannounced itinerary. The boat's permits are valid during tours that leave and return to the boat's home port, and apply regardless of whether the boat crosses into an area where sales are not legal, if the boat docks only at a port listed on the preannounced itinerary, except in an emergency; and
- (5) A boat conducting tours along the intracoastal waterway and navigable waterways that enters into the intracoastal waterway, pursuant to a preannounced itinerary that includes visits to two or more cities, may serve alcoholic beverages pursuant to ABC permits issued according to the jurisdiction of its home port in the following manner:
  - a. While on tour, alcoholic beverages may be served to passengers;
  - b. While docked in any other port alcoholic beverages may be served only to tour passengers;
  - c. During special city-sponsored events and festivals, in which case the boat may open its galley and bars at dockside to the general

public and sell those alcoholic beverages that are lawful in the jurisdiction in which it is docked. Any sales in this manner shall be in accordance with the requirements of any ordinances of the jurisdiction in which the boat is docked.

- (6) Liquor purchased for resale in mixed beverages may be purchased only from the local board for the jurisdiction of the boat's home port.

(j) Recreation Districts. — Notwithstanding the provisions of Article 6 of this Chapter, the Commission may issue permits for the sale of malt beverages, unfortified wine, fortified wine, and mixed beverages to qualified businesses in a recreation district.

A "recreation district" is an area that meets any of the following requirements:

- (1) An area that is located in a county that has not approved the issuance of permits, has at least two cities that have approved the sale of malt beverages, wine, and the operation of an ABC store, and contains a facility of at least 450 acres where five or more public auto racing events are held each year.
- (2) An area that is located in a county that borders a county which has held elections pursuant to G.S. 18B-600(f) and borders on another state and which (i) contains a facility of at least 225 acres where four or more public auto racing events are held each year or (ii) contains a facility of at least 140 acres where 80 or more motor sports events are held each year.
- (3) A recreation district includes the area within a half-mile radius of a racing facility that meets the requirements of subdivision (1) or (2) of this subsection.
- (4) Repealed by Session Laws 2004-203, s. 27, effective August 17, 2004.

(k) Residential Private Club and Sports Club Permits. — The Commission may issue the permits listed in G.S. 18B-1001, without approval at an election, to a residential private club or a sports club, except if the sale of mixed beverages is not lawful within a jurisdiction and that locality has voted against the sale of mixed beverages in a referendum conducted on or after September 1, 2001. If the issuance of permits is prohibited by the exception in the previous sentence, the Commission may renew existing permits and may continue to issue permits for a business location that had previously held permits under this subsection. No permit may be issued to any residential private club or sports club that practices discrimination on the basis of race, gender or ethnicity.

The mixed beverages purchase-transportation permit authorized by G.S. 18B-404(b) shall be issued by a local board operating a store located in the county.

- (l) Repealed by Session Laws 2004-203, s. 65, effective August 17, 2004.

(m) Interstate Interchange Economic Development Zones. —

- (1) The Commission may issue permits listed in G.S. 18B-1001(10), without approval at an election, to qualified establishments defined in G.S. 18B-1000(4), (6), and (8) located within one mile of an interstate highway interchange located in a county that:
  - a. Has approved the sale of malt beverages, unfortified wine, and fortified wine, but not mixed beverages;
  - b. Operates ABC stores;
  - c. Borders on another state; and
  - d. Lies north and east of the Roanoke River.
- (2) The Commission may issue permits listed in G.S. 18B-1001(1), (3), (5), and (10) to qualified establishments defined in G.S. 18B-1000(4), (6),



and (8) and may issue permits listed in G.S. 18B-1001(2) and (4) to qualified establishments defined in G.S. 18B-1000(3) in any county that qualifies for issuance of permits pursuant to G.S. 18B-1006(k). These permits may be issued without approval at an election and shall be issued only to qualified establishments that meet all of the following requirements:

- a. Located within one mile of any interstate highway interchange in that county;
- b. Located within one mile of an establishment issued a permit under G.S. 18B-1006(k); and
- c. Is, or is located within one-quarter mile of, a hotel with 70 or more rooms.

(3) Repealed by Session Laws 2004-203, s. 28, effective August 17, 2004.

(n) National Historic Landmark District. — The Commission may issue permits listed in G.S. 18B-1001(10), without approval at an election, to qualified establishments defined in G.S. 18B-1000(4) and (6) located within a National Historical Landmark as defined in 16 U.S.C. § 470a(a)(1)(B) located in a county that meets all of the following requirements:

- (1) Has approved the sale of malt beverages and unfortified wine but not mixed beverages.
- (2) Has at least one city that has approved the operation of an ABC store and the sale of mixed beverages.
- (3) Has at least 150,000 population based on the last federal census.

(o) Expired.

(p) The Commission shall issue a special occasion permit under G.S. 18B-1001(8) to a mixed beverage permittee in a sports facility occupied by a major league professional sports team with suites available for sale or lease to patrons of the facility to authorize patrons to make available alcoholic beverages in those suites as if the patron were a host of a reception, party or other special occasion. If the patron occupying the suite so desires, alcoholic beverages by self-service may be made available to any person at least 21 years of age possessing a valid ticket to the event authorizing that person to occupy the suite. At no event may the patron make available a quantity of alcoholic beverages in excess of the amount a person is allowed to buy under G.S. 18B-303(a). A mixed beverage permittee who holds a permit shall provide mixed beverage tax paid spirituous liquor for resale by the container in approved sizes of no larger than 750 milliliters to the host or patron of the suite. This subsection does not authorize any person possessing a valid ticket to an event at the facility to bring alcoholic beverages onto the premises and consume those alcoholic beverages on the premises, or to remove those beverages from the suite. (1981, c. 412, s. 2; 1981 (Reg. Sess., 1982), c. 1262, s. 23; 1985, c. 114, s. 2; c. 301; 1987, c. 515; c. 760; 1989, c. 360; c. 770, s. 49; c. 800, s. 18; 1991, c. 340, s. 1; c. 459, s. 7; 1991 (Reg. Sess., 1992), c. 920, s. 12; 1993, c. 415, ss. 17-19; c. 508, s. 6; 1995, c. 224, s. 1; c. 372, s. 2; c. 458, s. 8; c. 466, ss. 11-12; 1997-182, s. 3; 1997-395, s. 1; 1997-443, s. 16.27(a); 1999-462, ss. 2, 10, 12, 14; 2001-130, ss. 1, 1.4; 2004-199, s. 10; 2004-203, ss. 27, 28, 65; 2005-327, ss. 1, 2, 4; 2006-227, s. 7; 2006-264, s. 100.)

**Effect of Amendments. —**

Session Laws 2006-227, s. 7, effective August 10, 2006, inserted “or to any golf courses owned or leased by the institutions and open to the public for use” at the end of subsection (a).

Session Laws 2006-264, s. 100, effective August 27, 2006, in subsection (p), inserted “a mixed beverage permittee in” in the first sentence, and added the second to last sentence.



## ARTICLE 11.

*Commercial Activity.***§ 18B-1106. Authorization of wine importer permit.**

(a) Authorization. — The holder of a wine importer permit may:

- (1) Import fortified and unfortified wines from outside the United States in closed containers;
- (2) Store those wines;
- (3) Sell those wines to wine wholesalers for purposes of resale.

(b) Distribution Agreements. — Wine distribution agreements are governed by Article 12 of this Chapter.

(c) The holder of a wine importer permit may import and sell to wholesalers only wine for which it is a primary American source of supply. To be considered a primary American source of supply, a wine importer must establish that it has lawfully purchased the wine from the winery, or from an agent of the winery, and by written contract or otherwise has been authorized by the winery to distribute the wine to wholesalers in the United States. (1945, c. 903, s. 1; 1947, c. 1098, ss. 2, 3; 1949, c. 974, s. 1; 1957, cc. 1048, 1448; 1963, c. 426, ss. 10, 12; c. 460, s. 1; 1971, c. 872, s. 1; 1973, c. 476, s. 128; 1975, c. 586, s. 1; c. 654, ss. 1, 2; c. 722, s. 1; 1977, c. 70, s. 19; c. 182, s. 1; c. 669, ss. 1, 2; c. 676, ss. 1, 2; c. 911; 1979, c. 348, ss. 2, 3; c. 683, ss. 5, 6, 11, 12; 1981, c. 412, s. 2; 1983, c. 85, s. 1; 1993, c. 415, s. 21; 2006-227, s. 11.)

**Effect of Amendments.** — Session Laws  
2006-227, s. 11, effective August 10, 2006,  
added subsection (c).

**§ 18B-1107. Authorization of wine wholesaler permit.**

(a) Authorization. — The holder of a wine wholesaler permit may:

- (1) Receive, possess and transport shipments of fortified and unfortified wine. The wine must be received from one of the following:
  - a. A primary American source of supply for that wine as recognized by the Commission or as verified by the wholesaler.
  - b. A licensed North Carolina wholesaler who received the wine from a primary American source of supply and with whom the second wholesaler has a subcontracting agreement for distribution of the wine.
  - c. Another wholesaler from whom the purchasing wholesaler is purchasing the wholesaler's business or from whom the wholesaler is purchasing the brand or distribution rights for the wine being received.
  - d. Another wholesaler who also has distribution rights for the wine being received and from whom the wholesaler is acquiring the wine in order to address a temporary inventory shortage.
- (2) Sell, deliver and ship wine in closed containers for purposes of resale to wholesalers or retailers licensed under this Chapter as authorized by the ABC laws.
- (3) Furnish and sell wine to its employees, subject to the rules of the Commission and the Department of Revenue.
- (4) In locations where the sale is legal, furnish wine to guests and any other person who does not hold an ABC permit, for promotional purposes, subject to rules of the Commission.

- (5) Sell out-of-date unfortified and fortified wines to holders of cider and vinegar manufacturer permits, provided that each bottle is marked “out-of-date” by the wholesaler.

(b) Distribution Agreements. — Wine distribution agreements are governed by Article 12 of this Chapter. (1945, c. 903, s. 1; 1947, c. 1098, ss. 2, 3; 1949, c. 974, s. 1; 1957, cc. 1048, 1448; 1963, c. 426, ss. 10, 12; c. 460, s. 1; 1971, c. 872, s. 1; 1973, c. 476, s. 128; 1975, c. 586, s. 1; c. 654, ss. 1, 2; c. 722, s. 1; 1977, c. 70, s. 19; c. 182, s. 1; c. 669, ss. 1, 2; c. 676, ss. 1, 2; c. 911; 1979, c. 348, ss. 2, 3; c. 683, ss. 5, 6, 11, 12; 1981, c. 412, s. 2; 1983, c. 85, s. 1; 1997-134, s. 4; 2006-227, s. 12.)

**Effect of Amendments.** — Session Laws 2006-227, s. 12, effective August 10, 2006, re- wrote subdivision (a)(1) adding items a. to d. and making stylistic changes.

## **§ 18B-1114. Authorization of nonresident wine vendor permit.**

The holder of a nonresident wine vendor permit may sell, deliver, and ship unfortified and fortified wine in this State only to wholesalers, importers, and bottlers licensed under this Chapter, as authorized by the ABC laws. The unfortified and fortified wine must come to rest at the licensed premises of a wine wholesaler in this State before being resold to a retailer. A nonresident wine vendor permit may be issued to a winery, a wholesaler, an importer, or a bottler outside North Carolina who desires to sell, deliver, and ship unfortified and fortified wine into this State. The holder of a nonresident wine vendor permit may sell, deliver, and ship into this State only wine for which it is a primary American source of supply. To be considered a primary American source of supply, a nonresident wine vendor must establish that it has lawfully purchased the wine from the winery, or from an agent of the winery, and by written contract or otherwise has been authorized by the winery to distribute the wine to wholesalers in the United States. (1981, c. 747, s. 63; 1993, c. 415, s. 24; 2006-227, s. 13.)

**Effect of Amendments.** — Session Laws 2006-227, s. 13, effective August 10, 2006, added the last two sentences.

## Chapter 18C.

### North Carolina State Lottery.

#### Article 2.

##### North Carolina State Lottery Commission.

Sec.

18C-111. Commission membership; appointment; selection of chair; vacancies; removal; meetings; compensation.

18C-115. Reports.

#### Article 4.

##### Operation of Lottery.

18C-130. Types of lottery games; lottery games and lottery advertising; certain disclosures and information to be provided.

18C-131. Sales and sale price of tickets and shares; sales to minors prohibited.

Sec.

18C-132. Procedures for drawings and claiming prizes; payment of prizes; protection of information concerning certain prize winners.

#### Article 6.

##### Lottery Vendors and Lottery Contractors.

18C-151. Contracts.

#### Article 7.

##### North Carolina State Lottery Fund.

18C-164. Transfer of net revenues.

#### Article 8.

##### Miscellaneous.

18C-172. Lottery Oversight Committee.

## ARTICLE 2.

### *North Carolina State Lottery Commission.*

#### **§ 18C-111. Commission membership; appointment; selection of chair; vacancies; removal; meetings; compensation.**

(a) The Commission shall consist of nine members, five of whom shall be appointed by the Governor, two of whom shall be appointed by the General Assembly upon the recommendation of the President Pro Tempore of the Senate, and two of whom shall be appointed by the General Assembly upon the recommendation of the Speaker of the House of Representatives. Commissioners may be removed by the appointing authority for cause. The Governor shall select the chair of the Commission from among its membership, who shall serve at the pleasure of the Governor.

(b) Of the initial appointees of the Governor, three members shall serve a term of one year, one member shall serve a term of two years, and one member shall serve a term of three years. Of the initial appointees of the General Assembly upon the recommendation of the President Pro Tempore of the Senate, one member shall serve a term of two years, and one member shall serve a term of three years. Of the initial appointees of the General Assembly upon the recommendation of the Speaker of the House of Representatives, one member shall serve a term of two years, and one member shall serve a term of three years. All succeeding appointments shall be for terms of five years. Members shall not serve for more than two successive terms.

(c) Vacancies shall be filled by the appointing authority for the unexpired portion of the term in which they occur.

(d) The Commission shall meet at least quarterly upon the call of the chair. A majority of the total membership of the Commission shall constitute a quorum.



(e) Members of the Commission shall receive per diem, subsistence, and travel as provided in G.S. 138-5 and G.S. 138-6. (2005-344, s. 1; 2005-276, s. 31.1(d); 2006-259, s. 8(c).)

**Effect of Amendments. —**

Session Laws 2006-259, s. 8(c), effective Au-

gust 23, 2006, added the second to last sentence in subsection (a).

## § 18C-115. Reports.

The Commission shall send quarterly and annual reports on the operations of the Commission to the Governor, State Treasurer, the Lottery Oversight Committee, and to the General Assembly. The reports shall include complete statements of lottery revenues, prize disbursements, expenses, net revenues, and all other financial transactions involving lottery funds, including the occurrence of any audit. (2005-344, s. 1; 2006-225, s. 2.)

**Effect of Amendments. —**

Session Laws 2006-225, s. 2, effective August 10, 2006, in-

serted “the Lottery Oversight Committee,” in the first sentence.

## ARTICLE 3.

### *North Carolina State Lottery Director.*

## § 18C-122. Independent audits.

**Editor’s Note. —**

Session Laws 2005-344, s. 12, as amended by Session Laws 2006-259, s. 8(l), provides: “The first security audit required under G.S. 18C-122(a) shall be conducted at the beginning of

the first calendar year after the effective date of this act. The first audit required under G.S. 18C-122(d) shall be conducted at the end of the first fiscal year after the effective date of this act [August 31, 2005].”

## ARTICLE 4.

### *Operation of Lottery.*

## § 18C-130. Types of lottery games; lottery games and lottery advertising; certain disclosures and information to be provided.

(a) The Commission shall determine the types of lottery games that may be used in the Lottery. Games may include instant lotteries, online games, games played on computer terminals or other devices, and other games traditional to a lottery or that have been conducted by any other state government-operated lottery.

(b) In lottery games using tickets, each ticket in a particular game shall have printed on it a unique number distinguishing it from every other ticket in that lottery game and an abbreviated form of the game-play rules, including resources for responsible gaming information. In lottery games using tickets, each ticket may have printed on it a depiction of one or more cartoon characters, whose primary appeal is not to minors. In lottery games using tickets with preprinted winners, the overall estimated odds of winning prizes shall be printed on each ticket. No name or photograph of a current or former elected official shall appear on the tickets of any lottery game.

(c) In games using electronic computer terminals or other devices to play lottery games, no coins or currency shall be dispensed to players from those electronic computer terminals or devices.

(d) No games shall be based on the outcome of a particular sporting event or on the results of a series of sporting events.

(e) Lottery advertising shall be tastefully designed and presented in a manner to minimize the appeal of lottery games to minors. The use of cartoon characters or of false, misleading, or deceptive information in lottery advertising is prohibited. All advertising promoting the sale of lottery tickets or shares for a particular game shall include the actual or estimated overall odds of winning the game.

(f) The Commission shall make available a detailed tabulation of the estimated number of prizes of each particular prize denomination that are expected to be awarded in each lottery game or the estimated odds of winning these prizes at the time that lottery game is offered for sale to the public.

(g) The Commission shall, in consultation with the Department of Health and Human Services, develop and provide information to the public about gambling addiction and treatment. (2005-344, s. 1; 2005-276, ss. 31.1(j), 31.1(j1); 2006-259, s. 8(a).)

**Effect of Amendments. —**

Session Laws 2006-259, s. 8(a), effective Au-

gust 23, 2006, made a minor stylistic change in subsection (a).

## **§ 18C-131. Sales and sale price of tickets and shares; sales to minors prohibited.**

(a) The Commission may sell tickets and shares directly to the public, contract with lottery game retailers to sell tickets and shares, or distribute tickets or shares through any other method authorized by the Commission.

(b) No ticket or share in a lottery game shall be sold or resold for more than the retail sales price established by the Commission.

(c) The minimum retail price of each ticket or share in any lottery game shall be fifty cents (50¢). The minimum retail price shall not apply to any discounts or promotions authorized by the Commission for a particular lottery game.

(d) It shall be unlawful for a person to sell a lottery ticket or share to a person under the age of 18 years. No person under the age of 18 years shall purchase a lottery ticket or share. A person who violates this subsection shall be guilty of a Class 1 misdemeanor.

(e) It shall be a defense for the person who sold a ticket or share in violation of subsection (d) of this section if the person does either of the following:

- (1) Shows that the purchaser produced a valid drivers license, a special identification card issued under G.S. 20-37.7, a military identification card, or a passport, showing the purchaser to be at least 18 years old and bearing a physical description of the person named on the card that reasonably describes the purchaser.
- (2) Produces evidence of other facts that reasonably indicated at the time of sale that the purchaser was at least 18 years old. (2005-344, s. 1; 2006-259, s. 8(b).)

**Effect of Amendments. —**

Session Laws 2006-259, s. 8(b), effective August 23, 2006,

inserted “valid” preceding “drivers license” in subdivision (e)(1).

## **§ 18C-132. Procedures for drawings and claiming prizes; payment of prizes; protection of information concerning certain prize winners.**

(a) If a lottery game uses a daily or less frequent drawing of winning



numbers, a drawing among entries, or a drawing among finalists, all of the following conditions shall be met:

- (1) The drawings shall be open to the public.
- (2) The drawings shall be witnessed by an independent certified public accountant.
- (3) Any equipment used in the drawings shall be inspected by the independent certified public accountant and an employee of the Commission both before and after the drawings.
- (4) Audio and visual records of the drawings and inspections shall be made.

(b) Prizes that remain unclaimed after the period set by the Commission for claiming the prizes shall not be considered abandoned property. If a valid claim is not made for a prize within the applicable period, the unclaimed prize money shall be handled in accordance with this Chapter.

(c) After the expiration of the claim period for prizes for each lottery game, the Commission shall make available a detailed tabulation of the total number of prizes of each prize denomination that was actually claimed and paid directly by the Commission.

(d) No prize shall be paid for a lottery ticket or share that is stolen, counterfeit, altered, fraudulent, unissued, produced or issued in error, unreadable, not received or recorded by the Commission by the applicable deadlines, lacking in captions that conform and agree with the play symbols as appropriate to the lottery game involved, or not in compliance with any additional specific rules and public or confidential validation and security tests appropriate to the particular game involved.

(e) No valid claim for a prize in any lottery game shall be paid more than once. The Director, Commission, and the State shall be discharged of all liability upon payment of a prize.

(f) Winners of less than six hundred dollars (\$600.00) shall be permitted to claim prizes from any of the following:

- (1) The same lottery game retailer who sold the winning ticket or share.
- (2) Any other lottery retailer.
- (3) The Commission.

(g) Winners of six hundred dollars (\$600.00) or more shall claim prizes directly from the Commission.

(h) The right of any person to a prize shall not be assignable. Payment of any prize may be paid to the estate of a deceased prizewinner or to a person designated pursuant to a court order.

(i) No ticket or share in a lottery game shall be purchased by, and no prize shall be paid to, a member of the Commission, the Director, or employee of the Commission, or to any spouse, parent, or child living in the same household as a person disqualified by this subsection.

(j) No prize shall be paid to a person under the age of 18.

(k) If a prize winner submits to the Commission a copy of a protective order without attachments, if any, issued to that person under G.S. 50B-3 or a lawful order of any court of competent jurisdiction restricting the access or contact of one or more persons with that prize winner or a current and valid Address Confidentiality Program authorization card issued pursuant to the provisions of Chapter 15C of the General Statutes, that prize winner's identifying information shall be treated as confidential information under G.S. 132-1.2 as long as the protective order remains in effect or the prize winner remains a certified program participant in the Address Confidentiality Program. That prize winner's identifying information shall be available for inspection by a law enforcement agency or by a person identified in a court order if inspection of the address by that person is directed by that court order.

(l) All prizes are subject to the State income tax. (2005-344, s. 1; 2005-276, s. 31.1(k); 2006-225, s. 4.)



**Effect of Amendments.** —  
Session Laws 2006-225, s. 4, effective August  
10, 2006, substituted “this Chapter” for “Article

35A of Chapter 115C of the General Statutes” in  
the last sentence of subsection (b).

## ARTICLE 6.

### *Lottery Vendors and Lottery Contractors.*

#### **§ 18C-151. Contracts.**

(a) Except as otherwise specifically provided in this subsection for contracts for the purchase of services, apparatus, supplies, materials, or equipment, Article 8 of Chapter 143 of the General Statutes, including the provisions relating to minority participation goals, shall apply to contracts entered into by the Commission. If this subsection and Article 8 of Chapter 143 are in conflict, the provisions of this subsection shall control. In recognition of the particularly sensitive nature of the Lottery and the competence, quality of product, experience, and timeliness, fairness, and integrity in the operation and administration of the Lottery and maximization of the objective of raising revenues, a contract for the purchase of services, apparatus, supplies, materials, or equipment requiring an estimated aggregate expenditure of ninety thousand dollars (\$90,000) or more may be awarded by the Commission only after the following have occurred:

- (1) The Commission has invited proposals to be submitted by advertisement by electronic means or advertisement in a newspaper having general circulation in the State of North Carolina and containing the following information:
  - a. The time and place where a complete description of the services, apparatus, supplies, materials, or equipment may be had.
  - b. The time and place for opening of the proposals.
  - c. A statement reserving to the Commission the right to reject any or all proposals.
- (2) Proposals may be rejected for any reason determined by the Commission to be in the best interest of the Lottery.
- (3) All proposals shall be accompanied by a bond or letter of credit in an amount equal to not less than five percent (5%) of the proposal and the fee to cover the cost of the criminal record check conducted under G.S. 114-19.6.
- (4) The Commission has complied with the minority participation goals of G.S. 143-128.2 and G.S. 143-128.3.
- (5) The Commission may not award a contract to a lottery vendor who has been convicted of a felony or any gambling offense in any state or federal court of the United States within 10 years of entering into the contract, or employs officers and directors who have been convicted of a felony or any gambling offense in any state or federal court of the United States within 10 years of entering into the contract.
- (6) The Commission shall investigate and compare the overall business practices, ethical reputation, criminal record, civil litigation, competence, integrity, background, and regulatory compliance record of lottery vendors.
- (7) The Commission may engage an independent firm experienced in evaluating government procurement proposals to aid in evaluating proposals for a major procurement.
- (8) The Commission shall award the contract to the responsible lottery vendor who submits the best proposal that maximizes the benefits to the State.

(b) Upon the completion of the bidding process, a contract may be awarded to a lottery contractor with whom the Commission has previously contracted for the same purposes.

(c) Before a contract is awarded, the Director shall conduct a thorough background investigation of all of the following:

- (1) The vendor to whom the contract is to be awarded.
- (2) Any parent or subsidiary corporation of the vendor to whom the contract is to be awarded.
- (3) All shareholders with a five percent (5%) or more interest in the vendor or parent or subsidiary corporation of the vendor to whom the contract is to be awarded.
- (4) All officers and directors of the vendor or parent or subsidiary corporation of the vendor to whom the contract is to be awarded.

(d) The Commission may terminate the contract, without penalty, of a lottery contractor that fails to comply with the Commission's instruction to implement the recommendations of the State Auditor or an independent auditor in an audit conducted of Lottery security or operations.

(e) After entering into a contract with a lottery contractor, the Commission shall require the lottery contractor to periodically update the information required to be disclosed under G.S. 18C-152(c). Any contract with a lottery contractor who does not periodically update the required disclosures may be terminated by the Commission.

(f) No lottery system vendor nor any applicant for a contract may pay, give, or make any economic opportunity, gift, loan, gratuity, special discount, favor, hospitality, or service, excluding food and beverages having an aggregate value not exceeding one hundred dollars (\$100.00) in any calendar year, to the Director, any member or employee of the corporation, or a member of the immediate family residing in the same household as any of these individuals. (2005-344, s. 1; 2005-276, s. 31.1(p); 2006-259, s. 8(d).)

**Effect of Amendments. —**

Session Laws 2006-259, s. 8(d), effective Au-

gust 23, 2006, substituted "G.S. 18C-152(c)" for "G.S. 18C-149" in subsection (e).

## ARTICLE 7.

### *North Carolina State Lottery Fund.*

#### **§ 18C-164. Transfer of net revenues.**

(a) The funds remaining in the North Carolina State Lottery Fund after receipt of all revenues to the Lottery Fund and after accrual of all obligations of the Commission for prizes and expenses shall be considered to be the net revenues of the North Carolina State Lottery Fund. The net revenues of the North Carolina State Lottery Fund shall be transferred four times a year to the Education Lottery Fund, which shall be created in the State treasury.

(b) From the Education Lottery Fund, the Commission shall transfer a sum equal to five percent (5%) of the net revenue of the prior year to the Education Lottery Reserve Fund. A special revenue fund for this purpose shall be established in the State treasury to be known as the Education Lottery Reserve Fund, and that fund shall be capped at fifty million dollars (\$50,000,000). Monies in the Education Lottery Reserve Fund may be appropriated only as provided in subsection (e) of this section.

(c) The Commission shall distribute the remaining net revenue of the Education Lottery Fund, as follows, in the following manner:

- (1) A sum equal to fifty percent (50%) to support reduction of class size in early grades to class size allotments not exceeding 1:18 in order to eliminate achievement gaps and to support academic prekindergarten



programs for at-risk four-year-olds who would otherwise not be served in a high-quality education program in order to help those four-year-olds be prepared developmentally to succeed in school.

- (2) A sum equal to forty percent (40%) to the Public School Building Capital Fund in accordance with G.S. 115C-546.2.
- (3) A sum equal to ten percent (10%) to the State Educational Assistance Authority to fund college and university scholarships in accordance with Article 35A of Chapter 115C of the General Statutes.

(d) Of the sums transferred under subsection (c) of this section, the General Assembly shall appropriate the funds annually based upon estimates of lottery net revenue to the Education Lottery Fund provided by the Office of State Budget and Management and the Fiscal Research Division of the North Carolina General Assembly.

(e) If the actual net revenues are less than the appropriation for that given year, then the Governor may transfer from the Education Lottery Reserve Fund an amount sufficient to equal the appropriation by the General Assembly. If the monies available in the Education Lottery Reserve Fund are insufficient to reach a full appropriation, the Governor shall transfer monies in order of priority, to the following:

- (1) To support academic prekindergarten programs for at-risk four-year-olds who would otherwise not be served in a high-quality education program in order to help those four-year-olds be prepared developmentally to succeed in school.
- (2) To reduce class size.
- (3) To provide financial aid for needy students to attend college.
- (4) To the Public School Building Capital Fund to be spent in accordance with this section.

(f) If the actual net revenues exceed the amounts appropriated in that fiscal year, the excess net revenues shall remain in the Education Lottery Fund, and then be transferred as follows:

- (1) Fifty percent (50%) to the Public School Building Capital Fund to be spent in accordance with this section.
- (2) Fifty percent (50%) to the State Educational Assistance Authority to be spent in accordance with this section. (2005-344, s. 1; 2005-276, s. 31.1(t); 2006-259, s. 8(e).)

**Effect of Amendments. —**

Session Laws 2006-259, s. 8(e), effective August 23, 2006, substituted “four times a year”

for “periodically” in the last sentence of subsection (a).

## ARTICLE 8.

### *Miscellaneous.*

#### § 18C-172. Lottery Oversight Committee.

(a) **Creation and Membership. —** The Lottery Oversight Committee is established. The Committee shall be located administratively in the General Assembly. The Committee shall consist of nine members appointed as provided below. In making appointments, each appointing officer shall select members who have appropriate experience and knowledge of the issues to be examined by the Committee and shall strive to ensure racial, gender, and geographical diversity among the membership.

- (1) Three members shall be appointed by the Speaker of the House of Representatives, at least one being an educator and at least one being a person trained or experienced in financial management.



- (2) Three members shall be appointed by the President Pro Tempore of the Senate, at least one being an educator and at least one being a person trained or experienced in financial management.
- (3) Three members shall be appointed by the Governor, at least one being an educator and at least one being a person trained or experienced in financial management.
- (b) Terms. — Terms on the Committee are for three years and begin on January 1, except the terms of the initial members, which begin on appointment. A member continues to serve until a successor is appointed. A vacancy shall be filled within 30 days by the officer who made the original appointment.
- (c) Purpose and Powers. — The Committee shall:
  - (1) Review whether expenditures of the net revenues of the Lottery have been in accordance with Article 7 of this Chapter, and study ways to ensure that net proceeds from the Lottery will not be used to supplant education funding but to provide additional funding for education.
  - (2) Receive and review reports submitted to the General Assembly pursuant to Chapter 18C of the General Statutes.
  - (3) Study other Lottery matters as the Committee considers necessary to fulfill its mandate.
- (d) Reports. — The Committee shall report its analysis and any findings and recommendations to the General Assembly by September 15 of each year. The Committee may make interim reports to the General Assembly regarding the expenditure of net Lottery revenues.
- (e) Organization. — The President Pro Tempore of the Senate and the Speaker of the House of Representatives shall each designate a cochair of the Committee. The Committee shall meet at least once a quarter upon the joint call of the cochairs. A quorum of the Committee is six members. No action may be taken except by a majority vote at a meeting at which a quorum is present.
- (f) Funding. — From funds available to the General Assembly, the Legislative Services Commission shall allocate monies to fund the work of the Committee. Members of the Committee receive subsistence and travel expenses as provided in G.S. 120-3.1 and G.S. 138-5.
- (g) Staff. — The Legislative Services Commission, through the Legislative Services Officer, shall assign professional staff to assist the Committee in its work. Upon the direction of the Legislative Services Commission, the Director of Legislative Assistants of the Senate and of the House of Representatives shall assign clerical staff to the Committee. The expenses for clerical employees shall be borne by the Committee. (2006-225, s. 1.)

**Editor's Note.** — Session Laws 2006-225, s. 5, made this section effective August 10, 2006.

## Chapter 19.

### Offenses Against Public Morals.

#### ARTICLE 1.

#### *Abatement of Nuisances.*

### § 19-1. What are nuisances under this Chapter.

#### CASE NOTES

**Establishing a Nuisance.** — Based upon reading G.S. 19-1(a) and G.S. 19-1.2(6) together, in order to establish a nuisance, a plaintiff must show that a defendant has leased or used the defendant's property for the purpose of the illegal possession and sale of drugs, and as a means of showing the defendant's purpose in leasing or operating the building, the plaintiff may present evidence that the sale of controlled substances has occurred regularly; the defendant will then be permitted to offer evidence of a lawful business purpose in order to negate the inference that drug transactions are the sole purpose of the leasing or use of the property. State ex rel. City of Salisbury v. Campbell, 169 N.C. App. 829, 610 S.E.2d 799, 2005 N.C. App. LEXIS 803 (2005).

**No Breach of Peace.** — In city's nuisance action seeking to establish that 24 police trips to the landlords' property over the course of several years constituted a breach of the peace pursuant G.S. 19-1(b) and G.S. 19-1.1(1), seven of those police visits related to domestic incidents and one visit involving a search warrant

did not constitute breaches of the peace, because there was no evidence that these events involved any threats to other citizens or disturbed the public order. State ex rel. City of Salisbury v. Campbell, 169 N.C. App. 829, 610 S.E.2d 799, 2005 N.C. App. LEXIS 803 (2005).

**Nuisance Not Established.** — City of Salisbury failed to establish that the landlords' property was a nuisance under G.S. 19-1.2 and G.S. 19-1(a), because the property was not used for the purpose of the illegal possession and sale of drugs, as confirmed drug activity had occurred on the property only three times since 2000. State ex rel. City of Salisbury v. Campbell, 169 N.C. App. 829, 610 S.E.2d 799, 2005 N.C. App. LEXIS 803 (2005).

Three instances that could have constituted breaches of the peace — two assaults and one disturbance in which shots were fired — occurring over a two-and-a-half-year period, did not constitute a nuisance under G.S. 19-1(b), because the instances did not meet the standard of repeated acts. State ex rel. City of Salisbury v. Campbell, 169 N.C. App. 829, 610 S.E.2d 799, 2005 N.C. App. LEXIS 803 (2005).

#### § 19-1.1. Definitions.

#### CASE NOTES

**No Breach of Peace.** — In city's nuisance action seeking to establish that 24 police trips to the landlords' property over the course of several years constituted a breach of the peace pursuant G.S. 19-1(b) and G.S. 19-1.1(1), seven of those police visits related to domestic incidents and one visit involving a search warrant

did not constitute breaches of the peace, because there was no evidence that these events involved any threats to other citizens or disturbed the public order. State ex rel. City of Salisbury v. Campbell, 169 N.C. App. 829, 610 S.E.2d 799, 2005 N.C. App. LEXIS 803 (2005).

#### § 19-1.2. Types of nuisances.

#### CASE NOTES

**Establishing a Nuisance.** — Based upon reading G.S. 19-1(a) and G.S. 19-1.2(6) together, in order to establish a nuisance, a

plaintiff must show that a defendant has leased or used the defendant's property for the purpose of the illegal possession and sale of drugs,

and as a means of showing the defendant's purpose in leasing or operating the building, the plaintiff may present evidence that the sale of controlled substances has occurred regularly; the defendant will then be permitted to offer evidence of a lawful business purpose in order to negate the inference that drug transactions are the sole purpose of the leasing or use of the property. State ex rel. City of Salisbury v. Campbell, 169 N.C. App. 829, 610 S.E.2d 799, 2005 N.C. App. LEXIS 803 (2005).

**Property Held Not Used for the Purpose of Illegal Possession and Sale of Drugs. —** City of Salisbury failed to establish that the landlords' property was a nuisance under G.S. 19-1.2 and G.S. § 19-1(a), because the property was not used for the purpose of the illegal possession and sale of drugs, as confirmed drug activity had occurred on the property only three times since 2000. State ex rel. City of Salisbury v. Campbell, 169 N.C. App. 829, 610 S.E.2d 799, 2005 N.C. App. LEXIS 803 (2005).



## Chapter 19A.

### Protection of Animals.

#### Article 1.

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### ARTICLE 1.

#### *Civil Remedy for Protection of Animals.*

### § 19A-3. Preliminary injunction; care of animal pending hearing on the merits.

(a) Upon the filing of a verified complaint in the district court in the county in which cruelty to an animal has allegedly occurred, the judge may, as a matter of discretion, issue a preliminary injunction in accordance with the procedures set forth in G.S. 1A-1, Rule 65. Every such preliminary injunction, if the plaintiff so requests, may give the plaintiff the right to provide suitable care for the animal. If it appears on the face of the complaint that the condition giving rise to the cruel treatment of an animal requires the animal to be removed from its owner or other person who possesses it, then it shall be proper for the court in the preliminary injunction to allow the plaintiff to take possession of the animal as custodian.

(b) The plaintiff as custodian may employ a veterinarian to provide necessary medical care for the animal without any additional court order. Prior to taking such action, the plaintiff as custodian shall consult with, or attempt to consult with, the defendant in the action, but the plaintiff as custodian may authorize such care without the defendant's consent. Notwithstanding the provisions of this subsection, the plaintiff as custodian may not have an animal euthanized without written consent of the defendant or a court order that authorizes euthanasia upon the court's finding that the animal is suffering due to terminal illness or terminal injury.

(c) The plaintiff as custodian may place an animal with a foster care provider. The foster care provider shall return the animal to the plaintiff as custodian on demand. (1969, c. 831; 1971, c. 528, s. 10; 1979, c. 808, s. 3; 2003-208, s. 1; 2006-113, s. 1.1.)

**Effect of Amendments.** — Session Laws 2006-113, s. 1.1, effective December 1, 2006, and applicable to actions commenced on or after that date, added "care of animal pending hearing on the merits" in the section heading; designated the existing undesignated para-

graph as subsection (a), and in subsection (a), substituted "plaintiff" for "complainant" in four places, and "animal as custodian" for "animal" at the end the of the last sentence; and added subsections (b) and (c).

## § 19A-4. Permanent injunction.

(a) In accordance with G.S. 1A-1, Rule 65, a district court judge in the county in which the original action was brought shall determine the merits of the action by trial without a jury, and upon hearing such evidence as may be presented, shall enter orders as the court deems appropriate, including a permanent injunction and dismissal of the action along with dissolution of any preliminary injunction that had been issued.

(b) If the plaintiff prevails, the court in its discretion may include the costs of food, water, shelter, and care, including medical care, provided to the animal, less any amounts deposited by the defendant under G.S. 19A-70, as part of the costs allowed to the plaintiff under G.S. 6-18. In addition, if the court finds by a preponderance of the evidence that even if a permanent injunction were issued there would exist a substantial risk that the animal would be subjected to further cruelty if returned to the possession of the defendant, the court may terminate the defendant's ownership and right of possession of the animal and transfer ownership and right of possession to the plaintiff or other appropriate successor owner. For good cause shown, the court may also enjoin the defendant from acquiring new animals for a specified period of time or limit the number of animals the defendant may own or possess during a specified period of time.

(c) If the final judgment entitles the defendant to regain possession of the animal, the custodian shall return the animal, including taking any necessary steps to retrieve the animal from a foster care provider.

(d) The court shall consider and may provide for custody and care of the animal until the time to appeal expires or all appeals have been exhausted. (1969, c. 831; 1971, c. 528, s. 10; 1979, c. 808, s. 4; 2003-208, s. 1; 2006-113, s. 1.2.)

**Effect of Amendments.** — Session Laws 2006-113, s. 1.2, effective December 1, 2006, and applicable to actions commenced on or after that date, designated the first sentence of the existing undesignated paragraph as subsec-

tion (a); designated the second sentence of the existing undesignated paragraph as subsection (b), and added the first and the third sentences; added subsections (c) and (d).

## ARTICLE 5.

### *Spay/Neuter Program.*

## § 19A-64. Distributions to counties and cities from Spay/Neuter Account.

(a) **Reimbursable Costs.** — Counties and cities eligible for distributions from the Spay/Neuter Account may receive reimbursement for the direct costs of a spay/neuter surgical procedure for a dog or cat owned by a low-income person meeting the Department's eligibility requirements for spay/neuter services. Reimbursable costs shall include anesthesia, medication, and veterinary services. Counties and cities shall not be reimbursed for the administrative costs of providing reduced-cost spay/neuter services or capital expenditures for facilities and equipment associated with the provision of such services.

(b) **Application.** — A county or city eligible for reimbursement of spaying and neutering costs from the Spay/Neuter Account shall apply to the Department of Health and Human Services by the last day of January, April, July, and October of each year to receive a distribution from the Account for that quarter. The application shall be submitted in the form required by the Department



and shall include an itemized listing of the costs for which reimbursement is sought.

(c) Distribution. — The Department shall make payments from the Spay/Neuter Account to eligible counties and cities who have made timely application for reimbursement within 30 days of the closing date for receipt of applications for that quarter. In the event that total requests for reimbursement exceed the amounts available in the Spay/Neuter Account for distribution, the monies available will be distributed as follows:

- (1) Fifty percent (50%) of the monies available in the Spay/Neuter Account shall be reserved for reimbursement for eligible applicants within development tier one areas as defined in G.S. 143B-437.08. The remaining fifty percent (50%) of the funds shall be used to fund reimbursement requests from eligible applicants in development tier two and three areas as defined in G.S. 143B-437.08.
- (2) Among the eligible counties and cities in development tier one areas, reimbursement shall be made to each eligible county or city in proportion to the number of dogs and cats that have received rabies vaccinations during the preceding fiscal year in that county or city as compared to the number of dogs and cats that have received rabies vaccinations during the preceding fiscal year by all of the eligible applicants in development tier one areas.
- (3) Among the eligible counties and cities in development tier two and three areas, reimbursement shall be made to each eligible county or city in proportion to the number of dogs and cats that have received rabies vaccinations during the preceding fiscal year in that county or city as compared to the number of dogs and cats that have received rabies vaccinations during the preceding fiscal year by all of the eligible applicants in development tier two and three areas.
- (4) Should funds remain available from the fifty percent (50%) of the Spay/Neuter Account designated for development tier one areas after reimbursement of all claims by eligible applicants in those areas, the remaining funds shall be made available to reimburse eligible applicants in development tier two and three areas. (2000-163, s. 1; 2006-252, s. 2.11.)

**Effect of Amendments.** — Session Laws 2006-252, s. 2.11, effective January 1, 2007, throughout subdivisions (c)(1) through (c)(4), substituted “development tier one areas” and “development tier two and three areas” for

“enterprise tier one, two and three areas” and “enterprise tier four and five areas” respectively, and substituted “G.S. 143B-437.8” for “G.S. 105-129.3” twice in subdivision (c)(1).

## ARTICLE 6.

### *Care of Animal Subjected to Illegal Treatment.*

#### **§ 19A-70. Care of animal subjected to illegal treatment.**

(a) In every arrest under any provision of Article 47 of Chapter 14 of the General Statutes or under G.S. 67-4.3 or upon the commencement of an action under Article 1 of this Chapter by a county or municipality, by a county-approved animal cruelty investigator, by other county or municipal official, or by an organization operating a county or municipal shelter under contract, if an animal shelter takes custody of an animal, the operator of the shelter may file a petition with the court requesting that the defendant be ordered to deposit funds in an amount sufficient to secure payment of all the reasonable expenses expected to be incurred by the animal shelter in caring for and



providing for the animal pending the disposition of the litigation. For purposes of this section, "reasonable expenses" includes the cost of providing food, water, shelter, and care, including medical care, for at least 30 days.

(b) Upon receipt of a petition, the court shall set a hearing on the petition to determine the need to care for and provide for the animal pending the disposition of the litigation. The hearing shall be conducted no less than 10 and no more than 15 business days after the petition is filed. The operator of the animal shelter shall mail written notice of the hearing and a copy of the petition to the defendant at the address contained in the criminal charges or the complaint or summons by which a civil action was initiated. If the defendant is in a local detention facility at the time the petition is filed, the operator of the animal shelter shall also provide notice to the custodian of the detention facility.

(c) The court shall set the amount of funds necessary for 30 days' care after taking into consideration all of the facts and circumstances of the case, including the need to care for and provide for the animal pending the disposition of the litigation, the recommendation of the operator of the animal shelter, the estimated cost of caring for and providing for the animal, and the defendant's ability to pay. If the court determines that the defendant is unable to deposit funds, the court may consider issuing an order under subsection (f) of this section.

Any order for funds to be deposited pursuant to this section shall state that if the operator of the animal shelter files an affidavit with the clerk of superior court, at least two business days prior to the expiration of a 30-day period, stating that, to the best of the affiant's knowledge, the case against the defendant has not yet been resolved, the order shall be automatically renewed every 30 days until the case is resolved.

(d) If the court orders that funds be deposited, the amount of funds necessary for 30 days shall be posted with the clerk of superior court. The defendant shall also deposit the same amount with the clerk of superior court every 30 days thereafter until the litigation is resolved, unless the defendant requests a hearing no less than five business days prior to the expiration of a 30-day period. If the defendant fails to deposit the funds within five business days of the initial hearing, or five business days of the expiration of a 30-day period, the animal is forfeited by operation of law. If funds have been deposited in accordance with this section, the operator of the animal shelter may draw from the funds the actual costs incurred in caring for the animal.

In the event of forfeiture, the animal shelter may determine whether the animal is suitable for adoption and whether adoption can be arranged for the animal. The animal may not be adopted by the defendant or by any person residing in the defendant's household. If the adopted animal is a dog used for fighting, the animal shelter shall notify any persons adopting the dog of the liability provisions for owners of dangerous dogs under Article 1A of Chapter 67 of the General Statutes. If no adoption can be arranged after the forfeiture, or the animal is unsuitable for adoption, the shelter shall humanely euthanize the animal.

(e) The deposit of funds shall not prevent the animal shelter from disposing of the animal prior to the expiration of the 30-day period covered by the deposit if the court makes a final determination of the charges or claims against the defendant. Upon determination, the defendant is entitled to a refund for any portion of the deposit not incurred as expenses by the animal shelter. A person who is acquitted of all criminal charges or not found to have committed animal cruelty in a civil action under Article 1 of this Chapter is entitled to a refund of the deposit remaining after any draws from the deposit in accordance with subsection (d) of this section.

(f) Pursuant to subsection (c) of this section, the court may order a defendant to provide necessary food, water, shelter, and care, including any

necessary medical care, for any animal that is the basis of the charges or claims against the defendant without the removal of the animal from the existing location and until the charges or claims against the defendant are adjudicated. If the court issues such an order, the court shall provide for an animal control officer or other law enforcement officer to make regular visits to the location to ensure that the animal is receiving necessary food, water, shelter, and care, including any necessary medical care, and to impound the animal if it is not receiving those necessities. (2005-383, s. 1; 2006-113, s. 2.1.)

**Effect of Amendments.** — Session Laws 2006-113, s. 2.1, effective December 1, 2006, and applicable to actions commenced on or after that date, substituted “animal subjected

to illegal treatment” for “dogs illegally used for fighting” in the Article heading and section heading, and rewrote the section.

## **Chapter 20.**

### **Motor Vehicles.**

#### **Article 1.**

##### **Division of Motor Vehicles.**

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20-4.01. Definitions.

#### **Article 2.**

##### **Uniform Driver's License Act.**

- 20-7. Issuance and renewal of drivers licenses.  
20-9. What persons shall not be licensed.  
20-9.3. Notification of requirements for sex offender registration.  
20-11. Issuance of limited learner's permit and provisional drivers license to person who is less than 18 years old.  
20-16.2. Implied consent to chemical analysis; mandatory revocation of license in event of refusal; right of driver to request analysis.  
20-16.3. Alcohol screening tests required of certain drivers; approval of test devices and manner of use by Department of Health and Human Services; use of test results or refusal.  
20-16.3A. Checking stations and roadblocks.  
20-17. Mandatory revocation of license by Division.  
20-17.2. [Repealed.]  
20-17.8. Restoration of a license after certain driving while impaired convictions; ignition interlock.  
20-28. Unlawful to drive while license revoked, after notification, or while disqualified.  
20-28.2. Forfeiture of motor vehicle for impaired driving after impaired driving license revocation.  
20-28.3. Seizure, impoundment, forfeiture of motor vehicles for offenses involving impaired driving while license revoked or without license and insurance.

#### **Article 2B.**

##### **Special Identification Cards for Nonoperators.**

- 20-37.7. Special identification card.

#### **Article 2C.**

##### **Commercial Driver License.**

- 20-37.20. Notification of traffic convictions.  
20-38. [Repealed.]

#### **Article 2D.**

##### **Implied-Consent Offense Procedures.**

Sec.

- 20-38.1. Applicability.  
20-38.2. Investigation.  
20-38.3. Police processing duties.  
20-38.4. Initial appearance.  
20-38.5. Facilities.  
20-38.6. Motions and district court procedure.  
20-38.7. Appeal to superior court.

#### **Article 3.**

##### **Motor Vehicle Act of 1937.**

###### **Part 1. General Provisions.**

- 20-38.100. [Reserved.]

###### **Part 2. Authority and Duties of Commissioner and Division.**

- 20-45. Seizure of documents and plates.  
20-48. Giving of notice.

###### **Part 3. Registration and Certificates of Titles of Motor Vehicles.**

- 20-50.3. (For contingent repeal, see note) Division to furnish county assessors registration lists.  
20-50.4. (For effective date, see note) Division to refuse to register vehicles on which county and municipal taxes and fees are not paid and when there is a failure to meet court-ordered child support obligations.  
20-51. Exempt from registration.  
20-63. Registration plates furnished by Division; requirements; replacement of regular plates with First in Flight plates; surrender and reissuance; displaying; preservation and cleaning; alteration or concealment of numbers; commission contracts for issuance.

###### **Part 5. Issuance of Special Plates.**

- 20-79.4. Special registration plates.  
20-79.5. (Effective July 1, 2007) Special registration plates for elected and appointed State government officials.  
20-79.7. Fees for special registration plates and distribution of the fees.  
20-81.12. Collegiate insignia plates and certain other special plates.



## MOTOR VEHICLES

### Part 7. Title and Registration Fees.

Sec.

20-85. (See Editor's Note) Schedule of fees.

### Part 8. Anti-Theft and Enforcement Provisions.

20-114.3. Law enforcement and municipal employee motorized all-terrain vehicles permitted on highways with speed limits of 35 miles per hour or less.

### Part 9. The Size, Weight, Construction and Equipment of Vehicles.

20-118. Weight of vehicles and load.

20-135.2A. (See Editor's note) Seat belt use mandatory.

20-137.3. Unlawful use of a mobile phone by persons under 18 years of age.

### Part 10. Operation of Vehicles and Rules of the Road.

20-138.1. Impaired driving.

20-138.2. Impaired driving in commercial vehicle.

20-138.3. Driving by person less than 21 years old after consuming alcohol or drugs.

20-138.4. Requirement that prosecutor explain reduction or dismissal of charge involving impaired driving.

20-138.5. Habitual impaired driving.

20-138.7. Transporting an open container of alcoholic beverage.

20-139.1. Procedures governing chemical analyses; admissibility; evidentiary provisions; controlled-drinking programs.

20-141.4. Felony and misdemeanor death by vehicle; felony serious injury by vehicle; aggravated offenses; repeat felony death by vehicle.

20-157. Approach of law enforcement, fire department or rescue squad vehicles or ambulances; driving over fire hose or blocking fire-fighting equipment; parking, etc., near law enforcement, fire department, or rescue squad vehicle or ambulance.

20-158. Vehicle control signs and signals.

### Part 10C. Operation of All-Terrain Vehicles.

20-171.19. Prohibited acts by owners and operators.

### Part 11. Pedestrians' Rights and Duties.

20-175. Pedestrians soliciting rides, employment, business or funds upon highways or streets.

### Part 12. Sentencing; Penalties.

Sec.

20-179. Sentencing hearing after conviction for impaired driving; determination of grossly aggravating and aggravating and mitigating factors; punishments.

#### Article 3A.

#### Safety and Emissions Inspection Program.

##### Part 2. Safety and Emissions Inspections of Certain Vehicles.

20-183.2. Description of vehicles subject to safety or emissions inspection; definitions.

20-183.7. Fees for performing an inspection and putting an inspection sticker on a vehicle; use of civil penalties.

#### Article 3B.

#### Permanent Weigh Stations and Portable Scales.

20-183.9. Establishment and maintenance of permanent weigh stations.

#### Article 4.

#### State Highway Patrol.

20-189. (Effective July 1, 2007) Patrolmen assigned to Governor's office.

#### Article 7.

#### Miscellaneous Provisions Relating to Motor Vehicles.

20-217. Motor vehicles to stop for properly marked and designated school buses in certain instances; evidence of identity of driver.

#### Article 9A.

#### Motor Vehicle Safety and Financial Responsibility Act of 1953.

20-279.33A. Religious organizations; self-insurance.

#### Article 12.

#### Motor Vehicle Dealers and Manufacturers Licensing Law.

20-288. Application for license; license requirements; expiration of license; bond.

#### Article 13.

#### The Vehicle Financial Responsibility Act of 1957.

20-309. Financial responsibility prerequisite to registration; must be main-

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	tained throughout registration period.		Division when notified of a lapse in financial responsibility.
20-309.2.	(Effective July 1, 2008) Insurer shall notify Division of actions on insurance policies.	20-316.	(Effective July 1, 2008) Divisional hearings upon lapse of liability insurance coverage.
20-311.	(Effective July 1, 2008) Action by the		

## ARTICLE 1.

### *Division of Motor Vehicles.*

#### § 20-4.01. Definitions.

Unless the context requires otherwise, the following definitions apply throughout this Chapter to the defined words and phrases and their cognates:

- (1a) Alcohol. — Any substance containing any form of alcohol, including ethanol, methanol, propanol, and isopropanol.
- (1b) Alcohol Concentration. — The concentration of alcohol in a person, expressed either as:
  - a. Grams of alcohol per 100 milliliters of blood; or
  - b. Grams of alcohol per 210 liters of breath.
 The results of a defendant's alcohol concentration determined by a chemical analysis of the defendant's breath or blood shall be reported to the hundredths. Any result between hundredths shall be reported to the next lower hundredth.
- (1c) All-Terrain Vehicle or ATV. — A motorized off-highway vehicle designed to travel on three or four low-pressure tires, having a seat designed to be straddled by the operator and handlebars for steering control.
- (1d) Business District. — The territory prescribed as such by ordinance of the Board of Transportation.
- (2) Canceled. — As applied to drivers' licenses and permits, a declaration that a license or permit which was issued through error or fraud is void and terminated.
- (2a) Class A Motor Vehicle. — A combination of motor vehicles that meets either of the following descriptions:
  - a. Has a combined GVWR of at least 26,001 pounds and includes as part of the combination a towed unit that has a GVWR of at least 10,001 pounds.
  - b. Has a combined GVWR of less than 26,001 pounds and includes as part of the combination a towed unit that has a GVWR of at least 10,001 pounds.
- (2b) Class B Motor Vehicle. — Any of the following:
  - a. A single motor vehicle that has a GVWR of at least 26,001 pounds.
  - b. A combination of motor vehicles that includes as part of the combination a towing unit that has a GVWR of at least 26,001 pounds and a towed unit that has a GVWR of less than 10,001 pounds.
- (2c) Class C Motor Vehicle. — Any of the following:
  - a. A single motor vehicle not included in Class B.
  - b. A combination of motor vehicles not included in Class A or Class B.
- (3) Repealed by Session Laws 1979, c. 667, s. 1.
- (3a) Chemical Analysis. — A test or tests of the breath, blood, or other bodily fluid or substance of a person to determine the person's alcohol concentration or presence of an impairing substance, performed in

accordance with G.S. 20-139.1, including duplicate or sequential analyses.

- (3b) Chemical Analyst. — A person granted a permit by the Department of Health and Human Services under G.S. 20-139.1 to perform chemical analyses.
- (3c) Commercial Drivers License (CDL). — A license issued by a state to an individual who resides in the state that authorizes the individual to drive a class of commercial motor vehicle. A “nonresident commercial drivers license (NRCDL)” is issued by a state to an individual who resides in a foreign jurisdiction.
- (3d) Commercial Motor Vehicle. — Any of the following motor vehicles that are designed or used to transport passengers or property:
  - a. A Class A motor vehicle that has a combined GVWR of at least 26,001 pounds and includes as part of the combination a towed unit that has a GVWR of at least 10,001 pounds.
  - b. A Class B motor vehicle.
  - c. A Class C motor vehicle that meets either of the following descriptions:
    - 1. Is designed to transport 16 or more passengers, including the driver.
    - 2. Is transporting hazardous materials and is required to be placarded in accordance with 49 C.F.R. Part 172, Subpart F.
  - d. Repealed by Session Laws 1999, c. 330, s. 9, effective December 1, 1999.
- (4) Commissioner. — The Commissioner of Motor Vehicles.
- (4a) Conviction. — A conviction for an offense committed in North Carolina or another state:
  - a. In-State. When referring to an offense committed in North Carolina, the term means any of the following:
    - 1. A final conviction of a criminal offense, including a no contest plea.
    - 2. A determination that a person is responsible for an infraction, including a no contest plea.
    - 3. An unvacated forfeiture of cash in the full amount of a bond required by Article 26 of Chapter 15A of the General Statutes.
    - 4. A third or subsequent prayer for judgment continued within any five-year period.
    - 5. A prayer for judgment continued if the offender holds a commercial drivers license or if the offense occurs in a commercial motor vehicle.
  - b. Out-of-State. When referring to an offense committed outside North Carolina, the term means any of the following:
    - 1. An unvacated adjudication of guilt.
    - 2. A determination that a person has violated or failed to comply with the law in a court of original jurisdiction or an authorized administrative tribunal.
    - 3. An unvacated forfeiture of bail or collateral deposited to secure the person’s appearance in court.
    - 4. A violation of a condition of release without bail, regardless of whether or not the penalty is rebated, suspended, or probated.
    - 5. A final conviction of a criminal offense, including a no contest plea.
- (4b) Crash. — Any event that results in injury or property damage attributable directly to the motion of a motor vehicle or its load. The



terms collision, accident, and crash and their cognates are synonymous.

- (5) Dealer. — Every person engaged in the business of buying, selling, distributing, or exchanging motor vehicles, trailers, or semitrailers in this State, and having an established place of business in this State.

The terms “motor vehicle dealer,” “new motor vehicle dealer,” and “used motor vehicle dealer” as used in Article 12 of this Chapter have the meaning set forth in G.S. 20-286.

- (5a) Disqualification. — A withdrawal of the privilege to drive a commercial motor vehicle.
- (6) Division. — The Division of Motor Vehicles acting directly or through its duly authorized officers and agents.
- (7) Driver. — The operator of a vehicle, as defined in subdivision (25). The terms “driver” and “operator” and their cognates are synonymous.
- (7a) Electric Personal Assistive Mobility Device. — A self-balancing nontandem two-wheeled device, designed to transport one person, with a propulsion system that limits the maximum speed of the device to 15 miles per hour or less.
- (7b) Employer. — Any person who owns or leases a commercial motor vehicle or assigns a person to drive a commercial motor vehicle.
- (8) Essential Parts. — All integral and body parts of a vehicle of any type required to be registered hereunder, the removal, alteration, or substitution of which would tend to conceal the identity of the vehicle or substantially alter its appearance, model, type, or mode of operation.
- (9) Established Place of Business. — Except as provided in G.S. 20-286, the place actually occupied by a dealer or manufacturer at which a permanent business of bargaining, trading, and selling motor vehicles is or will be carried on and at which the books, records, and files necessary and incident to the conduct of the business of automobile dealers or manufacturers shall be kept and maintained.
- (10) Explosives. — Any chemical compound or mechanical mixture that is commonly used or intended for the purpose of producing an explosion and which contains any oxidizing and combustible units or other ingredients in such proportions, quantities, or packing that an ignition by fire, by friction, by concussion, by percussion, or by detonator of any part of the compound or mixture may cause such a sudden generation of highly heated gases that the resultant gaseous pressures are capable of producing destructible effects on contiguous objects or of destroying life or limb.
- (11) Farm Tractor. — Every motor vehicle designed and used primarily as a farm implement for drawing plows, mowing machines, and other implements of husbandry.
- (11a) For-Hire Motor Carrier. — A person who transports passengers or property by motor vehicle for compensation.
- (12) Foreign Vehicle. — Every vehicle of a type required to be registered hereunder brought into this State from another state, territory, or country, other than in the ordinary course of business, by or through a manufacturer or dealer and not registered in this State.
- (12a) Golf Cart. — A vehicle designed and manufactured for operation on a golf course for sporting or recreational purposes and that is not capable of exceeding speeds of 20 miles per hour.
- (12b) Gross Vehicle Weight Rating (GVWR). — The value specified by the manufacturer as the maximum loaded weight a vehicle is capable of safely hauling. The GVWR of a combination vehicle is the GVWR of the power unit plus the GVWR of the towed unit or units. When a

vehicle is determined by an enforcement officer to be structurally altered in any way from the manufacturer's original design in an attempt to increase the hauling capacity of the vehicle, the GVWR of that vehicle shall be deemed to be the greater of the license weight or the total weight of the vehicle or combination of vehicles for the purpose of enforcing this Chapter. For the purpose of classification of commercial drivers license and skills testing, the manufacturer's GVWR shall be used.

- (12c) Hazardous Materials. — Materials designated as hazardous by the United States Secretary of Transportation under 49 U.S.C. § 1803.
- (13) Highway. — The entire width between property or right-of-way lines of every way or place of whatever nature, when any part thereof is open to the use of the public as a matter of right for the purposes of vehicular traffic. The terms "highway" and "street" and their cognates are synonymous.
- (14) House Trailer. — Any trailer or semitrailer designed and equipped to provide living or sleeping facilities and drawn by a motor vehicle.
- (14a) Impairing Substance. — Alcohol, controlled substance under Chapter 90 of the General Statutes, any other drug or psychoactive substance capable of impairing a person's physical or mental faculties, or any combination of these substances.
- (15) Implement of Husbandry. — Every vehicle which is designed for agricultural purposes and used exclusively in the conduct of agricultural operations.
- (16) Intersection. — The area embraced within the prolongation of the lateral curblines or, if none, then the lateral edge of roadway lines of two or more highways which join one another at any angle whether or not one such highway crosses the other.

Where a highway includes two roadways 30 feet or more apart, then every crossing of each roadway of such divided highway by an intersecting highway shall be regarded as a separate intersection. In the event that such intersecting highway also includes two roadways 30 feet or more apart, then every crossing of two roadways of such highways shall be regarded as a separate intersection.
- (17) License. — Any driver's license or any other license or permit to operate a motor vehicle issued under or granted by the laws of this State including:
  - a. Any temporary license or learner's permit;
  - b. The privilege of any person to drive a motor vehicle whether or not such person holds a valid license; and
  - c. Any nonresident's operating privilege.
- (18) Local Authorities. — Every county, municipality, or other territorial district with a local board or body having authority to adopt local police regulations under the Constitution and laws of this State.
- (19) Manufacturer. — Every person, resident, or nonresident of this State, who manufactures or assembles motor vehicles.
- (20) Manufacturer's Certificate. — A certification on a form approved by the Division, signed by the manufacturer, indicating the name of the person or dealer to whom the therein-described vehicle is transferred, the date of transfer and that such vehicle is the first transfer of such vehicle in ordinary trade and commerce. The description of the vehicle shall include the make, model, year, type of body, identification number or numbers, and such other information as the Division may require.
- (21) Metal Tire. — Every tire the surface of which in contact with the highway is wholly or partly of metal or other hard, nonresilient material.



- (21a) Moped. — A type of passenger vehicle as defined in G.S. 105-164.3.
- (21b) Motor Carrier. — A for-hire motor carrier or a private motor carrier.
- (22) Motorcycle. — A type of passenger vehicle as defined in G.S. 20-4.01(27).
- (23) Motor Vehicle. — Every vehicle which is self-propelled and every vehicle designed to run upon the highways which is pulled by a self-propelled vehicle. This shall not include mopeds as defined in G.S. 20-4.01(27)d1.
- (24) Nonresident. — Any person whose legal residence<sup>1</sup> is in some state, territory, or jurisdiction other than North Carolina or in a foreign country.
- (24a) Offense Involving Impaired Driving. — Any of the following offenses:
- a. Impaired driving under G.S. 20-138.1.
  - b. Death by vehicle under G.S. 20-141.4 when conviction is based upon impaired driving or a substantially similar offense under previous law.
  - c. First or second degree murder under G.S. 14-17 or involuntary manslaughter under G.S. 14-18 when conviction is based upon impaired driving or a substantially similar offense under previous law.
  - d. An offense committed in another jurisdiction which prohibits substantially similar conduct prohibited by the offenses in this subsection.
  - e. A repealed or superseded offense substantially similar to impaired driving, including offenses under former G.S. 20-138 or G.S. 20-139.
  - f. Impaired driving in a commercial motor vehicle under G.S. 20-138.2, except that convictions of impaired driving under G.S. 20-138.1 and G.S. 20-138.2 arising out of the same transaction shall be considered a single conviction of an offense involving impaired driving for any purpose under this Chapter.
  - g. Habitual impaired driving under G.S. 20-138.5.
- A conviction under former G.S. 20-140(c) is not an offense involving impaired driving.
- (25) Operator. — A person in actual physical control of a vehicle which is in motion or which has the engine running. The terms “operator” and “driver” and their cognates are synonymous.
- (25a) Out of Service Order. — A declaration that a driver, a commercial motor vehicle, or a motor carrier operation is out-of-service.
- (26) Owner. — A person holding the legal title to a vehicle, or in the event a vehicle is the subject of a chattel mortgage or an agreement for the conditional sale or lease thereof or other like agreement, with the right of purchase upon performance of the conditions stated in the agreement, and with the immediate right of possession vested in the mortgagor, conditional vendee or lessee, said mortgagor, conditional vendee or lessee shall be deemed the owner for the purpose of this Chapter. For the purposes of this Chapter, the lessee of a vehicle owned by the government of the United States shall be considered the owner of said vehicle.
- (27) Passenger Vehicles. —
- a. Excursion passenger vehicles. — Vehicles transporting persons on sight-seeing or travel tours.
  - b. For hire passenger vehicles. — Vehicles transporting persons for compensation. This classification shall not include vehicles operated as ambulances; vehicles operated by the owner where the



costs of operation are shared by the passengers; vehicles operated pursuant to a ridesharing arrangement as defined in G.S. 136-44.21; vehicles transporting students for the public school system under contract with the State Board of Education or vehicles leased to the United States of America or any of its agencies on a nonprofit basis; or vehicles used for human service or volunteer transportation.

- c. Common carriers of passengers. — Vehicles operated under a certificate of authority issued by the Utilities Commission for operation on the highways of this State between fixed termini or over a regular route for the transportation of persons for compensation.
- c1. Child care vehicles. — Vehicles under the direction and control of a child care facility, as defined in G.S. 110-86(3), and driven by an owner, employee, or agent of the child care facility for the primary purpose of transporting children to and from the child care facility, or to and from a place for participation in an event or activity in connection with the child care facility.
- d. Motorcycles. — Vehicles having a saddle for the use of the rider and designed to travel on not more than three wheels in contact with the ground, including motor scooters and motor-driven bicycles, but excluding tractors and utility vehicles equipped with an additional form of device designed to transport property, three-wheeled vehicles while being used by law-enforcement agencies and mopeds as defined in subdivision d1 of this subsection.
- d1. Moped. — Defined in G.S. 105-164.3.
- d2. Motor home or house car. — A vehicular unit, designed to provide temporary living quarters, built into as an integral part, or permanently attached to, a self-propelled motor vehicle chassis or van. The vehicle must provide at least four of the following facilities: cooking, refrigeration or icebox, self-contained toilet, heating or air conditioning, a portable water supply system including a faucet and sink, separate 110-125 volt electrical power supply, or an LP gas supply.
- d3. School activity bus. — A vehicle, generally painted a different color from a school bus, whose primary purpose is to transport school students and others to or from a place for participation in an event other than regular classroom work. The term includes a public, private, or parochial vehicle that meets this description.
- d4. School bus. — A vehicle whose primary purpose is to transport school students over an established route to and from school for the regularly scheduled school day, that is equipped with alternately flashing red lights on the front and rear and a mechanical stop signal, and that bears the words "School Bus" on the front and rear in letters at least 8 inches in height. The term includes a public, private, or parochial vehicle that meets this description.
- e. U-drive-it passenger vehicles. — Passenger vehicles included in the definition of U-drive-it vehicles set forth in this section.
- f. Ambulances. — Vehicles equipped for transporting wounded, injured, or sick persons.
- g. Private passenger vehicles. — All other passenger vehicles not included in the above definitions.
- h. Low-speed vehicle. A four-wheeled electric vehicle whose top speed is greater than 20 miles per hour but less than 25 miles per hour.
- (28) Person. — Every individual, firm, partnership, association, corporation, governmental agency, or combination thereof of whatsoever form or character.

- (29) Pneumatic Tire. — Every tire in which compressed air is designed to support the load.
- (29a) Private Motor Carrier. — A person who transports passengers or property by motor vehicle in interstate commerce and is not a for-hire motor carrier.
- (30) Private Road or Driveway. — Every road or driveway not open to the use of the public as a matter of right for the purpose of vehicular traffic.
- (31) Property-Hauling Vehicles. —
- a. Vehicles used for the transportation of property.
  - b., c. Repealed by Session Laws 1995 (Regular Session, 1996), c. 756, s. 4.
  - d. Semitrailers. — Vehicles without motive power designed for carrying property or persons and for being drawn by a motor vehicle, and so constructed that part of their weight or their load rests upon or is carried by the pulling vehicle.
  - e. Trailers. — Vehicles without motive power designed for carrying property or persons wholly on their own structure and to be drawn by a motor vehicle, including “pole trailers” or a pair of wheels used primarily to balance a load rather than for purposes of transportation.
  - f. Repealed by Session Laws 1995 (Regular Session, 1996), c. 756, s. 4.
- (31a) Provisional Licensee. — A person under the age of 18 years.
- (32) Public Vehicular Area. — Any area within the State of North Carolina that meets one or more of the following requirements:
- a. The area is used by the public for vehicular traffic at any time, including by way of illustration and not limitation any drive, driveway, road, roadway, street, alley, or parking lot upon the grounds and premises of any of the following:
    1. Any public or private hospital, college, university, school, orphanage, church, or any of the institutions, parks or other facilities maintained and supported by the State of North Carolina or any of its subdivisions.
    2. Any service station, drive-in theater, supermarket, store, restaurant, or office building, or any other business, residential, or municipal establishment providing parking space whether the business or establishment is open or closed.
    3. Any property owned by the United States and subject to the jurisdiction of the State of North Carolina. (The inclusion of property owned by the United States in this definition shall not limit assimilation of North Carolina law when applicable under the provisions of Title 18, United States Code, section 13).
  - b. The area is a beach area used by the public for vehicular traffic.
  - c. The area is a road used by vehicular traffic within or leading to a subdivision, whether or not the subdivision roads have been offered for dedication to the public.
  - d. The area is a portion of private property used by vehicular traffic and designated by the private property owner as a public vehicular area in accordance with G.S. 20-219.4.
- (32a) Recreational Vehicle. — A vehicular type unit primarily designed as temporary living quarters for recreational, camping, or travel use that either has its own motive power or is mounted on, or towed by, another vehicle. The basic entities are camping trailer, fifth-wheel travel trailer, motor home, travel trailer, and truck camper.



- a. Motor home. — As defined in G.S. 20-4.01(27)d2.
  - b. Travel trailer. — A vehicular unit mounted on wheels, designed to provide temporary living quarters for recreational, camping, or travel use, and of a size or weight that does not require a special highway movement permit when towed by a motorized vehicle.
  - c. Fifth-wheel trailer. — A vehicular unit mounted on wheels designed to provide temporary living quarters for recreational, camping, or travel use, of a size and weight that does not require a special highway movement permit and designed to be towed by a motorized vehicle that contains a towing mechanism that is mounted above or forward of the tow vehicle's rear axle.
  - d. Camping trailer. — A vehicular portable unit mounted on wheels and constructed with collapsible partial side walls that fold for towing by another vehicle and unfold at the campsite to provide temporary living quarters for recreational, camping, or travel use.
  - e. Truck camper. — A portable unit that is constructed to provide temporary living quarters for recreational, camping, or travel use, consisting of a roof, floor, and sides and is designed to be loaded onto and unloaded from the bed of a pickup truck.
- (32b) Regular Drivers License. — A license to drive a commercial motor vehicle that is exempt from the commercial drivers license requirements or a noncommercial motor vehicle.
- (33)a. Flood Vehicle. — A motor vehicle that has been submerged or partially submerged in water to the extent that damage to the body, engine, transmission, or differential has occurred.
- b. Non-U.S.A. Vehicle. — A motor vehicle manufactured outside of the United States and not intended by the manufacturer for sale in the United States.
- c. Reconstructed Vehicle. — A motor vehicle of a type required to be registered hereunder that has been materially altered from original construction due to removal, addition or substitution of new or used essential parts; and includes glider kits and custom assembled vehicles.
- d. Salvage Motor Vehicle. — Any motor vehicle damaged by collision or other occurrence to the extent that the cost of repairs to the vehicle and rendering the vehicle safe for use on the public streets and highways would exceed seventy-five percent (75%) of its fair retail market value, whether or not the motor vehicle has been declared a total loss by an insurer. Repairs shall include the cost of parts and labor. Fair market retail values shall be as found in the NADA Pricing Guide Book or other publications approved by the Commissioner.
- e. Salvage Rebuilt Vehicle. — A salvage vehicle that has been rebuilt for title and registration.
- f. Junk Vehicle. — A motor vehicle which is incapable of operation or use upon the highways and has no resale value except as a source of parts or scrap, and shall not be titled or registered.
- (33a) Relevant Time after the Driving. — Any time after the driving in which the driver still has in his body alcohol consumed before or during the driving.
- (33b) Reportable Crash. — A crash involving a motor vehicle that results in one or more of the following:
- a. Death or injury of a human being.
  - b. Total property damage of one thousand dollars (\$1,000) or more, or property damage of any amount to a vehicle seized pursuant to G. S. 20-28.3.



- (34) Resident. — Any person who resides within this State for other than a temporary or transitory purpose for more than six months shall be presumed to be a resident of this State; but absence from the State for more than six months shall raise no presumption that the person is not a resident of this State.
- (35) Residential District. — The territory prescribed as such by ordinance of the Department of Transportation.
- (36) Revocation or Suspension. — Termination of a licensee's or permittee's privilege to drive or termination of the registration of a vehicle for a period of time stated in an order of revocation or suspension. The terms "revocation" or "suspension" or a combination of both terms shall be used synonymously.
- (37) Road Tractors. — Vehicles designed and used for drawing other vehicles upon the highway and not so constructed as to carry any part of the load, either independently or as a part of the weight of the vehicle so drawn.
- (38) Roadway. — That portion of a highway improved, designed, or ordinarily used for vehicular travel, exclusive of the shoulder. In the event a highway includes two or more separate roadways the term "roadway" as used herein shall refer to any such roadway separately but not to all such roadways collectively.
- (39) Safety Zone. — Traffic island or other space officially set aside within a highway for the exclusive use of pedestrians and which is so plainly marked or indicated by proper signs as to be plainly visible at all times while set apart as a safety zone.
- (40) Security Agreement. — Written agreement which reserves or creates a security interest.
- (41) Security Interest. — An interest in a vehicle reserved or created by agreement and which secures payments or performance of an obligation. The term includes but is not limited to the interest of a chattel mortgagee, the interest of a vendor under a conditional sales contract, the interest of a trustee under a chattel deed of trust, and the interest of a lessor under a lease intended as security. A security interest is "perfected" when it is valid against third parties generally.
- (41a) Serious Traffic Violation. — A conviction of one of the following offenses when operating a commercial or other motor vehicle:
  - a. Excessive speeding, involving a single charge of any speed 15 miles per hour or more above the posted speed limit.
  - b. Careless and reckless driving.
  - c. A violation of any State or local law relating to motor vehicle traffic control, other than a parking violation, arising in connection with a fatal accident.
  - d. Improper or erratic lane changes.
  - e. Following the vehicle ahead too closely.
  - f. Driving a commercial motor vehicle without obtaining a commercial drivers license.
  - g. Driving a commercial motor vehicle without a commercial drivers license in the driver's possession.
  - h. Driving a commercial motor vehicle without the proper class of commercial drivers license or endorsements for the specific vehicle group being operated or for the passenger or type of cargo being transported.
- (42) Solid Tire. — Every tire of rubber or other resilient material which does not depend upon compressed air for the support of the load.
- (43) Specially Constructed Vehicles. — Vehicles of a type required to be registered hereunder not originally constructed under a distinctive

name, make, model, or type by a generally recognized manufacturer of vehicles and not materially altered from their original construction.

- (44) Special Mobile Equipment. — Defined in G.S. 105-164.3.
- (44a) Specialty Vehicles. — Vehicles of a type required to be registered under this Chapter that are modified from their original construction for an educational, emergency services, or public safety use.
- (45) State. — A state, territory, or possession of the United States, District of Columbia, Commonwealth of Puerto Rico, a province of Canada, or the Sovereign Nation of the Eastern Band of the Cherokee Indians with tribal lands, as defined in 18 U.S.C. § 1151, located within the boundaries of the State of North Carolina.
- (46) Street. — A highway, as defined in subdivision (13). The terms “highway” and “street” and their cognates are synonymous.
- (47) Suspension. — Termination of a licensee’s or permittee’s privilege to drive or termination of the registration of a vehicle for a period of time stated in an order of revocation or suspension. The terms “revocation” or “suspension” or a combination of both terms shall be used synonymously.
- (48) Truck Tractors. — Vehicles designed and used primarily for drawing other vehicles and not so constructed as to carry any load independent of the vehicle so drawn.
- (48a) U-drive-it vehicles. — The following vehicles that are rented to a person, to be operated by that person:
  - a. A private passenger vehicle other than the following:
    - 1. A private passenger vehicle of nine-passenger capacity or less that is rented for a term of one year or more.
    - 2. A private passenger vehicle that is rented to public school authorities for driver-training instruction.
  - b. A property-hauling vehicle under 7,000 pounds that does not haul products for hire and that is rented for a term of less than one year.
  - c. Motorcycles.
- (48b) Under the Influence of an Impairing Substance. — The state of a person having his physical or mental faculties, or both, appreciably impaired by an impairing substance.
- (48c) Utility Vehicle. — Vehicle designed and manufactured for general maintenance, security, recreational, and landscaping purposes, but does not include vehicles designed and used primarily for the transportation of persons or property on a street or highway.
- (49) Vehicle. — Every device in, upon, or by which any person or property is or may be transported or drawn upon a highway, excepting devices moved by human power or used exclusively upon fixed rails or tracks; provided, that for the purposes of this Chapter bicycles shall be deemed vehicles and every rider of a bicycle upon a highway shall be subject to the provisions of this Chapter applicable to the driver of a vehicle except those which by their nature can have no application. This term shall not include a device which is designed for and intended to be used as a means of transportation for a person with a mobility impairment, or who uses the device for mobility enhancement, is suitable for use both inside and outside a building, including on sidewalks, and is limited by design to 15 miles per hour when the device is being operated by a person with a mobility impairment, or who uses the device for mobility enhancement. This term shall not include an electric personal assistive mobility device as defined in G.S. 20-4.01(7a).
- (50) Wreckers. — Vehicles with permanently attached cranes used to move other vehicles; provided, that said wreckers shall be equipped



with adequate brakes for units being towed. (1973, c. 1330, s. 1; 1975, cc. 94, 208; c. 716, s. 5; c. 743; c. 859, s. 1; 1977, c. 313; c. 464, s. 34; 1979, c. 39; c. 423, s. 1; c. 574, ss. 1-4; c. 667, s. 1; c. 680; 1981, c. 606, s. 3; c. 792, s. 2; 1983, c. 435, s. 8; 1983 (Reg. Sess., 1984), c. 1101, ss. 1-3; 1985, c. 509, s. 6; 1987, c. 607, s. 2; c. 658, s. 1; 1987 (Reg. Sess., 1988), c. 1069; c. 1105, s. 1; c. 1112, ss. 1-3; 1989, c. 455, ss. 1, 2; c. 727, s. 219(1); c. 771, ss. 1, 18; 1991, c. 449, s. 2; c. 726, ss. 1-4; 1991 (Reg. Sess., 1992), c. 1015, s. 1; 1993 (Reg. Sess., 1994), c. 761, s. 22; 1995, c. 191, s. 1; 1995 (Reg. Sess., 1996), c. 756, ss. 2-4; 1997-379, s. 5.1; 1997-443, s. 11A.8; 1997-456, s. 27; 1998-149, s. 1; 1998-182, ss. 1, 1.1, 26; 1998-217, s. 62(e); 1999-330, s. 9; 1999-337, s. 28(c)-(e); 1999-406, s. 14; 1999-452, ss. 1-5; 2000-155, s. 9; 2000-173, s. 10(c); 2001-212, s. 2; 2001-341, ss. 1, 2; 2001-356, ss. 1, 2; 2001-441, s. 1; 2001-487, ss. 50(a), 51; 2002-72, s. 19(b); 2002-98, ss. 1-3; 2003-397, s. 1; 2005-282, s. 1; 2005-349, ss. 1-3; 2006-253, s. 8.)

#### **Editor's Note. —**

Session Laws 2006-253, s. 1, provides: "This act shall be known as 'The Motor Vehicle Driver Protection Act of 2006.'"

#### **Effect of Amendments. —**

Session Laws 2006-253, s. 8, effective December 1, 2006, and applicable to offenses committed on or after December 1, 2006, rewrote subdivisions (32) and (45).

### **CASE NOTES**

#### **Electric Scooter Fell Within Statutory Definition of Vehicle. —**

Defendant's electric scooter, which was not self-balancing, with its two wheels in tandem, and which did not fall within the two statutory exceptions from a vehicle under G.S. 20-138.1(e) with regard to horses, bicycles, and lawnmowers or G.S. 20-4.01(49) as to transportation for a person with a mobility impairment, fell within the legislature's definition of vehicle in G.S. 20-4.01(49) and, because the evidence at trial showed that his breath alcohol concentration following arrest was 0.13, there was sufficient evidence to uphold defendant's conviction for impaired driving under G.S. 20-138.1. *State v. Crow*, — N.C. App. —, 623 S.E.2d 68, 2005 N.C. App. LEXIS 2747 (2005).

#### **For purposes of tort law and liability**

#### **insurance coverage, no ownership passes, etc. —**

Since actual title had not passed, an insurer had to provide coverage to its insured while driving a non-owned vehicle, even though the insured was in the process of buying the vehicle, as North Carolina required actual title to pass for ownership under G.S. 20-4.01(26); the insurer was responsible to a passenger who was injured in a collision with a non-owned vehicle being driven by the insured. *Hernandez v. Nationwide Mut. Ins. Co.*, 171 N.C. App. 510, 615 S.E.2d 425, 2005 N.C. App. LEXIS 1360 (2005), cert. denied, 360 N.C. 63, 621 S.E.2d 624 (2005).

**Applied** in *Pa. Nat'l Mut. Ins. Co. v. Strickland*, — N.C. App. —, 631 S.E.2d 845, 2006 N.C. App. LEXIS 1564 (2006).

### **ARTICLE 2.**

#### *Uniform Driver's License Act.*

### **§ 20-7. Issuance and renewal of drivers licenses.**

(a) **License Required. —** To drive a motor vehicle on a highway, a person must be licensed by the Division under this Article or Article 2C of this Chapter to drive the vehicle and must carry the license while driving the vehicle. The Division issues regular drivers licenses under this Article and issues commercial drivers licenses under Article 2C.

A license authorizes the holder of the license to drive any vehicle included in the class of the license and any vehicle included in a lesser class of license, except a vehicle for which an endorsement is required. To drive a vehicle for which an endorsement is required, a person must obtain both a license and an



endorsement for the vehicle. A regular drivers license is considered a lesser class of license than its commercial counterpart.

The classes of regular drivers licenses and the motor vehicles that can be driven with each class of license are:

- (1) Class A. — A Class A license authorizes the holder to drive any of the following:
  - a. A Class A motor vehicle that is exempt under G.S. 20-37.16 from the commercial drivers license requirements.
  - b. A Class A motor vehicle that has a combined GVWR of less than 26,001 pounds and includes as part of the combination a towed unit that has a GVWR of at least 10,001 pounds.
- (2) Class B. — A Class B license authorizes the holder to drive any Class B motor vehicle that is exempt under G.S. 20-37.16 from the commercial drivers license requirements.
- (3) Class C. — A Class C license authorizes the holder to drive any of the following:
  - a. A Class C motor vehicle that is not a commercial motor vehicle.
  - b. When operated by a volunteer member of a fire department, a rescue squad, or an emergency medical service (EMS) in the performance of duty, a Class A or Class B fire-fighting, rescue, or EMS motor vehicle or a combination of these vehicles.

The Commissioner may assign a unique motor vehicle to a class that is different from the class in which it would otherwise belong.

A person holding a commercial drivers license issued by another jurisdiction must apply for a transfer and obtain a North Carolina issued commercial drivers license within 30 days of becoming a resident. Any other new resident of North Carolina who has a drivers license issued by another jurisdiction must obtain a license from the Division within 60 days after becoming a resident.

- (a1) Motorcycles and Mopeds. — To drive a motorcycle, a person shall have:
  - (1) A full provisional license with a motorcycle learner's permit;
  - (2) A regular drivers license with a motorcycle learner's permit; or
  - (3) Either:
    - a. A full provisional license; or
    - b. A regular drivers license, with a motorcycle endorsement.

Subsection (a2) of this section sets forth the requirements for a motorcycle learner's permit.

To obtain a motorcycle endorsement, a person shall demonstrate competence to drive a motorcycle by:

- (1) Passing a road test;
- (2) Passing a written or oral test concerning motorcycles; and
- (3) Paying the fee for a motorcycle endorsement.

Neither a drivers license nor a motorcycle endorsement is required to drive a moped.

(a2) Motorcycle Learner's Permit. — The following persons are eligible for a motorcycle learner's permit:

- (1) A person who is at least 16 years old but less than 18 years old and has a full provisional license issued by the Division.
- (2) A person who is at least 18 years old and has a license issued by the Division.

To obtain a motorcycle learner's permit, an applicant shall pass a vision test, a road sign test, and a written test specified by the Division. A motorcycle learner's permit expires 18 months after it is issued. The holder of a motorcycle learner's permit may not drive a motorcycle with a passenger. The fee for a motorcycle learner's permit is the amount set in G.S. 20-7(1) for a learner's permit.

- (b) Repealed by Session Laws 1993, c. 368, s. 1, c. 533, s. 12.

(b1) Application. — To obtain an identification card, learners permit, or drivers license from the Division, a person shall complete an application form provided by the Division, present at least two forms of identification approved by the Commissioner, be a resident of this State, and, except for an identification card, demonstrate his or her physical and mental ability to drive safely a motor vehicle included in the class of license for which the person has applied. At least one of the forms of identification shall indicate the applicant's residence address. The Division may copy the identification presented or hold it for a brief period of time to verify its authenticity. To obtain an endorsement, a person shall demonstrate his or her physical and mental ability to drive safely the type of motor vehicle for which the endorsement is required.

The application form shall request all of the following information, and it shall contain the disclosures concerning the request for an applicant's social security number required by section 7 of the federal Privacy Act of 1974, Pub. L. No. 93-579:

- (1) The applicant's full name.
- (2) The applicant's mailing address and residence address.
- (3) A physical description of the applicant, including the applicant's sex, height, eye color, and hair color.
- (4) The applicant's date of birth.
- (5) The applicant's valid social security number.
- (6) The applicant's signature.

The Division shall not issue an identification card, learners permit, or drivers license to an applicant who fails to provide the applicant's valid social security number.

(b2) Disclosure of Social Security Number. — The social security number of an applicant is not a public record. The Division may not disclose an applicant's social security number except as allowed under federal law. A violation of the disclosure restrictions is punishable as provided in 42 U.S.C. § 408, and amendments to that law.

In accordance with 42 U.S.C. 405 and 42 U.S.C. 666, and amendments thereto, the Division may disclose a social security number obtained under subsection (b1) of this section only as follows:

- (1) For the purpose of administering the drivers license laws.
- (2) To the Department of Health and Human Services, Child Support Enforcement Program for the purpose of establishing paternity or child support or enforcing a child support order.
- (3) To the Department of Revenue for the purpose of verifying taxpayer identity.

(b3) The Division shall adopt rules implementing the provisions of subsection (b1) of this section with respect to proof of residency in this State. Those rules shall ensure that applicants submit verified or verifiable residency and address information that can be reasonably considered to be valid and that is provided on any of the following:

- (1) A document issued by an agency of the United States or by the government of another nation.
- (2) A document issued by another state.
- (3) A document issued by the State of North Carolina, or a political subdivision of this State. This includes an agency or instrumentality of this State.
- (4) A preprinted bank or other corporate statement.
- (5) A preprinted business letterhead.
- (6) Any other document deemed reliable by the Division.

(b4) Examples of documents that are reasonably reliable indicators of residency include, but are not limited to, any of the following:

- (1) A pay stub with the payee's address.



- (2) A utility bill showing the address of the applicant-payor.
- (3) A contract for an apartment, house, modular unit, or manufactured home with a North Carolina address signed by the applicant.
- (4) A receipt for personal property taxes paid.
- (5) A receipt for real property taxes paid to a North Carolina locality.
- (6) A current automobile insurance policy issued to the applicant and showing the applicant's address.
- (7) A monthly or quarterly financial statement from a North Carolina regulated financial institution.
- (8) A matricula consular or substantially similar document issued by the Mexican Consulate for North Carolina.
- (9) A document similar to that described in subsection (8) of this section, issued by the consulate or embassy of another country. This subdivision only applies if the Division has consulted with the United State Department of State and is satisfied with the reliability of such document.

(b5) The Division rules adopted pursuant to subsection (b3) of this section shall also provide that if an applicant cannot produce any documentation specified in subsection (b3) or (b4) of this section, the applicant, or in the case of a minor applicant a parent or legal guardian of the applicant, may complete an affidavit, on a form provided by the Division and sworn to before an official of the Division, indicating the applicant's current residence address. The affidavit shall contain the provisions of G.S. 20-15(a) and G.S. 20-17(a)(5) and shall indicate the civil and criminal penalties for completing a false affidavit.

(c) Tests. — To demonstrate physical and mental ability, a person must pass an examination. The examination may include road tests, vision tests, oral tests, and, in the case of literate applicants, written tests, as the Division may require. The tests must ensure that an applicant recognizes the handicapped international symbol of access, as defined in G.S. 20-37.5. The Division may not require a person who applies to renew a license that has not expired to take a written test or a road test unless one or more of the following applies:

- (1) The person has been convicted of a traffic violation since the person's license was last issued.
- (2) The applicant suffers from a mental or physical condition that impairs the person's ability to drive a motor vehicle.

The Division may not require a person who is at least 60 years old to parallel park a motor vehicle as part of a road test.

(c1) Insurance. — The Division may not issue a drivers license to a person until the person has furnished proof of financial responsibility. Proof of financial responsibility shall be in one of the following forms:

- (1) A written certificate or electronically-transmitted facsimile thereof from any insurance carrier duly authorized to do business in this State certifying that there is in effect a nonfleet private passenger motor vehicle liability policy for the benefit of the person required to furnish proof of financial responsibility. The certificate or facsimile shall state the effective date and expiration date of the nonfleet private passenger motor vehicle liability policy and shall state the date that the certificate or facsimile is issued. The certificate or facsimile shall remain effective proof of financial responsibility for a period of 30 consecutive days following the date the certificate or facsimile is issued but shall not in and of itself constitute a binder or policy of insurance.
- (2) A binder for or policy of nonfleet private passenger motor vehicle liability insurance under which the applicant is insured, provided that the binder or policy states the effective date and expiration date of the nonfleet private passenger motor vehicle liability policy.



The preceding provisions of this subsection do not apply to applicants who do not own currently registered motor vehicles and who do not operate nonfleet private passenger motor vehicles that are owned by other persons and that are not insured under commercial motor vehicle liability insurance policies. In such cases, the applicant shall sign a written certificate to that effect. Such certificate shall be furnished by the Division and may be incorporated into the license application form. Any material misrepresentation made by such person on such certificate shall be grounds for suspension of that person's license for a period of 90 days.

For the purpose of this subsection, the term "nonfleet private passenger motor vehicle" has the definition ascribed to it in Article 40 of General Statute Chapter 58.

The Commissioner may require that certificates required by this subsection be on a form approved by the Commissioner.

The requirement of furnishing proof of financial responsibility does not apply to a person who applies for a renewal of his or her drivers license.

Nothing in this subsection precludes any person from showing proof of financial responsibility in any other manner authorized by Articles 9A and 13 of this Chapter.

(d) Repealed by Session Laws 1993, c. 368, s. 1.

(e) Restrictions. — The Division may impose any restriction it finds advisable on a drivers license. It is unlawful for the holder of a restricted license to operate a motor vehicle without complying with the restriction and is the equivalent of operating a motor vehicle without a license. If any applicant shall suffer from any physical defect or disease which affects his or her operation of a motor vehicle, the Division may require to be filed with it a certificate of such applicant's condition signed by some medical authority of the applicant's community designated by the Division. This certificate shall in all cases be treated as confidential. Nothing in this subsection shall be construed to prevent the Division from refusing to issue a license, either restricted or unrestricted, to any person deemed to be incapable of safely operating a motor vehicle. This subsection does not prohibit deaf persons from operating motor vehicles who in every other way meet the requirements of this section.

(f) Duration and Renewal of Licenses. — Drivers licenses shall be issued and renewed pursuant to the provisions of this subsection.

- (1) Duration of license for persons under age 18. — A full provisional license issued to a person under the age of 18 shall expire on the person's twenty-first birthday.
- (2) Duration of license for persons at least 18 years of age or older. — A drivers license issued to a person at least 18 years old but less than 54 years old expires eight years after the date of issuance. A drivers license issued to a person at least 54 years old expires five years after the date of issuance.
- (3) Duration of license. — A drivers license that was issued by the Division and is renewed by the Division expires at the end of the period provided by this subsection after the expiration date of the license that is renewed unless the Division determines that a license of shorter duration should be issued when the applicant holds a visa of limited duration from the United States Department of Homeland Security, but in no event shall the license expire later than the applicant's lawful presence in the United States. A person may apply to the Division to renew a license during the 180-day period before the license expires. The Division may not accept an application for renewal made before the 180-day period begins.
- (4) Renewal by mail. — The Division may renew by mail a drivers license issued by the Division to a person who meets any of the following descriptions:

- a. Is serving on active duty in the armed forces of the United States and is stationed outside this State.
- b. Is a resident of this State and has been residing outside the State for at least 30 continuous days.

When renewing a license by mail, the Division may waive the examination that would otherwise be required for the renewal and may impose any conditions it finds advisable. A license renewed by mail is a temporary license that expires 60 days after the person to whom it is issued returns to this State.

- (5) **(Effective July 1, 2008)** License to be sent by mail. — The Division shall issue to the applicant a temporary driving certificate valid for 20 days, unless the applicant is applying for renewal by mail under subdivision (4) of this subsection. The temporary driving certificate shall be valid for driving purposes only and shall not be valid for identification purposes. The Division shall produce the applicant’s drivers license at a central location and send it to the applicant by first-class mail at the residence address provided by the applicant.

(g) Repealed by Session Laws 1979, c. 667, s. 6.

(h) Repealed by Session Laws 1979, c. 113, s. 1.

(i) Fees. — The fee for a regular drivers license is the amount set in the following table multiplied by the number of years in the period for which the license is issued:

<u>Class of Regular License</u>	<u>Fee for Each Year</u>
Class A	\$4.00
Class B	\$4.00
Class C	\$4.00

The fee for a motorcycle endorsement is one dollar and seventy-five cents (\$1.75) for each year of the period for which the endorsement is issued. The appropriate fee shall be paid before a person receives a regular drivers license or an endorsement.

(i1) Restoration Fee. — Any person whose drivers license has been revoked pursuant to the provisions of this Chapter, other than G.S. 20-17(2), shall pay a restoration fee of fifty dollars (\$50.00). A person whose drivers license has been revoked under G.S. 20-17(2) shall pay a restoration fee of seventy-five dollars (\$75.00) until the end of the fiscal year in which the cumulative total amount of fees deposited under this subsection in the General Fund exceeds ten million dollars (\$10,000,000), and shall pay a restoration fee of fifty dollars (\$50.00) thereafter. The fee shall be paid to the Division prior to the issuance to such person of a new drivers license or the restoration of the drivers license. The restoration fee shall be paid to the Division in addition to any and all fees which may be provided by law. This restoration fee shall not be required from any licensee whose license was revoked or voluntarily surrendered for medical or health reasons whether or not a medical evaluation was conducted pursuant to this Chapter. The fifty-dollar (\$50.00) fee, and the first fifty dollars (\$50.00) of the seventy-five-dollar (\$75.00) fee, shall be deposited in the Highway Fund. The remaining twenty-five dollars (\$25.00) of the seventy-five-dollar (\$75.00) fee shall be deposited in the General Fund of the State. The Office of State Budget and Management shall certify to the Department of Transportation and the General Assembly when the cumulative total amount of fees deposited in the General Fund under this subsection exceeds ten million dollars (\$10,000,000), and shall annually report to the General Assembly the amount of fees deposited in the General Fund under this subsection.

It is the intent of the General Assembly to annually appropriate the funds deposited in the General Fund under this subsection to the Board of Governors of The University of North Carolina to be used for the Center for Alcohol Studies Endowment at The University of North Carolina at Chapel Hill, but not to exceed this cumulative total of ten million dollars (\$10,000,000).



(j) Highway Fund. — The fees collected under this section and G.S. 20-14 shall be placed in the Highway Fund.

(k) Repealed by Session Laws 1991, c. 726, s. 5.

(l) Learner's Permit. — A person who is at least 18 years old may obtain a learner's permit. A learner's permit authorizes the permit holder to drive a specified type or class of motor vehicle while in possession of the permit. A learner's permit is valid for a period of 18 months after it is issued. The fee for a learner's permit is fifteen dollars (\$15.00). A learner's permit may be renewed, or a second learner's permit may be issued, for an additional period of 18 months. The permit holder must, while operating a motor vehicle over the highways, be accompanied by a person who is licensed to operate the motor vehicle being driven and is seated beside the permit holder.

(l-1) Repealed by Session Laws 1991, c. 726, s. 5.

(m) Instruction Permit. — The Division upon receiving proper application may in its discretion issue a restricted instruction permit effective for a school year or a lesser period to any of the following applicants:

- (1) An applicant who is less than 18 years old and is enrolled in a drivers education program that is approved by the State Superintendent of Public Instruction and is offered at a public high school, a nonpublic secondary school, or a licensed drivers training school.
- (2) An applicant for certification under G.S. 20-218 as a school bus driver. A restricted instruction permit authorizes the holder of the permit to drive a specified type or class of motor vehicle when in possession of the permit, subject to any restrictions imposed by the Division. The restrictions the Division may impose on a permit include restrictions to designated areas and highways and restrictions prohibiting operation except when an approved instructor is occupying a seat beside the permittee. A restricted instruction permit is not required to have a distinguishing number or a picture of the person to whom the permit is issued.

(n) Format. — A drivers license issued by the Division must be tamperproof and must contain all of the following information:

- (1) An identification of this State as the issuer of the license.
- (2) The license holder's full name.
- (3) The license holder's residence address.
- (4) A color photograph of the license holder, taken by the Division.
- (5) A physical description of the license holder, including sex, height, eye color, and hair color.
- (6) The license holder's date of birth.
- (7) An identifying number for the license holder assigned by the Division. The identifying number may not be the license holder's social security number.
- (8) Each class of motor vehicle the license holder is authorized to drive and any endorsements or restrictions that apply.
- (9) The license holder's signature.
- (10) The date the license was issued and the date the license expires.

The Commissioner may waive the requirement of a color photograph on a license if the license holder proves to the satisfaction of the Commissioner that taking the photograph would violate the license holder's religious convictions. In taking photographs of license holders, the Division must distinguish between license holders who are less than 21 years old and license holders who are at least 21 years old by using different color backgrounds or borders for each group. The Division shall determine the different colors to be used.

At the request of an applicant for a drivers license, a license issued to the applicant must contain the applicant's race.

(o) Repealed by Session Laws 1991, c. 726, s. 5.

(p) The Division must give the clerk of superior court in each county at least 50 copies of the driver license handbook free of charge. The clerk must give a copy to a person who requests it.



(q) Military Designation. — The Division shall develop a military designation for drivers licenses that may, upon request, be granted to North Carolina residents on active duty and to their spouses and dependent children. A drivers license with a military designation on it may be renewed by mail no more than two times during the license holder’s lifetime. A license renewed by mail under this subsection is a permanent license and does not expire when the license holder returns to the State. A drivers license with a military designation on it issued to a person on active duty may be renewed up to one year prior to its expiration upon presentation of military or Department of Defense credentials.

(r) Waiver of Vision Test. — The following license holders shall be exempt from any required eye exam when renewing a drivers license by mail under either subsection (f) of this section or subsection (q) of this section if, at the time of renewal, the license holder is serving in a combat zone or a qualified hazardous duty zone:

- (1) A member of the armed forces of the United States.

(2) A member of the national guard or of a reserve component of the armed forces of the United States.
- (s) Notwithstanding the requirements of subsection (b1) of this section that an applicant present a valid social security number, the Division shall issue a drivers license of limited duration, under subsection (f) of this section, to an applicant present in the United States under a valid visa issued to the applicant by the United States Department of Homeland Security if the applicant presents that valid visa. (1935, c. 52, s. 2; 1943, c. 649, s. 1; c. 787, s. 1; 1947, c. 1067, s. 10; 1949, c. 583, ss. 9, 10; c. 826, ss. 1, 2; 1951, c. 542, ss. 1, 2; c. 1196, ss. 1-3; 1953, cc. 839, 1284, 1311; 1955, c. 1187, ss. 2-6; 1957, c. 1225; 1963, cc. 754, 1007, 1022; 1965, c. 410, s. 5; 1967, c. 509; 1969, c. 183; c. 783, s. 1; c. 865; 1971, c. 158; 1973, cc. 73, 705; c. 1057, ss. 1, 3; 1975, c. 162, s. 1; c. 295; c. 296, ss. 1, 2; c. 684; c. 716, s. 5; c. 841; c. 875, s. 4; c. 879, s. 46; 1977, c. 6; c. 340, s. 3; c. 865, ss. 1, 3; 1979, c. 37, s. 1; c. 113; c. 178, s. 2; c. 667, ss. 3-11, 41; c. 678, ss. 1-3; c. 801, ss. 5, 6; 1981, c. 42; c. 690, ss. 8-10; c. 792, s. 3; 1981 (Reg. Sess., 1982), c. 1257, s. 1; 1983, c. 443, s. 1; 1985, c. 141, s. 4; c. 682, ss. 1, 2; 1987, c. 869, ss. 10, 11; 1989, c. 436, ss. 1, 2; c. 771, s. 5; c. 786, s. 4; 1991, c. 478, s. 1; c. 689, s. 325; c. 726, s. 5; 1991 (Reg. Sess., 1992), c. 1007, s. 27; c. 1030, s. 10; 1993, c. 368, s. 1; c. 533, ss. 2, 3, 12; 1993 (Reg. Sess., 1994), c. 595, ss. 1, 2; c. 750, s. 1; c. 761, s. 1.1; 1995 (Reg. Sess., 1996), c. 675, s. 1; 1997-16, ss. 5, 8, 9; 1997-122, ss. 2, 3; 1997-377, s. 1; 1997-433, s. 4; 1997-443, ss. 11A.122, 32.20; 1997-456, s. 32, 33; 1998-17, s. 1; 1998-149, s. 2; 2000-120, ss. 14, 15; 2000-140, s. 93.1(a); 2001-424, ss. 12.2(b), 27.10A(a)-(d); 2001-513, s. 32(a); 2003-152, ss. 1, 2; 2003-284, s. 36.1; 2004-189, s. 5(a); 2004-203, s. 2; 2005-276, s. 44.1(a); 2005-349, s. 4; 2006-257, ss. 1, 2; 2006-264, s. 35.2.)

Effect of Amendments. —

Session Laws 2006-257, s. 1, effective January 1, 2007, rewrote subsection (f); and s. 2 added subdivision (f)(5) effective July 1, 2008.

Session Laws 2006-264, s. 35.2, effective August 27, 2006, in subsection (b1), deleted the former second to last paragraph relating to

applicants who do not have social security numbers, and in the last paragraph, deleted “either” following “to provide” and “or the applicant’s valid Taxpayer Identification Number” from the end; rewrote subsection (f); and added subsection (s).

§ 20-9. What persons shall not be licensed.

(a) To obtain a regular drivers license, a person must have reached the minimum age set in the following table for the class of license sought:

Class of Regular License	Minimum Age
Class A	18

Class of Regular License	Minimum Age
Class B	18
Class C	16

G.S. 20-37.13 sets the age qualifications for a commercial drivers license.

(b) The Division shall not issue a driver's license to any person whose license has been suspended or revoked during the period for which the license was suspended or revoked.

(b1) The Division shall not issue a drivers license to any person whose permit or license has been suspended or revoked under G.S. 20-13.2(c1) during the suspension or revocation period, unless the Division has restored the person's permit or license under G.S. 20-13.2(c1).

(c) The Division shall not issue a driver's license to any person who is an habitual drunkard or is an habitual user of narcotic drugs or barbiturates, whether or not such use be in accordance with the prescription of a physician.

(d) No driver's license shall be issued to any applicant who has been previously adjudged insane or an idiot, imbecile, or feebleminded, and who has not at the time of such application been restored to competency by judicial decree or released from a hospital for the insane or feebleminded upon a certificate of the superintendent that such person is competent, nor then unless the Division is satisfied that such person is competent to operate a motor vehicle with safety to persons and property.

(e) The Division shall not issue a driver's license to any person when in the opinion of the Division such person is afflicted with or suffering from such physical or mental disability or disease as will serve to prevent such person from exercising reasonable and ordinary control over a motor vehicle while operating the same upon the highways, nor shall a license be issued to any person who is unable to understand highway warnings or direction signs.

(f) The Division shall not issue a driver's license to any person whose license or driving privilege is in a state of cancellation, suspension or revocation in any jurisdiction, if the acts or things upon which the cancellation, suspension or revocation in such other jurisdiction was based would constitute lawful grounds for cancellation, suspension or revocation in this State had those acts or things been done or committed in this State; provided, however, any such cancellation shall not prohibit issuance for a period in excess of 18 months.

(g) The Division may issue a driver's license to any applicant covered by subsection (e) of this section under the following conditions:

- (1) The Division may issue a license to any person who is afflicted with or suffering from a physical or mental disability set out in subsection (e) of this section who is otherwise qualified to obtain a license, provided such person submits to the Division a certificate in the form prescribed in subdivision (2). Until a license issued under this subdivision expires or is revoked, the license continues in force as long as the licensee presents to the Division a certificate in the form prescribed in subdivision (2) of this subsection at the intervals determined by the Division to be in the best interests of public safety.
- (2) The Division shall not issue a license pursuant to this section unless the applicant has submitted to a physical examination by a physician or surgeon duly licensed to practice medicine in this State or in any other state of the United States and unless such examining physician or surgeon has completed and signed the certificate required by subdivision (1). Such certificate shall be devised by the Commissioner with the advice of qualified experts in the field of diagnosing and treating physical and mental disorders as he may select to assist him and shall be designed to elicit the maximum medical information necessary to aid in determining whether or not it would be a hazard to public safety to permit the applicant to operate a motor vehicle,



including, if such is the fact, the examining physician's statement that the applicant is under medication and treatment and that such person's physical or mental disability is controlled. The certificate shall contain a waiver of privilege and the recommendation of the examining physician to the Commissioner as to whether a license should be issued to the applicant.

- (3) The Commissioner is not bound by the recommendation of the examining physician but shall give fair consideration to such recommendation in exercising his discretion in acting upon the application, the criterion being whether or not, upon all the evidence, it appears that it is safe to permit the applicant to operate a motor vehicle. The burden of proof of such fact is upon the applicant. In deciding whether to issue or deny a license, the Commissioner may be guided by opinion of experts in the field of diagnosing and treating the specific physical or mental disorder suffered by an applicant and such experts may be compensated for their services on an equitable basis. The Commissioner may also take into consideration any other factors which bear on the issue of public safety.
- (4) Whenever a license is denied by the Commissioner, such denial may be reviewed by a reviewing board upon written request of the applicant filed with the Division within 10 days after receipt of such denial. The reviewing board shall consist of the Commissioner or his authorized representative and four persons designated by the chairman of the Commission for Health Services. The persons designated by the chairman of the Commission for Health Services shall be either members of the Commission for Health Services or physicians duly licensed to practice medicine in this State. The members so designated by the chairman of the Commission for Health Services shall receive the same per diem and expenses as provided by law for members of the Commission for Health Services, which per diem and expenses shall be charged to the same appropriation as per diems and expenses for members of the Commission for Health Services. The Commissioner or his authorized representative, plus any two of the members designated by the chairman of the Commission for Health Services, constitute a quorum. The procedure for hearings authorized by this section shall be as follows:
  - a. Applicants shall be afforded an opportunity for hearing, after reasonable notice of not less than 10 days, before the review board established by subdivision (4). The notice shall be in writing and shall be delivered to the applicant in person or sent by certified mail, with return receipt requested. The notice shall state the time, place, and subject of the hearing.
  - b. The review board may compel the attendance of witnesses and the production of such books, records and papers as it desires at a hearing authorized by the section. Upon request of an applicant, a subpoena to compel the attendance of any witness or a subpoena duces tecum to compel the production of any books, records, or papers shall be issued by the board. Subpoenas shall be directed to the sheriff of the county where the witness resides or is found and shall be served and returned in the same manner as a subpoena in a criminal case. Fees of the sheriff and witnesses shall be the same as that allowed in the district court in cases before that court and shall be paid in the same manner as other expenses of the Division of Motor Vehicles are paid. In any case of disobedience or neglect of any subpoena served on any person, or the refusal of any witness to testify to any matters regarding which he may be lawfully interrogated, the district court or superior court where such disobedience, neglect or refusal occurs,



or any judge thereof, on application by the board, shall compel obedience or punish as for contempt.

- c. A hearing may be continued upon motion of the applicant for good cause shown with approval of the board or upon order of the board.
  - d. The board shall pass upon the admissibility of evidence at a hearing but the applicant affected may at the time object to the board's ruling, and, if evidence offered by an applicant is rejected the party may proffer the evidence, and such proffer shall be made a part of the record. The board shall not be bound by common law or statutory rules of evidence which prevail in courts of law or equity and may admit and give probative value to evidence which possesses probative value commonly accepted by reasonably prudent men in the conduct of their affairs. They may exclude incompetent, immaterial, irrelevant and unduly repetitious evidence. Uncontested facts may be stipulated by agreement between an applicant and the board and evidence relating thereto may be excluded. All evidence, including records and documents in the possession of the Division of Motor Vehicles or the board, of which the board desires to avail itself shall be made a part of the record. Documentary evidence may be received in the form of copies or excerpts, or by incorporation by reference. The board shall prepare an official record, which shall include testimony and exhibits. A record of the testimony and other evidence submitted shall be taken, but it shall not be necessary to transcribe shorthand notes or electronic recordings unless requested for purposes of court review.
  - e. Every decision and order adverse to an applicant shall be in writing or stated in the record and shall be accompanied by findings of fact and conclusions of law. The findings of fact shall consist of a concise statement of the board's conclusions on each contested issue of fact. Counsel for applicant, or applicant, if he has no counsel, shall be notified of the board's decision in person or by registered mail with return receipt requested. A copy of the board's decision with accompanying findings and conclusions shall be delivered or mailed upon request to applicant's attorney of record or to applicant, if he has no attorney.
  - f. Actions of the reviewing board are subject to judicial review as provided under Chapter 150B of the General Statutes.
  - g. Repealed by Session Laws 1977, c. 840.
  - h. All records and evidence collected and compiled by the Division and the reviewing board shall not be considered public records within the meaning of Chapter [section] 132-1, and following, of the General Statutes of North Carolina and may be made available to the public only upon an order of a court of competent jurisdiction. All information furnished by or on behalf of an applicant under this section shall be without prejudice and shall be for the use of the Division, the reviewing board or the court in administering this section and shall not be used in any manner as evidence, or for any other purposes in any trial, civil or criminal.
- (h) The Division shall not issue a drivers license to an applicant who currently holds a license to drive issued by another state unless the applicant surrenders the license.

(i) The Division shall not issue a drivers license to an applicant who has resided in this State for less than 12 months until the Division has searched the National Sex Offender Public Registry to determine if the person is currently registered as a sex offender in another state.

- (1) If the Division finds that the person is currently registered as a sex offender in another state, the Division shall not issue a drivers license to the person until the person submits proof of registration pursuant to Article 27A of Chapter 14 of the General Statutes issued by the sheriff of the county where the person resides.
- (2) If the person does not appear on the National Sex Offender Public Registry, the Division shall issue a drivers license but shall require the person to sign an affidavit acknowledging that the person has been notified that if the person is a sex offender, then the person is required to register pursuant to Article 27A of Chapter 14 of the General Statutes.
- (3) If the Division is unable to access all states' information contained in the National Sex Offender Public Registry, but the person is otherwise qualified to obtain a drivers license, then the Division shall issue the drivers license but shall first require the person to sign an affidavit stating that: (i) the person does not appear on the National Sex Offender Public Registry and (ii) acknowledging that the person has been notified that if the person is a sex offender, then the person is required to register pursuant to Article 27A of Chapter 14 of the General Statutes. The Division shall search the National Sex Offender Public Registry for the person within a reasonable time after access to the Registry is restored. If the person does appear in the National Sex Offender Public Registry, the person is in violation of G.S. 20-30, and the Division shall immediately revoke the drivers license and shall promptly notify the sheriff of the county where the person resides of the offense.
- (4) Any person denied a license or whose license has been revoked by the Division pursuant to this subsection shall have a right to file a petition within 30 days thereafter for a hearing in the matter in the superior court of the county wherein such person shall reside, or to the resident judge of the district or judge holding the court of that district, or special or emergency judge holding a court in such district, and such court or judge is hereby vested with jurisdiction, and it shall be its or his duty to set the matter for hearing upon 30 days' written notice to the Division, and thereupon to take testimony and examine into the facts of the case and to determine whether the petitioner is entitled to a license under the provisions of this subsection and whether the petitioner is in violation of G.S. 20-30. (1935, c. 52, s. 4; 1951, c. 542, s. 3; 1953, c. 773; 1955, c. 118, s. 7; 1967, cc. 961, 966; 1971, c. 152; c. 528, s. 11; 1973, cc. 135, 441; c. 476, s. 128; c. 1331, s. 3; 1975, c. 716, s. 5; 1979, c. 667, ss. 14, 41; 1983, c. 545; 1987, c. 827, s. 1; 1989, c. 771, s. 7; 1991, c. 726, s. 6; 1993, c. 368, s. 2; c. 533, s. 4; 1999-243, s. 4; 1999-452, s. 8; 2003-14, s. 1; 2006-247, s. 19(c).)

**Editor's Note. —**

Session Laws 2006-247, s. 1(a), provides: "This act shall be known as 'An Act To Protect North Carolina's Children/Sex Offender Law Changes.'"

Session Laws 2006-247, s. 21 is a severability clause.

**Effect of Amendments. —** Session Laws

2006-247, s. 19(c), effective December 1, 2006, and applicable to all applications for a drivers license, learner's permit, instruction permit, or special identification card submitted on or after that date, added subsection (i).

### § 20-9.3. Notification of requirements for sex offender registration.

The Division shall provide notice to each person who applies for the issuance of a drivers license, learner's permit, or instruction permit to operate a motor



vehicle, and to each person who applies for an identification card, that if the person is a sex offender, then the person is required to register pursuant to Article 27A of Chapter 14 of the General Statutes. (2006-247, s. 19(b).)

**Editor's Note.** — Session Laws 2006-247, s. 1(a), provides: "This act shall be known as 'An Act To Protect North Carolina's Children/Sex Offender Law Changes.'"

Session Laws 2006-247, s. 19(e), made this section effective December 1, 2006, and appli-

cable to all applications for a drivers license, learner's permit, instruction permit, or special identification card submitted on or after that date.

Session Laws 2006-247, s. 21 is a severability clause.

## § 20-11. Issuance of limited learner's permit and provisional drivers license to person who is less than 18 years old.

(a) Process. — Safe driving requires instruction in driving and experience. To ensure that a person who is less than 18 years old has both instruction and experience before obtaining a drivers license, driving privileges are granted first on a limited basis and are then expanded in accordance with the following process:

- (1) Level 1. — Driving with a limited learner's permit.
- (2) Level 2. — Driving with a limited provisional license.
- (3) Level 3. — Driving with a full provisional license.

A permit or license issued under this section must have a color background or border that indicates the level of driving privileges granted by the permit or license.

(b) Level 1. — A person who is at least 15 years old but less than 18 years old may obtain a limited learner's permit if the person meets all of the following requirements:

- (1) Passes a course of driver education prescribed in G.S. 20-88.1 or a course of driver instruction at a licensed commercial driver training school.
- (2) Passes a written test administered by the Division.
- (3) Has a driving eligibility certificate or a high school diploma or its equivalent.

(c) Level 1 Restrictions. — A limited learner's permit authorizes the permit holder to drive a specified type or class of motor vehicle only under the following conditions:

- (1) The permit holder must be in possession of the permit.
- (2) A supervising driver must be seated beside the permit holder in the front seat of the vehicle when it is in motion. No person other than the supervising driver can be in the front seat.
- (3) For the first six months after issuance, the permit holder may drive only between the hours of 5:00 a.m. and 9:00 p.m.
- (4) After the first six months after issuance, the permit holder may drive at any time.
- (5) Every person occupying the vehicle being driven by the permit holder must have a safety belt properly fastened about his or her body, or be restrained by a child passenger restraint system as provided in G.S. 20-137.1(a), when the vehicle is in motion.
- (6) The permit holder shall not use a mobile telephone or other additional technology associated with a mobile telephone while operating the motor vehicle on a public street or highway or public vehicular area.

(d) Level 2. — A person who is at least 16 years old but less than 18 years old may obtain a limited provisional license if the person meets all of the following requirements:



- (1) Has held a limited learner's permit issued by the Division for at least 12 months.
  - (2) Has not been convicted of a motor vehicle moving violation or seat belt infraction or a violation of G.S. 20-137.3 during the preceding six months.
  - (3) Passes a road test administered by the Division.
  - (4) Has a driving eligibility certificate or a high school diploma or its equivalent.
- (e) Level 2 Restrictions. — A limited provisional license authorizes the license holder to drive a specified type or class of motor vehicle only under the following conditions:
- (1) The license holder shall be in possession of the license.
  - (2) The license holder may drive without supervision in any of the following circumstances:
    - a. From 5:00 a.m. to 9:00 p.m.
    - b. When driving to or from work.
    - c. When driving to or from an activity of a volunteer fire department, volunteer rescue squad, or volunteer emergency medical service, if the driver is a member of the organization.
  - (3) The license holder may drive with supervision at any time. When the license holder is driving with supervision, the supervising driver shall be seated beside the license holder in the front seat of the vehicle when it is in motion. The supervising driver need not be the only other occupant of the front seat, but shall be the person seated next to the license holder.
  - (4) When the license holder is driving the vehicle and is not accompanied by the supervising driver, there may be no more than one passenger under 21 years of age in the vehicle. This limit does not apply to passengers who are members of the license holder's immediate family or whose primary residence is the same household as the license holder. However, if a family member or member of the same household as the license holder who is younger than 21 years of age is a passenger in the vehicle, no other passengers under 21 years of age, who are not members of the license holder's immediate family or members of the license holder's household, may be in the vehicle.
  - (5) Every person occupying the vehicle being driven by the license holder shall have a safety belt properly fastened about his or her body, or be restrained by a child passenger restraint system as provided in G.S. 20-137.1(a), when the vehicle is in motion.
  - (6) The license holder shall not use a mobile telephone or other additional technology associated with a mobile telephone while operating the vehicle on a public street or highway or public vehicular area.
- (f) Level 3. — A person who is at least 16 years old but less than 18 years old may obtain a full provisional license if the person meets all of the following requirements:
- (1) Has held a limited provisional license issued by the Division for at least six months.
  - (2) Has not been convicted of a motor vehicle moving violation or seat belt infraction or a violation of G.S. 20-137.3 during the preceding six months.
  - (3) Has a driving eligibility certificate or a high school diploma or its equivalent.
- A person who meets these requirements may obtain a full provisional license by mail.
- (g) Level 3 Restrictions. — The restrictions on Level 1 and Level 2 drivers concerning time of driving, supervision, and passenger limitations do not apply

to a full provisional license. However, the prohibition against operating a motor vehicle while using a mobile telephone under G.S. 20-137.3(b) shall apply to a full provisional license.

(h) Exception for Persons 16 to 18 Who Have an Unrestricted Out-of-State License. — A person who is at least 16 years old but less than 18 years old, who was a resident of another state and has an unrestricted drivers license issued by that state, and who becomes a resident of this State may obtain one of the following upon the submission of a driving eligibility certificate or a high school diploma or its equivalent:

- (1) A temporary permit, if the person has not completed a drivers education program that meets the requirements of the Superintendent of Public Instruction but is currently enrolled in a drivers education program that meets these requirements. A temporary permit is valid for the period specified in the permit and authorizes the holder of the permit to drive a specified type or class of motor vehicle when in possession of the permit, subject to any restrictions imposed by the Division concerning time of driving, supervision, and passenger limitations. The period must end within 10 days after the expected completion date of the drivers education program in which the applicant is enrolled.
- (2) A full provisional license, if the person has completed a drivers education program that meets the requirements of the Superintendent of Public Instruction, has held the license issued by the other state for at least 12 months, and has not been convicted during the preceding six months of a motor vehicle moving violation, a seat belt infraction, or an offense committed in another jurisdiction that would be a motor vehicle moving violation or seat belt infraction if committed in this State.
- (2a) A full provisional license, if the person has completed a drivers education program that meets the requirements of the Superintendent of Public Instruction, has held both a learner's permit and a restricted license from another state for at least six months each, the Commissioner finds that the requirements for the learner's permit and restricted license are comparable to the requirements for a learner's permit and restricted license in this State, and the person has not been convicted during the preceding six months of a motor vehicle moving violation, a seat belt infraction, or an offense committed in another jurisdiction that would be a moving violation or a seat belt infraction if committed in this State.
- (3) A limited provisional license, if the person has completed a drivers education program that meets the requirements of the Superintendent of Public Instruction but either did not hold the license issued by the other state for at least 12 months or was convicted during the preceding six months of a motor vehicle moving violation, a seat belt infraction, or an offense committed in another jurisdiction that would be a motor vehicle moving violation or seat belt infraction if committed in this State.

(h1) Exception for Persons 16 to 18 Who Have an Out-of-State Restricted License. — A person who is at least 16 years old but less than 18 years old, who was a resident of another state and has a restricted drivers license issued by that state, and who becomes a resident of this State may obtain one of the following:

- (1) A limited provisional license, if the person has completed a drivers education program that meets the requirements of the Superintendent of Public Instruction, held the restricted license issued by the other state for at least 12 months, and whose parent or guardian



certifies that the person has not been convicted during the preceding six months of a motor vehicle moving violation, a seat belt infraction, or an offense committed in another jurisdiction that would be a motor vehicle moving violation or seat belt infraction if committed in this State.

- (2) A limited learners permit, if the person has completed a drivers education program that meets the requirements of the Superintendent of Public Instruction but either did not hold the restricted license issued by the other state for at least 12 months or was convicted during the preceding six months of a motor vehicle moving violation, a seat belt infraction, or an offense committed in another jurisdiction that would be a motor vehicle moving violation or seat belt infraction if committed in this State. A person who qualifies for a limited learners permit under this subdivision and whose parent or guardian certifies that the person has not been convicted of a moving violation in the preceding six months shall be deemed to have held a limited learners permit in this State for each month the person held a restricted license in another state.

(h2) Exception for Persons Age 15 Who Have an Out-of-State Unrestricted or Restricted License. — A person who is age 15, who was a resident of another state, has an unrestricted or restricted drivers license issued by that state, and who becomes a resident of this State may obtain a limited learners permit if the person has completed a drivers education program that meets the requirements of the Superintendent of Public Instruction. A person who qualifies for a limited learners permit under this subsection and whose parent or guardian certifies that the person has not been convicted of a moving violation in the preceding six months shall be deemed to have held a limited learners permit in this State for each month the person held an unrestricted or restricted license in another state.

(h3) Exception for Persons Less Than Age 18 Who Have a Federally Issued Unrestricted or Restricted License. — A person who is less than age 18, who has an unrestricted or restricted drivers license issued by the federal government, and who becomes a resident of this State may obtain a limited provisional license or a provisional license if the person has completed a drivers education program substantially equivalent to the drivers education program that meets the requirements of the Superintendent of Public Instruction. A person who qualifies for a limited provisional license or a provisional license under this subsection and whose parent or guardian certifies that the person has not been convicted of a moving violation in the preceding six months shall be deemed to have held a limited provisional license or a provisional license in this State for each month the person held an unrestricted or restricted license issued by the federal government.

(i) Application. — An application for a permit or license authorized by this section must be signed by both the applicant and another person. That person must be:

- (1) The applicant's parent or guardian;
- (2) A person approved by the applicant's parent or guardian; or
- (3) A person approved by the Division.

(j) Duration and Fee. — A limited learner's permit expires on the eighteenth birthday of the permit holder. A limited provisional license expires on the eighteenth birthday of the license holder. A limited learner's permit or limited provisional license issued under this section that expires on a weekend or State holiday shall remain valid through the fifth regular State business day following the date of expiration. A full provisional license expires on the date set under G.S. 20-7(f). The fee for a limited learner's permit or a limited provisional license is fifteen dollars (\$15.00). The fee for a full provisional license is the amount set under G.S. 20-7(i).



(k) **Supervising Driver.** — A supervising driver shall be a parent, grandparent, or guardian of the permit holder or license holder or a responsible person approved by the parent or guardian or the Division. A supervising driver shall be a licensed driver who has been licensed for at least five years. At least one supervising driver shall sign the application for a permit or license.

(l) **Violations.** — It is unlawful for the holder of a limited learner's permit, a temporary permit, or a limited provisional license to drive a motor vehicle in violation of the restrictions that apply to the permit or license. Failure to comply with a restriction concerning the time of driving or the presence of a supervising driver in the vehicle constitutes operating a motor vehicle without a license. Failure to comply with the restriction regarding the use of a mobile telephone while operating a motor vehicle is an infraction punishable by a fine of twenty-five dollars (\$25.00). Failure to comply with any other restriction, including seating and passenger limitations, is an infraction punishable by a monetary penalty as provided in G.S. 20-176. Failure to comply with the provisions of subsections (e) and (g) of this section shall not constitute negligence per se or contributory negligence by the driver or passenger in any action for the recovery of damages arising out of the operation, ownership or maintenance of a motor vehicle. Any evidence of failure to comply with the provisions of subdivisions (1), (2), (3), (4), and (5) of subsection (e) of this section shall not be admissible in any criminal or civil trial, action, or proceeding except in an action based on a violation of this section. No drivers license points or insurance surcharge shall be assessed for failure to comply with seating and occupancy limitations in subsection (e) of this section. No drivers license points or insurance surcharge shall be assessed for failure to comply with subsection (e) or (g) of this section regarding the use of a mobile telephone while operating a motor vehicle.

(m) **Insurance Status.** — The holder of a limited learner's permit is not considered a licensed driver for the purpose of determining the inexperienced operator premium surcharge under automobile insurance policies.

(n) **Driving Eligibility Certificate.** — A person who desires to obtain a permit or license issued under this section must have a high school diploma or its equivalent or must have a driving eligibility certificate. A driving eligibility certificate must meet the following conditions:

- (1) The person who is required to sign the certificate under subdivision (4) of this subsection must show that he or she has determined that one of the following requirements is met:
  - a. The person is currently enrolled in school and is making progress toward obtaining a high school diploma or its equivalent.
  - b. A substantial hardship would be placed on the person or the person's family if the person does not receive a certificate.
  - c. The person cannot make progress toward obtaining a high school diploma or its equivalent.
- (1a) The person who is required to sign the certificate under subdivision (4) of this subsection also must show that one of the following requirements is met:
  - a. The person who seeks a permit or license issued under this section is not subject to subsection (n1) of this section.
  - b. The person who seeks a permit or license issued under this section is subject to subsection (n1) of this section and is eligible for the certificate under that subsection.
- (2) It must be on a form approved by the Division.
- (3) It must be dated within 30 days of the date the person applies for a permit or license issuable under this section.
- (4) It must be signed by the applicable person named below:
  - a. The principal, or the principal's designee, of the public school in which the person is enrolled.

- b. The administrator, or the administrator's designee, of the nonpublic school in which the person is enrolled.
- c. The person who provides the academic instruction in the home school in which the person is enrolled.
- c1. The person who provides the academic instruction in the home in accordance with an educational program found by a court, prior to July 1, 1998, to comply with the compulsory attendance law.
- d. The designee of the board of directors of the charter school in which the person is enrolled.
- e. The president, or the president's designee, of the community college in which the person is enrolled.

Notwithstanding any other law, the decision concerning whether a driving eligibility certificate was properly issued or improperly denied shall be appealed only as provided under the rules adopted in accordance with G.S. 115C-12(28), 115D-5(a3), or 115C-566, whichever is applicable, and may not be appealed under this Chapter.

(n1) Lose Control; Lose License.

(1) The following definitions apply in this subsection:

- a. Applicable State entity. — The State Board of Education for public schools and charter schools, the State Board of Community Colleges for community colleges, or the Secretary of Administration for nonpublic schools and home schools.
- b. Certificate. — A driving eligibility certificate that meets the conditions of subsection (n) of this section.
- c. Disciplinary action. — An expulsion, a suspension for more than 10 consecutive days, or an assignment to an alternative educational setting for more than 10 consecutive days.
- d. Enumerated student conduct. — One of the following behaviors that results in disciplinary action:
  - 1. The possession or sale of an alcoholic beverage or an illegal controlled substance on school property.
  - 2. The bringing, possession, or use on school property of a weapon or firearm that resulted in disciplinary action under G.S. 115C-391(d1) or that could have resulted in that disciplinary action if the conduct had occurred in a public school.
  - 3. The physical assault on a teacher or other school personnel on school property.
- e. School. — A public school, charter school, community college, nonpublic school, or home school.
- f. School administrator. — The person who is required to sign certificates under subdivision (4) of subsection (n) of this section.
- g. School property. — The physical premises of the school, school buses or other vehicles under the school's control or contract and that are used to transport students, and school-sponsored curricular or extracurricular activities that occur on or off the physical premises of the school.
- h. Student. — A person who desires to obtain a permit or license issued under this section.

(2) Any student who was subject to disciplinary action for enumerated student conduct that occurred either after the first day of July before the school year in which the student enrolled in the eighth grade or after the student's fourteenth birthday, whichever event occurred first, is subject to this subsection.

(3) A student who is subject to this subsection is eligible for a certificate when the school administrator determines that the student has exhausted all administrative appeals connected to the disciplinary action and that one of the following conditions is met:



- a. The enumerated student conduct occurred before the student reached the age of 15, and the student is now at least 16 years old.
  - b. The enumerated student conduct occurred after the student reached the age of 15, and it is at least one year after the date the student exhausted all administrative appeals connected to the disciplinary action.
  - c. The student needs the certificate in order to drive to and from school, a drug or alcohol treatment counseling program, as appropriate, or a mental health treatment program, and no other transportation is available.
- (4) A student whose permit or license is denied or revoked due to ineligibility for a certificate under this subsection may otherwise be eligible for a certificate if, after six months from the date of the ineligibility, the school administrator determines that one of the following conditions is met:
- a. The student has returned to school or has been placed in an alternative educational setting, and has displayed exemplary student behavior, as defined by the applicable State entity.
  - b. The disciplinary action was for the possession or sale of an alcoholic beverage or an illegal controlled substance on school property, and the student subsequently attended and successfully completed, as defined by the applicable State entity, a drug or alcohol treatment counseling program, as appropriate. (1935, c. 52, s. 6; 1953, c. 355; 1955, c. 1187, s. 8; 1963, c. 968, ss. 2, 2A; 1965, c. 410, s. 3; c. 1171; 1967, c. 694; 1969, c. 37; 1973, c. 191, ss. 1, 2; c. 664, ss. 1, 2; 1975, c. 79; c. 716, s. 5; 1979, c. 101; c. 667, ss. 15, 16, 41; 1981 (Reg. Sess., 1982), c. 1257, s. 2; 1989 (Reg. Sess., 1990), c. 1021, s. 11; 1991, c. 689, s. 326; 1993, c. 539, s. 319; 1994, Ex. Sess., c. 24, s. 14(c); 1997-16, s. 1; 1997-443, s. 32.20; 1997-507, s. 1; 1998-149, ss. 2.1, 2.2, 2.3, 2.4, 2.5; 1998-212, s. 9.21(c); 1999-243, ss. 1, 2; 1999-276, s. 1; 1999-387, s. 4; 1999-452, s. 9; 2001-194, s. 1; 2001-487, s. 51.5(a); 2002-73, ss. 1, 2; 2002-159, s. 30; 2005-276, s. 44.1(b); 2006-177, ss. 2-7.)

#### **Effect of Amendments. —**

Session Laws 2006-177, ss. 2-7, effective December 1, 2006, and applicable to offenses committed on or after that date, added subdivisions (c)(6) and (e)(6); inserted “or a violation of G.S. 20-137.3” in the middle of subdivisions (d)(2) and (f)(2); added the last sentence in subsection

(g); and, in subsection (l), added the third sentence, substituted “subsections (e) and (g)” for “subsection (e)” in the fifth sentence, inserted “of subdivisions (1), (2), (3), (4), and (5)” in the middle of the sixth sentence, and added the last sentence.

## **§ 20-16. Authority of Division to suspend license.**

### **CASE NOTES**

#### **I. In General.**

##### **I. IN GENERAL.**

N.C. App. —, 630 S.E.2d 4, 2006 N.C. App. LEXIS 1080 (2006).

**Cited in** *Shavitz v. City of High Point*, —

## **§ 20-16.2. Implied consent to chemical analysis; mandatory revocation of license in event of refusal; right of driver to request analysis.**

(a) **Basis for Officer to Require Chemical Analysis; Notification of Rights. —**



Any person who drives a vehicle on a highway or public vehicular area thereby gives consent to a chemical analysis if charged with an implied-consent offense. Any law enforcement officer who has reasonable grounds to believe that the person charged has committed the implied-consent offense may obtain a chemical analysis of the person.

Before any type of chemical analysis is administered the person charged shall be taken before a chemical analyst authorized to administer a test of a person's breath or a law enforcement officer who is authorized to administer chemical analysis of the breath, who shall inform the person orally and also give the person a notice in writing that:

- (1) You have been charged with an implied-consent offense. Under the implied-consent law, you can refuse any test, but your drivers license will be revoked for one year and could be revoked for a longer period of time under certain circumstances, and an officer can compel you to be tested under other laws.
- (2) Repealed by Session Laws 2006-253, s. 15, effective December 1, 2006, and applicable to offenses committed on or after that date.
- (3) The test results, or the fact of your refusal, will be admissible in evidence at trial.
- (4) Your driving privilege will be revoked immediately for at least 30 days if you refuse any test or the test result is 0.08 or more, 0.04 or more if you were driving a commercial vehicle, or 0.01 or more if you are under the age of 21.
- (5) After you are released, you may seek your own test in addition to this test.
- (6) You may call an attorney for advice and select a witness to view the testing procedures remaining after the witness arrives, but the testing may not be delayed for these purposes longer than 30 minutes from the time you are notified of these rights. You must take the test at the end of 30 minutes even if you have not contacted an attorney or your witness has not arrived.

(a1) **Meaning of Terms.** — Under this section, an “implied-consent offense” is an offense involving impaired driving or an alcohol-related offense made subject to the procedures of this section. A person is “charged” with an offense if the person is arrested for it or if criminal process for the offense has been issued.

(b) **Unconscious Person May Be Tested.** — If a law enforcement officer has reasonable grounds to believe that a person has committed an implied-consent offense, and the person is unconscious or otherwise in a condition that makes the person incapable of refusal, the law enforcement officer may direct the taking of a blood sample or may direct the administration of any other chemical analysis that may be effectively performed. In this instance the notification of rights set out in subsection (a) and the request required by subsection (c) are not necessary.

(c) **Request to Submit to Chemical Analysis.** — A law enforcement officer or chemical analyst shall designate the type of test or tests to be given and may request the person charged to submit to the type of chemical analysis designated. If the person charged willfully refuses to submit to that chemical analysis, none may be given under the provisions of this section, but the refusal does not preclude testing under other applicable procedures of law.

(c1) **Procedure for Reporting Results and Refusal to Division.** — Whenever a person refuses to submit to a chemical analysis, a person has an alcohol concentration of 0.16 or more, or a person's drivers license has an alcohol concentration restriction and the results of the chemical analysis establish a violation of the restriction, the law enforcement officer and the chemical analyst shall without unnecessary delay go before an official authorized to administer oaths and execute an affidavit(s) stating that:

- (1) The person was charged with an implied-consent offense or had an alcohol concentration restriction on the drivers license;
- (2) A law enforcement officer had reasonable grounds to believe that the person had committed an implied-consent offense or violated the alcohol concentration restriction on the drivers license;
- (3) Whether the implied-consent offense charged involved death or critical injury to another person, if the person willfully refused to submit to chemical analysis;
- (4) The person was notified of the rights in subsection (a); and
- (5) The results of any tests given or that the person willfully refused to submit to a chemical analysis.

If the person's drivers license has an alcohol concentration restriction, pursuant to G.S. 20-19(c3), and an officer has reasonable grounds to believe the person has violated a provision of that restriction other than violation of the alcohol concentration level, the officer and chemical analyst shall complete the applicable sections of the affidavit and indicate the restriction which was violated. The officer shall immediately mail the affidavit(s) to the Division. If the officer is also the chemical analyst who has notified the person of the rights under subsection (a), the officer may perform alone the duties of this subsection.

(d) Consequences of Refusal; Right to Hearing before Division; Issues. — Upon receipt of a properly executed affidavit required by subsection (c1), the Division shall expeditiously notify the person charged that the person's license to drive is revoked for 12 months, effective on the tenth calendar day after the mailing of the revocation order unless, before the effective date of the order, the person requests in writing a hearing before the Division. Except for the time referred to in G.S. 20-16.5, if the person shows to the satisfaction of the Division that his or her license was surrendered to the court, and remained in the court's possession, then the Division shall credit the amount of time for which the license was in the possession of the court against the 12-month revocation period required by this subsection. If the person properly requests a hearing, the person retains his or her license, unless it is revoked under some other provision of law, until the hearing is held, the person withdraws the request, or the person fails to appear at a scheduled hearing. The hearing officer may subpoena any witnesses or documents that the hearing officer deems necessary. The person may request the hearing officer to subpoena the charging officer, the chemical analyst, or both to appear at the hearing if the person makes the request in writing at least three days before the hearing. The person may subpoena any other witness whom the person deems necessary, and the provisions of G.S. 1A-1, Rule 45, apply to the issuance and service of all subpoenas issued under the authority of this section. The hearing officer is authorized to administer oaths to witnesses appearing at the hearing. The hearing shall be conducted in the county where the charge was brought, and shall be limited to consideration of whether:

- (1) The person was charged with an implied-consent offense or the driver had an alcohol concentration restriction on the drivers license pursuant to G.S. 20-19;
- (2) A law enforcement officer had reasonable grounds to believe that the person had committed an implied-consent offense or violated the alcohol concentration restriction on the drivers license;
- (3) The implied-consent offense charged involved death or critical injury to another person, if this allegation is in the affidavit;
- (4) The person was notified of the person's rights as required by subsection (a); and
- (5) The person willfully refused to submit to a chemical analysis.

If the Division finds that the conditions specified in this subsection are met, it shall order the revocation sustained. If the Division finds that any of the



conditions (1), (2), (4), or (5) is not met, it shall rescind the revocation. If it finds that condition (3) is alleged in the affidavit but is not met, it shall order the revocation sustained if that is the only condition that is not met; in this instance subsection (d1) does not apply to that revocation. If the revocation is sustained, the person shall surrender his or her license immediately upon notification by the Division.

(d1) Consequences of Refusal in Case Involving Death or Critical Injury. — If the refusal occurred in a case involving death or critical injury to another person, no limited driving privilege may be issued. The 12-month revocation begins only after all other periods of revocation have terminated unless the person's license is revoked under G.S. 20-28, 20-28.1, 20-19(d), or 20-19(e). If the revocation is based on those sections, the revocation under this subsection begins at the time and in the manner specified in subsection (d) for revocations under this section. However, the person's eligibility for a hearing to determine if the revocation under those sections should be rescinded is postponed for one year from the date on which the person would otherwise have been eligible for the hearing. If the person's driver's license is again revoked while the 12-month revocation under this subsection is in effect, that revocation, whether imposed by a court or by the Division, may only take effect after the period of revocation under this subsection has terminated.

(e) Right to Hearing in Superior Court. — If the revocation for a willful refusal is sustained after the hearing, the person whose license has been revoked has the right to file a petition in the superior court for a hearing on the record. The superior court review shall be limited to whether there is sufficient evidence in the record to support the Commissioner's findings of fact and whether the conclusions of law are supported by the findings of fact and whether the Commissioner committed an error of law in revoking the license.

(e1) Limited Driving Privilege after Six Months in Certain Instances. — A person whose driver's license has been revoked under this section may apply for and a judge authorized to do so by this subsection may issue a limited driving privilege if:

- (1) At the time of the refusal the person held either a valid drivers license or a license that had been expired for less than one year;
- (2) At the time of the refusal, the person had not within the preceding seven years been convicted of an offense involving impaired driving;
- (3) At the time of the refusal, the person had not in the preceding seven years willfully refused to submit to a chemical analysis under this section;
- (4) The implied consent offense charged did not involve death or critical injury to another person;
- (5) The underlying charge for which the defendant was requested to submit to a chemical analysis has been finally disposed of:
  - a. Other than by conviction; or
  - b. By a conviction of impaired driving under G.S. 20-138.1, at a punishment level authorizing issuance of a limited driving privilege under G.S. 20-179.3(b), and the defendant has complied with at least one of the mandatory conditions of probation listed for the punishment level under which the defendant was sentenced;
- (6) Subsequent to the refusal the person has had no unresolved pending charges for or additional convictions of an offense involving impaired driving;
- (7) The person's license has been revoked for at least six months for the refusal; and
- (8) The person has obtained a substance abuse assessment from a mental health facility and successfully completed any recommended training or treatment program.



Except as modified in this subsection, the provisions of G.S. 20-179.3 relating to the procedure for application and conduct of the hearing and the restrictions required or authorized to be included in the limited driving privilege apply to applications under this subsection. If the case was finally disposed of in the district court, the hearing shall be conducted in the district court district as defined in G.S. 7A-133 in which the refusal occurred by a district court judge. If the case was finally disposed of in the superior court, the hearing shall be conducted in the superior court district or set of districts as defined in G.S. 7A-41.1 in which the refusal occurred by a superior court judge. A limited driving privilege issued under this section authorizes a person to drive if the person's license is revoked solely under this section or solely under this section and G.S. 20-17(2). If the person's license is revoked for any other reason, the limited driving privilege is invalid.

(f) Notice to Other States as to Nonresidents. — When it has been finally determined under the procedures of this section that a nonresident's privilege to drive a motor vehicle in this State has been revoked, the Division shall give information in writing of the action taken to the motor vehicle administrator of the state of the person's residence and of any state in which the person has a license.

(g) Repealed by Session Laws 1973, c. 914.

(h) Repealed by Session Laws 1979, c. 423, s. 2.

(i) Right to Chemical Analysis before Arrest or Charge. — A person stopped or questioned by a law enforcement officer who is investigating whether the person may have committed an implied consent offense may request the administration of a chemical analysis before any arrest or other charge is made for the offense. Upon this request, the officer shall afford the person the opportunity to have a chemical analysis of his or her breath, if available, in accordance with the procedures required by G.S. 20-139.1(b). The request constitutes the person's consent to be transported by the law enforcement officer to the place where the chemical analysis is to be administered. Before the chemical analysis is made, the person shall confirm the request in writing and shall be notified:

- (1) That the test results will be admissible in evidence and may be used against you in any implied consent offense that may arise;
- (2) Your driving privilege will be revoked immediately for at least 30 days if the test result is 0.08 or more, 0.04 or more if you were driving a commercial vehicle, or 0.01 or more if you are under the age of 21.
- (3) That if you fail to comply fully with the test procedures, the officer may charge you with any offense for which the officer has probable cause, and if you are charged with an implied consent offense, your refusal to submit to the testing required as a result of that charge would result in revocation of your driving privilege. The results of the chemical analysis are admissible in evidence in any proceeding in which they are relevant. (1963, c. 966, s. 1; 1965, c. 1165; 1969, c. 1074, s. 1; 1971, c. 619, ss. 3-6; 1973, c. 206, ss. 1, 2; cc. 824, 914; 1975, c. 716, s. 5; 1977, c. 812; 1979, c. 423, s. 2; 1979, 2nd Sess., c. 1160; 1981, c. 412, s. 4; c. 747, s. 66; 1983, c. 87; c. 435, s. 11; 1983 (Reg. Sess., 1984), c. 1101, ss. 5-8; 1987, c. 797, s. 3; 1987 (Reg. Sess., 1988), c. 1037, ss. 76, 77; c. 1112; 1989, c. 771, ss. 13, 14, 18; 1991, c. 689, s. 233.1(c); 1993, c. 285, ss. 3, 4; 1995, c. 163, s. 1; 1997-379, ss. 3.1-3.3; 1998-182, s. 28; 1999-406, ss. 1, 10; 2000-155, s. 5; 2006-253, s. 15.)

**Editor's Note. —**

Session Laws 2006-253, s. 1, provides: "This act shall be known as 'The Motor Vehicle Driver Protection Act of 2006.'"

**Effect of Amendments. —**

Session Laws 2006-253, s. 15, effective December 1, 2006, and applicable to offenses committed on or after that date, rewrote the section.

## CASE NOTES

## I. In General.

## I. IN GENERAL.

81, 614 S.E.2d 323, 2005 N.C. App. LEXIS 1190 (2005).

Applied in *State v. Streckfuss*, 171 N.C. App.

**§ 20-16.3. Alcohol screening tests required of certain drivers; approval of test devices and manner of use by Department of Health and Human Services; use of test results or refusal.**

(a) When Alcohol Screening Test May Be Required; Not an Arrest. — A law-enforcement officer may require the driver of a vehicle to submit to an alcohol screening test within a relevant time after the driving if the officer has:

- (1) Reasonable grounds to believe that the driver has consumed alcohol and has:
  - a. Committed a moving traffic violation; or
  - b. Been involved in an accident or collision; or
- (2) An articulable and reasonable suspicion that the driver has committed an implied-consent offense under G.S. 20-16.2, and the driver has been lawfully stopped for a driver's license check or otherwise lawfully stopped or lawfully encountered by the officer in the course of the performance of the officer's duties.

Requiring a driver to submit to an alcohol screening test in accordance with this section does not in itself constitute an arrest.

(b) Approval of Screening Devices and Manner of Use. — The Department of Health and Human Services is directed to examine and approve devices suitable for use by law-enforcement officers in making on-the-scene tests of drivers for alcohol concentration. For each alcohol screening device or class of devices approved, the Department must adopt regulations governing the manner of use of the device. For any alcohol screening device that tests the breath of a driver, the Department is directed to specify in its regulations the shortest feasible minimum waiting period that does not produce an unacceptably high number of false positive test results.

(c) Tests Must Be Made with Approved Devices and in Approved Manner. — No screening test for alcohol concentration is a valid one under this section unless the device used is one approved by the Department and the screening test is conducted in accordance with the applicable regulations of the Department as to the manner of its use.

(d) Use of Screening Test Results or Refusal by Officer. — The fact that a driver showed a positive or negative result on an alcohol screening test, but not the actual alcohol concentration result, or a driver's refusal to submit may be used by a law-enforcement officer, is admissible in a court, or may also be used by an administrative agency in determining if there are reasonable grounds for believing:

- (1) That the driver has committed an implied-consent offense under G.S. 20-16.2; and
- (2) That the driver had consumed alcohol and that the driver had in his or her body previously consumed alcohol, but not to prove a particular alcohol concentration. Negative results on the alcohol screening test may be used in factually appropriate cases by the officer, a court, or an administrative agency in determining whether a person's alleged impairment is caused by an impairing substance other than alcohol. (1973, c. 312, s. 1; c. 476, s. 128; 1981, c. 412, s. 4; c. 747, s. 66; 1983, c. 435, s. 12; 2006-253, s. 7.)



**Editor's Note.** — Session Laws 2006-253, s. 1, provides: "This act shall be known as 'The Motor Vehicle Driver Protection Act of 2006.'"

**Effect of Amendments.** — Session Laws

2006-253, s. 7, effective December 1, 2006, and applicable to offenses committed on or after that date, rewrote the section and section heading.

## § 20-16.3A. Checking stations and roadblocks.

(a) A law-enforcement agency may conduct checking stations to determine compliance with the provisions of this Chapter. If the agency is conducting a checking station for the purposes of determining compliance with this Chapter, it must:

- (1) Repealed by Session Laws 2006-253, s. 4, effective December 1, 2006, and applicable to offenses committed on or after that date.
- (2) Designate in advance the pattern both for stopping vehicles and for requesting drivers that are stopped to produce drivers license, registration, or insurance information.
- (2a) Operate under a written policy that provides guidelines for the pattern, which need not be in writing. The policy may be either the agency's own policy, or if the agency does not have a written policy, it may be the policy of another law enforcement agency, and may include contingency provisions for altering either pattern if actual traffic conditions are different from those anticipated, but no individual officer may be given discretion as to which vehicle is stopped or, of the vehicles stopped, which driver is requested to produce drivers license, registration, or insurance information. If officers of a law enforcement agency are operating under another agency's policy, it must be stated in writing.
- (3) Advise the public that an authorized checking station is being operated by having, at a minimum, one law enforcement vehicle with its blue light in operation during the conducting of the checking station.

(b) An officer who determines there is a reasonable suspicion that an occupant has violated a provision of this Chapter, or any other provision of law, may detain the driver to further investigate in accordance with law. The operator of any vehicle stopped at a checking station established under this subsection may be requested to submit to an alcohol screening test under G.S. 20-16.3 if during the course of the stop the officer determines the driver had previously consumed alcohol or has an open container of alcoholic beverage in the vehicle. The officer so requesting shall consider the results of any alcohol screening test or the driver's refusal in determining if there is reasonable suspicion to investigate further.

(c) Law enforcement agencies may conduct any type of checking station or roadblock as long as it is established and operated in accordance with the provisions of the United States Constitution and the Constitution of North Carolina.

(d) The placement of checkpoints should be random or statistically indicated, and agencies shall avoid placing checkpoints repeatedly in the same location or proximity. This subsection shall not be grounds for a motion to suppress or a defense to any offense arising out of the operation of a checking station. (1983, c. 435, s. 22; 2006-253, s. 4.)

**Editor's Note.** — Session Laws 2006-253, s. 1, provides: "This act shall be known as 'The Motor Vehicle Driver Protection Act of 2006.'"

**Effect of Amendments.** — Session Laws

2006-253, s. 4, effective December 1, 2006, and applicable to offenses committed on or after that date, rewrote the section and section heading.



## CASE NOTES

**Cited in** State v. Bowden, — N.C. App. —, 630 S.E.2d 208, 2006 N.C. App. LEXIS 1218 (2006).

### § 20-16.5. Immediate civil license revocation for certain persons charged with implied-consent offenses.

## CASE NOTES

**Impact of Double Jeopardy Clause.** — Revocation of defendant's driver's license did not constitute jeopardy for double jeopardy pur-

poses because it was not a punishment. State v. Streckfuss, 171 N.C. App. 81, 614 S.E.2d 323, 2005 N.C. App. LEXIS 1190 (2005).

### § 20-17. Mandatory revocation of license by Division.

(a) The Division shall forthwith revoke the license of any driver upon receiving a record of the driver's conviction for any of the following offenses:

- (1) Manslaughter (or negligent homicide) resulting from the operation of a motor vehicle.
- (2) Either of the following impaired driving offenses:
  - a. Impaired driving under G.S. 20-138.1.
  - b. Impaired driving under G.S. 20-138.2, if the driver's alcohol concentration level was .06 or higher. For the purposes of this sub-subdivision, the driver's alcohol concentration level result, obtained by chemical analysis, shall be conclusive and is not subject to modification by any party, with or without approval by the court.
- (3) Any felony in the commission of which a motor vehicle is used.
- (4) Failure to stop and render aid in violation of G.S. 20-166(a) or (b).
- (5) Perjury or the making of a false affidavit or statement under oath to the Division under this Article or under any other law relating to the ownership of motor vehicles.
- (6) Conviction, within a period of 12 months, of (i) two charges of reckless driving, (ii) two charges of aggressive driving, or (iii) one or more charges of reckless driving and one or more charges of aggressive driving.
- (7) Conviction upon one charge of aggressive driving or reckless driving while engaged in the illegal transportation of intoxicants for the purpose of sale.
- (8) Conviction of using a false or fictitious name or giving a false or fictitious address in any application for a drivers license, or learner's permit, or any renewal or duplicate thereof, or knowingly making a false statement or knowingly concealing a material fact or otherwise committing a fraud in any such application or procuring or knowingly permitting or allowing another to commit any of the foregoing acts.
- (9) Death by vehicle as defined in G.S. 20-141.4.
- (10) Repealed by Session Laws 1997-443, s. 19.26(b).
- (11) Conviction of assault with a motor vehicle.
- (12) A second or subsequent conviction of transporting an open container of alcoholic beverage under G.S. 20-138.7.
- (13) A second or subsequent conviction, as defined in G.S. 20-138.2A(d), of driving a commercial motor vehicle after consuming alcohol under G.S. 20-138.2A.

- (14) A conviction of driving a school bus, school activity bus, or child care vehicle after consuming alcohol under G.S. 20-138.2B.
  - (15) A conviction of malicious use of an explosive or incendiary device to damage property (G.S. 14-49(b) and (b1)); making a false report concerning a destructive device in a public building (G.S. 14-69.1(c)); perpetrating a hoax concerning a destructive device in a public building (G.S. 14-69.2(c)); possessing or carrying a dynamite cartridge, bomb, grenade, mine, or powerful explosive on educational property (G.S. 14-269.2(b1)); or causing, encouraging, or aiding a minor to possess or carry a dynamite cartridge, bomb, grenade, mine, or powerful explosive on educational property (G.S. 14-269.2(c1)).
  - (16) A second or subsequent conviction of larceny of motor fuel under G.S. 14-72.5. A conviction for violating G.S. 14-72.5 is a second or subsequent conviction if at the time of the current offense the person has a previous conviction under G.S. 14-72.5 that occurred in the seven years immediately preceding the date of the current offense.
- (b) On the basis of information provided by the child support enforcement agency or the clerk of court, the Division shall:
- (1) Ensure that no license or right to operate a motor vehicle under this Chapter is renewed or issued to an obligor who is delinquent in making child support payments when a court of record has issued a revocation order pursuant to G.S. 110-142.2 or G.S. 50-13.12. The obligor shall not be entitled to any other hearing before the Division as a result of the revocation of his license pursuant to G.S. 110-142.2 or G.S. 50-13.12; or
  - (2) Revoke the drivers license of any person who has willfully failed to complete court-ordered community service and a court has issued a revocation order. This revocation shall continue until the Division receives certification from the clerk of court that the person has completed the court-ordered community service. No person whose drivers license is revoked pursuant to this subdivision shall be entitled to any other hearing before the Division as a result of this revocation. (1935, c. 52, s. 12; 1947, c. 1067, s. 14; 1967, c. 1098, s. 2; 1971, c. 619, s. 7; 1973, c. 18, s. 1; c. 1081, s. 3; c. 1330, s. 2; 1975, c. 716, s. 5; c. 831; 1979, c. 667, ss. 20, 41; 1981, c. 412, s. 4; c. 747, s. 66; 1983, c. 435, s. 15; 1989, c. 771, s. 11; 1991, c. 726, s. 7; 1993 (Reg. Sess., 1994), c. 761, s. 1; 1995, c. 506, s. 7; c. 538, s. 2(b); 1997-234, s. 3; 1997-443, s. 19.26(b); 1998-182, s. 18; 1999-257, s. 4.1; 2001-352, s. 3; 2001-487, s. 52; 2004-193, ss. 4, 5; 2006-253, s. 22.2.)

**Editor's Note. —**

Session Laws 2006-253, s. 1, provides: "This act shall be known as 'The Motor Vehicle Driver Protection Act of 2006.'"

**Effect of Amendments. —**

Session Laws 2006-253, s. 22.2, effective December 1, 2006, and applicable to offenses committed on or after that date, rewrote subdivision (a)(2)b.

## CASE NOTES

### II. Impaired Driving.

#### II. IMPAIRED DRIVING.

##### **Revocation of a driver's license is mandatory, etc. —**

Under G.S. 20-17(a)(2), defendant's driver's license was subject to mandatory revocation for

one year because she was convicted under G.S. 20-138.1 for driving with an alcohol concentration of 0.16. *State v. Benbow*, 169 N.C. App. 613, 610 S.E.2d 297, 2005 N.C. App. LEXIS 687 (2005).

**§ 20-17.2:** Repealed by Session Laws 2006-253, s. 25, effective December 1, 2006, and applicable to offenses committed on or after that date.

**§ 20-17.8. Restoration of a license after certain driving while impaired convictions; ignition interlock.**

(a) Scope. — This section applies to a person whose license was revoked as a result of a conviction of driving while impaired, G.S. 20-138.1, and:

- (1) The person had an alcohol concentration of 0.16 or more; or
- (2) The person has been convicted of another offense involving impaired driving, which offense occurred within seven years immediately preceding the date of the offense for which the person's license has been revoked.

(b) Ignition Interlock Required. — Except as provided in subsection (l) of this section, when the Division restores the license of a person who is subject to this section, in addition to any other restriction or condition, it shall require the person to agree to and shall indicate on the person's drivers license the following restrictions for the period designated in subsection (c):

- (1) A restriction that the person may operate only a vehicle that is equipped with a functioning ignition interlock system of a type approved by the Commissioner. The Commissioner shall not unreasonably withhold approval of an ignition interlock system and shall consult with the Division of Purchase and Contract in the Department of Administration to ensure that potential vendors are not discriminated against.
- (2) A requirement that the person personally activate the ignition interlock system before driving the motor vehicle.
- (3) An alcohol concentration restriction as follows:
  - a. If the ignition interlock system is required pursuant only to subdivision (a)(1) of this section, a requirement that the person not drive with an alcohol concentration of 0.04 or greater;
  - b. If the ignition interlock system is required pursuant to subdivision (a)(2) of this section, a requirement that the person not drive with an alcohol concentration of greater than 0.00; or
  - c. If the ignition interlock system is required pursuant to subdivision (a)(1) of this section, and the person has also been convicted, based on the same set of circumstances, of: (i) driving while impaired in a commercial vehicle, G.S. 20-138.2, (ii) driving while less than 21 years old after consuming alcohol or drugs, G.S. 20-138.3, (iii) felony death by vehicle, G.S. 20-141.4(a1), or (iv) manslaughter or negligent homicide resulting from the operation of a motor vehicle when the offense involved impaired driving, a requirement that the person not drive with an alcohol concentration of greater than 0.00.

(c) Length of Requirement. — The requirements of subsection (b) shall remain in effect for:

- (1) One year from the date of restoration if the original revocation period was one year;
- (2) Three years from the date of restoration if the original revocation period was four years; or
- (3) Seven years from the date of restoration if the original revocation was a permanent revocation.

(c1) Vehicles Subject to Requirement. — A person subject to this section shall have all registered vehicles owned by that person equipped with a functioning ignition interlock system of a type approved by the Commissioner,



unless the Division determines that one or more specific registered vehicles owned by that person are relied upon by another member of that person's family for transportation and that the vehicle is not in the possession of the person subject to this section.

(d) Effect of Limited Driving Privileges. — If the person was eligible for and received a limited driving privilege under G.S. 20-179.3, with the ignition interlock requirement contained in G.S. 20-179.3(g5), the period of time for which that limited driving privilege was held shall be applied towards the requirements of subsection (c).

(e) Notice of Requirement. — When a court reports to the Division a conviction of a person who is subject to this section, the Division must send the person written notice of the requirements of this section and of the consequences of failing to comply with these requirements. The notification must include a statement that the person may contact the Division for information on obtaining and having installed an ignition interlock system of a type approved by the Commissioner.

(f) Effect of Violation of Restriction. — A person subject to this section who violates any of the restrictions of this section commits the offense of driving while license revoked under G.S. 20-28(a) and is subject to punishment and license revocation as provided in that section. If a law enforcement officer has reasonable grounds to believe that a person subject to this section has consumed alcohol while driving or has driven while he has remaining in his body any alcohol previously consumed, the suspected offense of driving while license is revoked is an alcohol-related offense subject to the implied-consent provisions of G.S. 20-16.2. If a person subject to this section is charged with driving while license revoked by violating a condition of subsection (b) of this section, and a judicial official determines that there is probable cause for the charge, the person's license is suspended pending the resolution of the case, and the judicial official must require the person to surrender the license. The judicial official must also notify the person that he is not entitled to drive until his case is resolved. An alcohol concentration report from the ignition interlock system shall not be admissible as evidence of driving while license revoked, nor shall it be admissible in an administrative revocation proceeding as provided in subsection (g) of this section, unless the person operated a vehicle when the ignition interlock system indicated an alcohol concentration in violation of the restriction placed upon the person by subdivision (b)(3) of this section. If a person subject to this section is charged with driving while license revoked by violating the requirements of subsection (c1) of this section, and no other violation of this section is alleged, the court may make a determination at the hearing of the case that the vehicle, on which the ignition interlock system was not installed, was relied upon by another member of that person's family for transportation and that the vehicle was not in the possession of the person subject to this section, and therefore the vehicle was not required to be equipped with a functioning ignition interlock system. If the court determines that the vehicle was not required to be equipped with a functioning ignition interlock system and the person subject to this section has committed no other violation of this section, the court shall find the person not guilty of driving while license revoked.

(g) Effect of Violation of Restriction When Driving While License Revoked Not Charged. — A person subject to this section who violates any of the restrictions of this section, but is not charged or convicted of driving while license revoked pursuant to G.S. 20-28(a), shall have the person's license revoked by the Division for a period of one year.

(h) Beginning of Revocation Period. — If the original period of revocation was imposed pursuant to G.S. 20-19(d) or (e), any remaining period of the original revocation, prior to its reduction, shall be reinstated and the revoca-

tion required by subsection (f) or (g) of this section begins after all other periods of revocation have terminated.

(i) Notification of Revocation. — If the person's license has not already been surrendered to the court, the Division must expeditiously notify the person that the person's license to drive is revoked pursuant to subsection (f) or (g) of this section effective on the tenth calendar day after the mailing of the revocation order.

(j) Right to Hearing Before Division; Issues. — If the person's license is revoked pursuant to subsection (g) of this section, before the effective date of the order issued under subsection (i) of this section, the person may request in writing a hearing before the Division. Except for the time referred to in G.S. 20-16.5, if the person shows to the satisfaction of the Division that the person's license was surrendered to the court and remained in the court's possession, then the Division shall credit the amount of time for which the license was in the possession of the court against the revocation period required by subsection (g) of this section. If the person properly requests a hearing, the person retains the person's license, unless it is revoked under some other provision of law, until the hearing is held, the person withdraws the request, or the person fails to appear at a scheduled hearing. The hearing officer may subpoena any witnesses or documents that the hearing officer deems necessary. The person may request the hearing officer to subpoena the charging officer, the chemical analyst, or both to appear at the hearing if the person makes the request in writing at least three days before the hearing. The person may subpoena any other witness whom the person deems necessary, and the provisions of G.S. 1A-1, Rule 45, apply to the issuance and service of all subpoenas issued under the authority of this section. The hearing officer is authorized to administer oaths to witnesses appearing at the hearing. The hearing must be conducted in the county where the charge was brought, and must be limited to consideration of whether:

- (1) The drivers license of the person had an ignition interlock requirement; and
- (2) The person:
  - a. Was driving a vehicle that was not equipped with a functioning ignition interlock system; or
  - b. Did not personally activate the ignition interlock system before driving the vehicle; or
  - c. Drove the vehicle in violation of an applicable alcohol concentration restriction prescribed by subdivision (b)(3) of this section.

If the Division finds that the conditions specified in this subsection are met, it must order the revocation sustained. If the Division finds that the condition of subdivision (1) is not met, or that none of the conditions of subdivision (2) are met, it must rescind the revocation. If the revocation is sustained, the person must surrender the person's license immediately upon notification by the Division. If the revocation is sustained, the person may appeal the decision of the Division pursuant to G.S. 20-25.

(k) Restoration After Violation. — When the Division restores the license of a person whose license was revoked pursuant to subsection (f) or (g) of this section and the revocation occurred prior to completion of time period required by subsection (c) of this section, in addition to any other restriction or condition, it shall require the person to comply with the conditions of subsection (b) of this section until the person has complied with those conditions for the cumulative period of time as set forth in subsection (c) of this section. The period of time for which the person successfully complied with subsection (b) of this section prior to revocation pursuant to subsection (f) or (g)



of this section shall be applied towards the requirements of subsection (c) of this section.

(l) **Medical Exception to Requirement.** — A person subject to this section who has a medically diagnosed physical condition that makes the person incapable of personally activating an ignition interlock system may request an exception to the requirements of this section from the Division. The Division shall not issue an exception to this section unless the person has submitted to a physical examination by two or more physicians or surgeons duly licensed to practice medicine in this State or in any other state of the United States and unless such examining physicians or surgeons have completed and signed a certificate in the form prescribed by the Division. Such certificate shall be devised by the Commissioner with the advice of those qualified experts in the field of diagnosing and treating physical disorders that the Commissioner may select and shall be designed to elicit the maximum medical information necessary to aid in determining whether or not the person is capable of personally activating an ignition interlock system. The certificate shall contain a waiver of privilege and the recommendation of the examining physician to the Commissioner as to whether the person is capable of personally activating an ignition interlock system.

The Commissioner is not bound by the recommendations of the examining physicians but shall give fair consideration to such recommendations in acting upon the request for medical exception, the criterion being whether or not, upon all the evidence, it appears that the person is in fact incapable of personally activating an ignition interlock system. The burden of proof of such fact is upon the person seeking the exception.

Whenever an exception is denied by the Commissioner, such denial may be reviewed by a reviewing board upon written request of the person seeking the exception filed with the Division within 10 days after receipt of such denial. The composition, procedures, and review of the reviewing board shall be as provided in G.S. 20-9(g)(4). (1999-406, s. 3; 2000-155, ss. 1-3; 2001-487, s. 8; 2006-253, ss. 22.3, 22.4.)

**Editor's Note.** —

Session Laws 2006-253, s. 1, provides: "This act shall be known as 'The Motor Vehicle Driver Protection Act of 2006.'"

**Effect of Amendments.** — Session Laws 2006-253, ss. 22.3 and 22.4, effective December

1, 2006, and applicable to offenses committed on or after that date, inserted "Except as provided in subsection (l) of this section" at the beginning of subsection (b); and added subsection (l).

## CASE NOTES

**No Exceptions to Ignition Interlock Device.** — G.S. 20-17.8 does not provide any exceptions to the mandatory ignition interlock device. *State v. Benbow*, 169 N.C. App. 613, 610 S.E.2d 297, 2005 N.C. App. LEXIS 687 (2005).

**Review Process.** — There is no review process under G.S. 20-17.8 which would allow a defendant to present her arguments to the Division of Motor Vehicles (DMV); G.S. 20-17.8(j) governs appeals of a DMV decision in cases where a person has violated the requirements of G.S. 20-17.8, but it does not govern instances where a person seeks an exemption from the requirement. *State v. Benbow*, 169

N.C. App. 613, 610 S.E.2d 297, 2005 N.C. App. LEXIS 687 (2005).

**No Right to Appeal Mandatory Revocation.** — There is no right to appeal to a court where the cancellation of the license is mandatory, and the provisions of G.S. 20-17.8 are mandatory; thus, the district court could not review, under G.S. 20-25, a decision by the Division of Motor Vehicles that decided not to reinstate, without a requisite ignition interlock device, the license of a driver whose license had been suspended for violating G.S. 20-17.8. *State v. Benbow*, 169 N.C. App. 613, 610 S.E.2d 297, 2005 N.C. App. LEXIS 687 (2005).



## § 20-19. Period of suspension or revocation; conditions of restoration.

### CASE NOTES

**Cited** in *State v. Benbow*, 169 N.C. App. 613, 610 S.E.2d 297, 2005 N.C. App. LEXIS 687 (2005).

## § 20-22. Suspending privileges of nonresidents and reporting convictions.

### CASE NOTES

**Revocation of Out-of-State License.** — analysis was permissible. *State v. Streckfuss*, 171 N.C. App. 81, 614 S.E.2d 323, 2005 N.C. App. LEXIS 1190 (2005).

## § 20-25. Right of appeal to court.

### CASE NOTES

**But Mandatory Revocations Under G.S. 20-17 Are Not Reviewable, etc.** —

There is no right to appeal to a court where the cancellation of the license is mandatory, and the provisions of G.S. 20-17.8 are mandatory; thus, the district court could not review, under G.S. 20-25, a decision by the Division of

Motor Vehicles that decided not to reinstate, without a requisite ignition interlock device, the license of a driver whose license had been suspended for violating G.S. 20-17.8. *State v. Benbow*, 169 N.C. App. 613, 610 S.E.2d 297, 2005 N.C. App. LEXIS 687 (2005).

## § 20-28. Unlawful to drive while license revoked, after notification, or while disqualified.

(a) **Driving While License Revoked.** — Except as provided in subsection (a1) of this section, any person whose drivers license has been revoked who drives any motor vehicle upon the highways of the State while the license is revoked is guilty of a Class 1 misdemeanor. Upon conviction, the person's license shall be revoked for an additional period of one year for the first offense, two years for the second offense, and permanently for a third or subsequent offense.

The restoree of a revoked drivers license who operates a motor vehicle upon the highways of the State without maintaining financial responsibility as provided by law shall be punished as for driving without a license.

(a1) **Driving Without Reclaiming License.** — A person convicted under subsection (a) shall be punished as if the person had been convicted of driving without a license under G.S. 20-35 if the person demonstrates to the court that either subdivisions (1) and (2), or subdivision (3) of this subsection is true:

- (1) At the time of the offense, the person's license was revoked solely under G.S. 20-16.5; and
- (2)a. The offense occurred more than 45 days after the effective date of a revocation order issued under G.S. 20-16.5(f) and the period of revocation was 45 days as provided under subdivision (3) of that subsection; or
- b. The offense occurred more than 30 days after the effective date of the revocation order issued under any other provision of G.S. 20-16.5; or

- (3) At the time of the offense the person had met the requirements of G.S. 50-13.12, or G.S. 110-142.2 and was eligible for reinstatement of the person's drivers license privilege as provided therein.

In addition, a person punished under this subsection shall be treated for drivers license and insurance rating purposes as if the person had been convicted of driving without a license under G.S. 20-35, and the conviction report sent to the Division must indicate that the person is to be so treated.

(a2) Driving After Notification or Failure to Appear. — A person shall be guilty of a Class 1 misdemeanor if:

- (1) The person drives upon a highway while that person's license is revoked for an impaired drivers license revocation after the Division has sent notification in accordance with G.S. 20-48; or
- (2) The person fails to appear for two years from the date of the charge after being charged with an implied-consent offense.

Upon conviction, the person's drivers license shall be revoked for an additional period of one year for the first offense, two years for the second offense, and permanently for a third or subsequent offense. The restorer of a revoked drivers license who operates a motor vehicle upon the highways of the State without maintaining financial responsibility as provided by law shall be punished as for driving without a license.

(b) Repealed by Session Laws 1993 (Reg. Sess., 1994), c. 761, s. 3.

(c) When Person May Apply for License. — A person whose license has been revoked may apply for a license as follows:

- (1) If revoked under subsection (a) of this section for one year, the person may apply for a license after 90 days.
- (2) If punished under subsection (a1) of this section and the original revocation was pursuant to G.S. 20-16.5, in order to obtain reinstatement of a drivers license, the person must obtain a substance abuse assessment and show proof of financial responsibility to the Division. If the assessment recommends education or treatment, the person must complete the education or treatment within the time limits specified by the Division.
- (3) If revoked under subsection (a2) of this section for one year, the person may apply for a license after one year.
- (4) If revoked under this section for two years, the person may apply for a license after one year.
- (5) If revoked under this section permanently, the person may apply for a license after three years.

(c1) Upon the filing of an application the Division may, with or without a hearing, issue a new license upon satisfactory proof that the former licensee has not been convicted of a moving violation under this Chapter or the laws of another state, a violation of any provision of the alcoholic beverage laws of this State or another state, or a violation of any provisions of the drug laws of this State or another state when any of these violations occurred during the revocation period.

(c2) The Division may impose any restrictions or conditions on the new license that the Division considers appropriate for the balance of the revocation period. When the revocation period is permanent, the restrictions and conditions imposed by the Division may not exceed three years.

(c3) A person whose license is revoked for violation of subsection (a) of this section where the person's license was originally revoked for an impaired driving revocation, or a person whose license is revoked for a violation of subsection (a2) of this section, may only have the license conditionally restored by the Division pursuant to the provisions of subsection (c4) of this section.

(c4) For a conditional restoration under subsection (c3) of this section, the Division shall require at a minimum that the driver obtain a substance abuse assessment prior to issuance of a license and show proof of financial responsibility. If the substance abuse assessment recommends education or treat-



ment, the person must complete the education or treatment within the time limits specified. If the assessment determines that the person abuses alcohol, the Division shall require the person to install and use an ignition interlock system on any vehicles that are to be driven by that person for the period of time set forth in G.S. 20-17.8(c).

(c5) For licenses conditionally restored pursuant to subsections (c3) and (c4) of this section, the Division shall cancel the license and impose the remaining revocation period if any of the following occur:

- (1) The person violates any condition of the restoration.
- (2) The person is convicted of any moving offense in this or another state.
- (3) The person is convicted for a violation of the alcoholic beverage or controlled substance laws of this or any other state.

(d) **Driving While Disqualified.** — A person who was convicted of a violation that disqualified the person and required the person's drivers license to be revoked who drives a motor vehicle during the revocation period is punishable as provided in the other subsections of this section. A person who has been disqualified who drives a commercial motor vehicle during the disqualification period is guilty of a Class 1 misdemeanor and is disqualified for an additional period as follows:

- (1) For a first offense of driving while disqualified, a person is disqualified for a period equal to the period for which the person was disqualified when the offense occurred.
- (2) For a second offense of driving while disqualified, a person is disqualified for a period equal to two times the period for which the person was disqualified when the offense occurred.
- (3) For a third offense of driving while disqualified, a person is disqualified for life.

The Division may reduce a disqualification for life under this subsection to 10 years in accordance with the guidelines adopted under G.S. 20-17.4(b). A person who drives a commercial motor vehicle while the person is disqualified and the person's drivers license is revoked is punishable for both driving while the person's license was revoked and driving while disqualified. (1935, c. 52, s. 22; 1945, c. 635; 1947, c. 1067, s. 16; 1955, c. 1020, s. 1; c. 1152, s. 18; c. 1187, s. 20; 1957, c. 1046; 1959, c. 515; 1967, c. 447; 1973, c. 47, s. 2; cc. 71, 1132; 1975, c. 716, s. 5; 1979, c. 377, ss. 1, 2; c. 667, s. 41; 1981, c. 412, s. 4; c. 747, s. 66; 1983, c. 51; 1983 (Reg. Sess., 1984), c. 1101, s. 18A; 1989, c. 771, s. 4; 1991, c. 509, s. 2; c. 726, s. 12; 1993, c. 539, ss. 320-322; 1994, Ex. Sess., c. 24, s. 14(c); 1993 (Reg. Sess., 1994), c. 761, ss. 2, 3; 1995, c. 538, s. 2(e), (f); 2002-159, s. 6; 2006-253, s. 22.1.)

**Editor's Note.** — Session Laws 2006-253, s. 1, provides: "This act shall be known as 'The Motor Vehicle Driver Protection Act of 2006.'"

**Effect of Amendments.** — Session Laws 2006-253, s. 22.1, effective December 1, 2006, and applicable to offenses committed on or after

that date, rewrote the section catchline; added subsection (a2); rewrote subsection (c); redesignated former subsection (c) as present subsections (c1) and (c2); and added subsections (c3) through (c5).

## CASE NOTES

### I. In General.

#### I. IN GENERAL.

##### **Actual or Constructive Knowledge Required for Conviction.** —

Trial court erred in denying defendant's motion to dismiss the charge against him of driving while license revoked, as the state did not

present sufficient evidence that defendant knew his license was revoked, in part because the state was unable to show that defendant had been notified of the alleged revocation. *State v. Cruz*, 173 N.C. App. 689, 620 S.E.2d 251, 2005 N.C. App. LEXIS 2288 (2005).



## **§ 20-28.2. Forfeiture of motor vehicle for impaired driving after impaired driving license revocation.**

(a) Meaning of “Impaired Driving License Revocation”. — The revocation of a person’s drivers license is an impaired driving license revocation if the revocation is pursuant to:

- (1) G.S. 20-13.2, 20-16(a)(8b), 20-16.2, 20-16.5, 20-17(a)(2), 20-17(a)(12), 20-17.2, or 20-138.5; or
- (2) G.S. 20-16(a)(7), 20-17(a)(1), 20-17(a)(3), 20-17(a)(9), or 20-17(a)(11), if the offense involves impaired driving; or
- (3) The laws of another state and the offense for which the person’s license is revoked prohibits substantially similar conduct which if committed in this State would result in a revocation listed in subdivisions (1) or (2).

(a1) Definitions. — As used in this section and in G.S. 20-28.3, 20-28.4, 20-28.5, 20-28.7, 20-28.8, and 20-28.9, the following terms mean:

- (1) Acknowledgment. — A written document acknowledging that:

- a. The motor vehicle was operated by a person charged with an offense involving impaired driving, and:
  1. That person’s drivers license was revoked as a result of a prior impaired drivers license revocation; or
  2. That person did not have a valid drivers license, and did not have liability insurance.
- b. If the motor vehicle is again operated by this particular person, and the person is charged with an offense involving impaired driving, then the vehicle is subject to impoundment and forfeiture if (i) the offense occurs while that person’s drivers license is revoked, or (ii) the offense occurs while the person has no valid drivers license, and has no liability insurance; and
- c. A lack of knowledge or consent to the operation will not be a defense in the future, unless the motor vehicle owner has taken all reasonable precautions to prevent the use of the motor vehicle by this particular person and immediately reports, upon discovery, any unauthorized use to the appropriate law enforcement agency.

- (1a) Fair Market Value. — The value of the seized motor vehicle, as determined in accordance with the schedule of values adopted by the Commissioner pursuant to G.S. 105-187.3.

- (2) Innocent Owner. — A motor vehicle owner:

- a. Who did not know and had no reason to know that (i) the defendant’s drivers license was revoked, or (ii) that the defendant did not have a valid drivers license, and that the defendant had no liability insurance; or
- b. Who knew that (i) the defendant’s drivers license was revoked, or (ii) that the defendant had no valid drivers license, and that the defendant had no liability insurance, but the defendant drove the vehicle without the person’s expressed or implied permission, and the owner files a police report for unauthorized use of the motor vehicle and agrees to prosecute the unauthorized operator of the motor vehicle; or
- c. Whose vehicle was reported stolen; or
- d. Repealed by Session Laws 1999-406, s. 17.
- e. Who is in the business of renting vehicles, and the vehicle was driven by a person who is not listed as an authorized driver on the rental contract; or
- f. Who is in the business of leasing motor vehicles, who holds legal title to the motor vehicle as a lessor at the time of seizure and who

has no actual knowledge of the revocation of the lessee's drivers license at the time the lease is entered.

- (2a) Insurance Company. — Any insurance company that has coverage on or is otherwise liable for repairs or damages to the motor vehicle at the time of the seizure.
- (2b) Insurance Proceeds. — Proceeds paid under an insurance policy for damage to a seized motor vehicle less any payments actually paid to valid lienholders and for towing and storage costs incurred for the motor vehicle after the time the motor vehicle became subject to seizure.
- (3) Lienholder. — A person who holds a perfected security interest in a motor vehicle at the time of seizure.
- (3a) Motor Vehicle Owner. — A person in whose name a registration card or certificate of title for a motor vehicle is issued at the time of seizure.
- (4) Order of Forfeiture. — An order by the court which terminates the rights and ownership interest of a motor vehicle owner in a motor vehicle and any insurance proceeds or proceeds of sale in accordance with G.S. 20-28.2.
- (5) Repealed by Session Laws 1998-182, s. 2.
- (6) Registered Owner. — A person in whose name a registration card for a motor vehicle is issued at the time of seizure.
- (7) Repealed by Session Laws 1998-182, s. 2.

(b) When Motor Vehicle Becomes Property Subject to Order of Forfeiture; Impaired Driving and Prior Revocation. — A judge may determine whether the vehicle driven by an impaired driver at the time of the offense becomes subject to an order of forfeiture. The determination may be made at any of the following times:

- (1) A hearing for the underlying offense involving impaired driving.
- (2) A separate hearing after conviction of the defendant.
- (3) A forfeiture hearing held at least 60 days after the defendant failed to appear at the scheduled trial for the underlying offense, and the defendant's order of arrest for failing to appear has not been set aside.

The vehicle shall become subject to an order of forfeiture if the greater weight of the evidence shows that the underlying offense involved impaired driving, and that the defendant's license was revoked pursuant to an impaired driving license revocation as defined in subsection (a) of this section.

(b1) When a Motor Vehicle Becomes Property Subject to Order of Forfeiture; No License and No Insurance. — A judge may determine whether the vehicle driven by an impaired driver at the time of the offense becomes subject to an order of forfeiture. The determination may be made at any of the following times:

- (1) A hearing for the underlying offense involving impaired driving.
- (2) A separate hearing after conviction of the defendant.
- (3) A forfeiture hearing held at least 60 days after the defendant failed to appear at the scheduled trial for the underlying offense, and the defendant's order of arrest for failing to appear has not been set aside.

The vehicle shall become subject to an order of forfeiture if the greater weight of the evidence shows that the underlying offense involved impaired driving, and: (i) the defendant was driving without a valid drivers license, and (ii) the defendant was not covered by an automobile liability policy.

(c) Duty of Prosecutor to Notify Possible Innocent Parties. — In any case in which a prosecutor determines that a motor vehicle driven by a defendant may be subject to forfeiture under this section and the motor vehicle has not been permanently released to a nondefendant vehicle owner pursuant to G.S. 20-28.3(e1), a defendant owner pursuant to G.S. 20-28.3(e2), or a lienholder, pursuant to G.S. 20-28.3(e3), the prosecutor shall notify the defendant, each



motor vehicle owner, and each lienholder that the motor vehicle may be subject to forfeiture and that the defendant, motor vehicle owner, or the lienholder may intervene to protect that person's interest. The notice may be served by any means reasonably likely to provide actual notice, and shall be served at least 10 days before the hearing at which an order of forfeiture may be entered.

(c1) Motor Vehicles Involved in Accidents. — If a motor vehicle subject to forfeiture was damaged while the defendant operator was committing the underlying offense involving impaired driving, or was damaged incident to the seizure of the motor vehicle, the Division shall determine the name of any insurance companies that are the insurers of record with the Division for the motor vehicle at the time of the seizure or that may otherwise be liable for repair to the motor vehicle. In any case where a seized motor vehicle was involved in an accident, the Division shall notify the insurance companies that the claim for insurance proceeds for damage to the seized motor vehicle shall be paid to the clerk of superior court of the county where the motor vehicle driver was charged to be held and disbursed pursuant to further orders of the court. Any insurance company that receives written or other actual notice of seizure pursuant to this section shall not be relieved of any legal obligation under any contract of insurance unless the claim for property damage to the seized motor vehicle minus the policy owner's deductible is paid directly to the clerk of court. The insurance company paying insurance proceeds to the clerk of court pursuant to this section shall be immune from suit by the motor vehicle owner for any damages alleged to have occurred as a result of the motor vehicle seizure. The proceeds shall be held by the clerk. The clerk shall disburse the insurance proceeds pursuant to further orders of the court.

(d) Forfeiture Hearing. — Unless a motor vehicle that has been seized pursuant to G.S. 20-28.3 has been permanently released to an innocent owner pursuant to G.S. 20-28.3(e1), a defendant owner pursuant to G.S. 20-28.3(e2), or to a lienholder pursuant to G.S. 20-28.3(e3), the court shall conduct a hearing on the forfeiture of the motor vehicle. The hearing may be held at the sentencing hearing on the underlying offense involving impaired driving, at a separate hearing after conviction of the defendant, or at a separate forfeiture hearing held not less than 60 days after the defendant failed to appear at the scheduled trial for the underlying offense and the defendant's order of arrest for failing to appear has not been set aside. If at the forfeiture hearing, the judge determines that the motor vehicle is subject to forfeiture pursuant to this section and proper notice of the hearing has been given, the judge shall order the motor vehicle forfeited. If at the sentencing hearing or at a forfeiture hearing, the judge determines that the motor vehicle is subject to forfeiture pursuant to this section and proper notice of the hearing has been given, the judge shall order the motor vehicle forfeited unless another motor vehicle owner establishes, by the greater weight of the evidence, that such motor vehicle owner is an innocent owner as defined in this section, in which case the trial judge shall order the motor vehicle released to the innocent owner pursuant to the provisions of subsection (e) of this section. In any case where the motor vehicle is ordered forfeited, the judge shall:

- (1)a. Authorize the sale of the motor vehicle at public sale or allow the county board of education to retain the motor vehicle for its own use pursuant to G.S. 20-28.5; or
- b. Order the motor vehicle released to a lienholder pursuant to the provisions of subsection (f) of this section; and
- (2)a. Order any proceeds of sale or insurance proceeds held by the clerk of court to be disbursed to the county board of education; and
- b. Order any outstanding insurance claims be assigned to the county board of education in the event the motor vehicle has been damaged in an accident incident to the seizure of the motor vehicle.



If the judge determines that the motor vehicle is subject to forfeiture pursuant to this section, but that notice as required by subsection (c) has not been given, the judge shall continue the forfeiture proceeding until adequate notice has been given. In no circumstance shall the sentencing of the defendant be delayed as a result of the failure of the prosecutor to give adequate notice.

(e) Release of Vehicle to Innocent Motor Vehicle Owner. — At a forfeiture hearing, if a nondefendant motor vehicle owner establishes by the greater weight of the evidence that: (i) the motor vehicle was being driven by a person who was not the only motor vehicle owner or had no ownership interest in the motor vehicle at the time of the underlying offense and (ii) the petitioner is an “innocent owner”, as defined by this section, a judge shall order the motor vehicle released to that owner, conditioned upon payment of all towing and storage charges incurred as a result of the seizure and impoundment of the motor vehicle.

Release to an innocent owner shall only be ordered upon satisfactory proof of:

- (1) The identity of the person as a motor vehicle owner;
- (2) The existence of financial responsibility to the extent required by Article 13 of this Chapter or by the laws of the state in which the vehicle is registered; and
- (3) Repealed by Session Laws 1998-182, s. 2, effective December 1, 1998.
- (4) The execution of an acknowledgment as defined in subdivision (a1)(1) of this section.

If the nondefendant owner is a lessor, the release shall also be conditioned upon the lessor agreeing not to sell, give, or otherwise transfer possession of the forfeited motor vehicle to the defendant or any person acting on the defendant's behalf. A lessor who refuses to sell, give, or transfer possession of a seized motor vehicle to the defendant or any person acting on the behalf of the defendant shall not be liable for damages arising out of the refusal.

No motor vehicle subject to forfeiture under this section shall be released to a nondefendant motor vehicle owner if the records of the Division indicate the motor vehicle owner had previously signed an acknowledgment, as required by this section, and the same person was operating the motor vehicle while that person's license was revoked unless the innocent owner shows by the greater weight of the evidence that the motor vehicle owner has taken all reasonable precautions to prevent the use of the motor vehicle by this particular person and immediately reports, upon discovery, any unauthorized use to the appropriate law enforcement agency. A determination by the court at the forfeiture hearing held pursuant to subsection (d) of this section that the petitioner is not an innocent owner is a final judgment and is immediately appealable to the Court of Appeals.

(f) Release to Lienholder. — At a forfeiture hearing, the trial judge shall order a forfeited motor vehicle released to the lienholder upon payment of all towing and storage charges incurred as a result of the seizure of the motor vehicle if the judge determines, by the greater weight of the evidence, that:

- (1) The lienholder's interest has been perfected and appears on the title to the forfeited vehicle;
- (2) The lienholder agrees not to sell, give, or otherwise transfer possession of the forfeited motor vehicle to the defendant or to the motor vehicle owner who owned the motor vehicle immediately prior to forfeiture, or any person acting on the defendant's or motor vehicle owner's behalf;
- (3) The forfeited motor vehicle had not previously been released to the lienholder;
- (4) The owner is in default under the terms of the security instrument evidencing the interest of the lienholder and as a consequence of the default the lienholder is entitled to possession of the motor vehicle; and

- (5) The lienholder agrees to sell the motor vehicle in accordance with the terms of its agreement and pursuant to the provisions of Part 6 of Article 9 of Chapter 25 of the General Statutes. Upon the sale of the motor vehicle, the lienholder will pay to the clerk of court of the county in which the vehicle was forfeited all proceeds from the sale, less the amount of the lien in favor of the lienholder, and any towing and storage costs paid by the lienholder.

A lienholder who refuses to sell, give, or transfer possession of a forfeited motor vehicle to the defendant, the vehicle owner who owned the motor vehicle immediately prior to forfeiture, or any person acting on the behalf of the defendant or motor vehicle owner shall not be liable for damages arising out of such refusal. The defendant, the motor vehicle owner who owned the motor vehicle immediately prior to forfeiture, and any person acting on the defendant's or motor vehicle owner's behalf are prohibited from purchasing the motor vehicle at any sale conducted by the lienholder.

(g) Repealed by Session Laws 1998-182, s. 2, effective December 1, 1998.

(h) Any order issued pursuant to this section authorizing the release of a seized vehicle shall require the payment of all towing and storage charges incurred as a result of the seizure and impoundment of the motor vehicle. This requirement shall not be waived. (1983, c. 435, s. 21; 1983 (Reg. Sess., 1984), c. 1101, s. 19; 1989 (Reg. Sess., 1990), c. 1024, s. 6; 1997-379, s. 1.1; 1997-456, s. 30; 1998-182, s. 2; 1999-406, ss. 11, 12, 17; 2000-169, s. 28; 2001-362, s. 7; 2006-253, s. 31.)

**Editor's Note. —**

Session Laws 2006-253, s. 1, provides: "This act shall be known as 'The Motor Vehicle Driver Protection Act of 2006.'"

**Effect of Amendments. —** Session Laws

2006-253, s. 31, effective December 1, 2006, and applicable to offenses committed on or after that date, rewrote subdivisions (a1)(1) and (2), and subsections (b) and (b1).

## **§ 20-28.3. Seizure, impoundment, forfeiture of motor vehicles for offenses involving impaired driving while license revoked or without license and insurance.**

(a) Motor Vehicles Subject to Seizure. — A motor vehicle that is driven by a person who is charged with an offense involving impaired driving is subject to seizure if:

- (1) At the time of the violation, the drivers license of the person driving the motor vehicle was revoked as a result of a prior impaired driving license revocation as defined in G.S. 20-28.2(a); or
- (2) At the time of the violation:
  - a. The person was driving without a valid drivers license, and
  - b. The driver was not covered by an automobile liability policy.

For the purposes of this subsection, a person who has a complete defense, pursuant to G.S. 20-35, to a charge of driving without a drivers license, shall be considered to have had a valid drivers license at the time of the violation.

(b) Duty of Officer. — If the charging officer has probable cause to believe that a motor vehicle driven by the defendant may be subject to forfeiture under this section, the officer shall seize the motor vehicle and have it impounded. If the officer determines prior to seizure that the motor vehicle had been reported stolen, the officer shall not seize the motor vehicle pursuant to this section. If the officer determines prior to seizure that the motor vehicle was a rental vehicle driven by a person not listed as an authorized driver on the rental contract, the officer shall not seize the motor vehicle pursuant to this section, but shall make a reasonable effort to notify the owner of the rental vehicle that



the vehicle was stopped and that the driver of the vehicle was not listed as an authorized driver on the rental contract. Probable cause may be based on the officer's personal knowledge, reliable information conveyed by another officer, records of the Division, or other reliable source. The seizing officer shall notify the executive agency designated under subsection (b1) of this section as soon as practical but no later than 24 hours after seizure of the motor vehicle of the seizure in accordance with procedures established by the executive agency designated under subsection (b1) of this section.

(b1) Written Notification of Impoundment. — Within 48 hours of receipt within regular business hours of the notice of seizure, an executive agency designated by the Governor shall issue written notification of impoundment to the Division, to any lienholder of record and to any motor vehicle owner who was not operating the motor vehicle at the time of the offense. A notice of seizure received outside regular business hours shall be considered to have been received at the start of the next business day. The notification of impoundment shall be sent by first-class mail to the most recent address contained in the Division's records. If the motor vehicle is registered in another state, notice shall be sent to the address shown on the records of the state where the motor vehicle is registered. This written notification shall provide notice that the motor vehicle has been seized, state the reason for the seizure and the procedure for requesting release of the motor vehicle. Additionally, if the motor vehicle was damaged while the defendant operator was committing an offense involving impaired driving or incident to the seizure, the agency shall issue written notification of the seizure to the owner's insurance company of record and to any other insurance companies that may be insuring other motor vehicles involved in the accident. The Division shall prohibit title to a seized motor vehicle from being transferred by a motor vehicle owner unless authorized by court order.

(b2) Additional Notification to Lienholders. — In addition to providing written notification pursuant to subsection (b1) of this section, within eight hours of receipt within regular business hours of the notice of seizure, the executive agency designated under subsection (b1) of this section shall notify by facsimile any lienholder of record that has provided the executive agency with a designated facsimile number for notification of impoundment. The facsimile notification of impoundment shall state that the vehicle has been seized, state the reason for the seizure, and notify the lienholder of the additional written notification that will be provided pursuant to subsection (b1) of this section. The executive agency shall establish procedures to allow a lienholder to provide one designated facsimile number for notification of impoundment for any vehicle for which the lienholder is a lienholder of record and shall maintain a centralized database of the provided facsimile numbers. The lienholder must provide a facsimile number at which the executive agency may give notification of impoundment at anytime.

(c) Review by Magistrate. — Upon determining that there is probable cause for seizing a motor vehicle, the seizing officer shall present to a magistrate within the county where the driver was charged an affidavit of impoundment setting forth the basis upon which the motor vehicle has been or will be seized for forfeiture. The magistrate shall review the affidavit of impoundment and if the magistrate determines the requirements of this section have been met, shall order the motor vehicle held. The magistrate may request additional information and may hear from the defendant if the defendant is present. If the magistrate determines the requirements of this section have not been met, the magistrate shall order the motor vehicle released to a motor vehicle owner upon payment of towing and storage fees. If the motor vehicle has not yet been seized, and the magistrate determines that seizure is appropriate, the magistrate shall issue an order of seizure of the motor vehicle. The magistrate shall



provide a copy of the order of seizure to the clerk of court. The clerk shall provide copies of the order of seizure to the district attorney and the attorney for the county board of education.

(c1) Effecting an Order of Seizure. — An order of seizure shall be valid anywhere in the State. Any officer with territorial jurisdiction and who has subject matter jurisdiction for violations of this Chapter may use such force as may be reasonable to seize the motor vehicle and to enter upon the property of the defendant to accomplish the seizure. An officer who has probable cause to believe the motor vehicle is concealed or stored on private property of a person other than the defendant may obtain a search warrant to enter upon that property for the purpose of seizing the motor vehicle.

(d) Custody of Motor Vehicle. — Unless the motor vehicle is towed pursuant to a statewide or regional contract, or a contract with the county board of education, the seized motor vehicle shall be towed by a commercial towing company designated by the law enforcement agency that seized the motor vehicle. Seized motor vehicles not towed pursuant to a statewide or regional contract or a contract with a county board of education shall be retrieved from the commercial towing company within a reasonable time, not to exceed 10 days, by the county board of education or their agent who must pay towing and storage fees to the commercial towing company when the motor vehicle is retrieved. If either a statewide or regional contractor, or the county board of education, chooses to contract for local towing services, all towing companies on the towing list for each law enforcement agency with jurisdiction within the county shall be given written notice and an opportunity to submit proposals prior to a contract for local towing services being awarded. The seized motor vehicle is under the constructive possession of the county board of education for the county in which the operator of the vehicle is charged at the time the vehicle is delivered to a location designated by the county board of education or delivered to its agent pending release or sale, or in the event a statewide or regional contract is in place, under the constructive possession of the Department of Public Instruction, on behalf of the State at the time the vehicle is delivered to a location designated by the Department of Public Instruction or delivered to its agent pending release or sale. Absent a statewide or regional contract that provides otherwise, each county board of education may elect to have seized motor vehicles stored on property owned or leased by the county board of education and charge a reasonable fee for storage, not to exceed ten dollars (\$10.00) per day. In the alternative, the county board of education may contract with a commercial towing and storage facility or other private entity for the towing, storage, and disposal of seized motor vehicles, and a storage fee of not more than ten dollars (\$10.00) per day may be charged. Except for gross negligence or intentional misconduct, the county board of education, or any of its employees, shall not be liable to the owner or lienholder for damage to or loss of the motor vehicle or its contents, or to the owner of personal property in a seized vehicle, during the time the motor vehicle is being towed or stored pursuant to this subsection.

(e) Release of Motor Vehicle Pending Trial. — A motor vehicle owner, other than the driver at the time of the underlying offense resulting in the seizure, may apply to the clerk of superior court in the county where the charges are pending for pretrial release of the motor vehicle.

The clerk shall release the motor vehicle to a nondefendant motor vehicle owner conditioned upon payment of all towing and storage charges incurred as a result of seizure and impoundment of the motor vehicle under the following conditions:

- (1) The motor vehicle has been seized for not less than 24 hours;
- (2) Repealed by Session Laws 1998-182, s. 3, effective December 1, 1998.
- (3) A bond in an amount equal to the fair market value of the motor vehicle as defined by G.S. 20-28.2 has been executed and is secured by

- a cash deposit in the full amount of the bond, by a recordable deed of trust to real property in the full amount of the bond, by a bail bond under G.S. 58-71-1(2), or by at least one solvent surety, payable to the county school fund and conditioned on return of the motor vehicle, in substantially the same condition as it was at the time of seizure and without any new or additional liens or encumbrances, on the day of any hearing scheduled and noticed by the district attorney under G.S. 20-28.2(c), unless the motor vehicle has been permanently released;
- (4) Execution of an acknowledgment as described in G.S. 20-28.2(a1);
  - (5) A check of the records of the Division indicates that the requesting motor vehicle owner has not previously executed an acknowledgment naming the operator of the seized motor vehicle; and
  - (6) A bond posted to secure the release of this motor vehicle under this subsection has not been previously ordered forfeited under G.S. 20-28.5.

In the event a nondefendant motor vehicle owner who obtains temporary possession of a seized motor vehicle pursuant to this subsection does not return the motor vehicle on the day of the forfeiture hearing as noticed by the district attorney under G.S. 20-28.3(c) or otherwise violates a condition of pretrial release of the seized motor vehicle as set forth in this subsection, the bond posted shall be ordered forfeited and an order of seizure shall be issued by the court. Additionally, a nondefendant motor vehicle owner or lienholder who willfully violates any condition of pretrial release may be held in civil or criminal contempt.

(e1) Pretrial Release of Motor Vehicle to Innocent Owner. — A nondefendant motor vehicle owner may file a petition with the clerk of court seeking a pretrial determination that the petitioner is an innocent owner. The clerk shall consider the petition and make a determination as soon as may be feasible. At any proceeding conducted pursuant to this subsection, the clerk is not required to determine the issue of forfeiture, only the issue of whether the petitioner is an innocent owner. If the clerk determines that the petitioner is an innocent owner, the clerk shall release the motor vehicle to the petitioner subject to the same conditions as if the petitioner were an innocent owner under G.S. 20-28.2(e). The clerk shall send a copy of the order authorizing or denying release of the vehicle to the district attorney and the attorney for the county board of education. An order issued under this subsection finding that the petitioner failed to establish that the petitioner is an innocent owner may be reconsidered by the court as part of the forfeiture hearing conducted pursuant to G.S. 20-28.2(d).

(e2) Pretrial Release of Motor Vehicle to Defendant Owner. — A defendant motor vehicle owner may file a petition with the clerk of court seeking a pretrial determination that the defendant's license was not revoked pursuant to an impaired driving license revocation as defined in G.S. 20-28.2(a). The clerk shall schedule a hearing before a judge of the division in which the underlying criminal charge is pending for a hearing to be held within 10 business days or as soon thereafter as may be feasible. Notice of the hearing shall be given to the defendant, the district attorney, and the attorney for the county board of education. The clerk shall forward a copy of the petition to the district attorney for the district attorney's review. If, based on available information, the district attorney determines that the defendant's motor vehicle is not subject to forfeiture, the district attorney may note the State's consent to the release of the motor vehicle on the petition and return the petition to the clerk of court who shall enter an order releasing the motor vehicle to the defendant upon payment of all towing and storage charges incurred as a result of the seizure and impoundment of the motor vehicle, subject to the satisfactory proof of the identity of the defendant as a motor



vehicle owner and the existence of financial responsibility to the extent required by Article 13 of this Chapter, and no hearing shall be held. The clerk shall send a copy of the order of release to the attorney for the county board of education. At any pretrial hearing conducted pursuant to this subsection, the court is not required to determine the issue of the underlying offense of impaired driving only the existence of a prior drivers license revocation as an impaired driving license revocation. Accordingly, the State shall not be required to prove the underlying offense of impaired driving. An order issued under this subsection finding that the defendant failed to establish that the defendant's license was not revoked pursuant to an impaired driving license revocation as defined in G.S. 20-28.2(a) may be reconsidered by the court as part of the forfeiture hearing conducted pursuant to G.S. 20-28.2(d).

(e3) Pretrial Release of Motor Vehicle to Lienholder. —

- (1) A lienholder may file a petition with the clerk of court requesting the court to order pretrial release of a seized motor vehicle. The lienholder shall serve a copy of the petition on all interested parties which shall include the registered owner, the titled owner, the district attorney, and the county board of education attorney. Upon 10 days' prior notice of the date, time, and location of the hearing sent by the lienholder to all interested parties, a judge, after a hearing, shall order a seized motor vehicle released to the lienholder conditioned upon payment of all towing and storage costs incurred as a result of the seizure and impoundment of the motor vehicle if the judge determines, by the greater weight of the evidence, that:
  - a. Default on the obligation secured by the motor vehicle has occurred;
  - b. As a consequence of default, the lienholder is entitled to possession of the motor vehicle;
  - c. The lienholder agrees to sell the motor vehicle in accordance with the terms of its agreement and pursuant to the provisions of Part 6 of Article 9 of Chapter 25 of the General Statutes. Upon sale of the motor vehicle, the lienholder will pay to the clerk of court of the county in which the driver was charged all proceeds from the sale, less the amount of the lien in favor of the lienholder, and any towing and storage costs paid by the lienholder;
  - d. The lienholder agrees not to sell, give, or otherwise transfer possession of the seized motor vehicle while the motor vehicle is subject to forfeiture, or the forfeited motor vehicle after the forfeiture hearing, to the defendant or the motor vehicle owner; and
  - e. The seized motor vehicle while the motor vehicle is subject to forfeiture, or the forfeited motor vehicle after the forfeiture hearing, had not previously been released to the lienholder as a result of a prior seizure involving the same defendant or motor vehicle owner.
- (2) The clerk of superior court may order a seized vehicle released to the lienholder conditioned upon payment of all towing and storage costs incurred as a result of the seizure and impoundment of the motor vehicle at any time when all interested parties have, in writing, waived any rights that they may have to notice and a hearing, and the lienholder has agreed to the provision of subdivision (1)(d) above. A lienholder who refuses to sell, give, or transfer possession of a seized motor vehicle while the motor vehicle is subject to forfeiture, or a forfeited motor vehicle after the forfeiture hearing, to:
  - a. The defendant;
  - b. The motor vehicle owner who owned the motor vehicle immediately prior to seizure pending the forfeiture hearing, or to forfeiture after the forfeiture hearing; or



c. Any person acting on the behalf of the defendant or the motor vehicle owner,

shall not be liable for damages arising out of such refusal. However, any subsequent violation of the conditions of release by the lienholder shall be punishable by civil or criminal contempt.

(f), (g) Repealed by Session Laws 1998-182, s. 3, effective December 1, 1998.

(h) Insurance Proceeds. — In the event a motor vehicle is damaged incident to the conduct of the defendant which gave rise to the defendant's arrest and seizure of the motor vehicle pursuant to this section, the county board of education, or its authorized designee, is authorized to negotiate the county board of education's interest with the insurance company and to compromise and accept settlement of any claim for damages. Property insurance proceeds accruing to the defendant, or other owner of the seized motor vehicle, shall be paid by the responsible insurance company directly to the clerk of superior court in the county where the motor vehicle driver was charged. If the motor vehicle is declared a total loss by the insurance company liable for the damages to the motor vehicle, the clerk of superior court, upon application of the county board of education, shall enter an order that the motor vehicle be released to the insurance company upon payment into the court of all insurance proceeds for damage to the motor vehicle after payment of towing and storage costs and all valid liens. The clerk of superior court shall provide the Division with a certified copy of the order entered pursuant to this subsection, and the Division shall transfer title to the insurance company or to such other person or entity as may be designated by the insurance company. Insurance proceeds paid to the clerk of court pursuant to this subsection shall be subject to forfeiture pursuant to G.S. 20-28.5 and shall be disbursed pursuant to further orders of the court. An affected motor vehicle owner or lienholder who objects to any agreed upon settlement under this subsection may file an independent claim with the insurance company for any additional monies believed owed. Notwithstanding any other provisions in this Chapter, nothing in this section or G.S. 20-28.2 shall require an insurance company to make payments in excess of those required pursuant to its policy of insurance on the seized motor vehicle.

(i) Expedited Sale of Seized Motor Vehicles in Certain Cases. — In order to avoid additional liability for towing and storage costs pending resolution of the criminal proceedings of the defendant, the county board of education may, after expiration of 90 days from the date of seizure, sell any motor vehicle having a fair market value of one thousand five hundred dollars (\$1,500) or less. The county board of education may also sell a motor vehicle, regardless of the fair market value, any time the outstanding towing and storage costs exceed eighty-five percent (85%) of the fair market value of the vehicle, or with the consent of all the motor vehicle owners. Any sale conducted pursuant to this subsection shall be conducted in accordance with the provisions of G.S. 20-28.5(a), and the proceeds of the sale, after the payment of outstanding towing and storage costs or reimbursement of towing and storage costs paid by a person other than the defendant, shall be deposited with the clerk of superior court. If an order of forfeiture is entered by the court, the court shall order the proceeds held by the clerk to be disbursed as provided in G.S. 20-28.5(b). If the court determines that the motor vehicle is not subject to forfeiture, the court shall order the proceeds held by the clerk to be disbursed first to pay the sale, towing, and storage costs, second to pay outstanding liens on the motor vehicle, and the balance to be paid to the motor vehicle owners.

(j) Retrieval of Certain Personal Property. — At reasonable times, the entity charged with storing the motor vehicle may permit owners of personal property not affixed to the motor vehicle to retrieve those items from the motor vehicle, provided satisfactory proof of ownership of the motor vehicle or the items of personal property is presented to the storing entity.

(k) County Board of Education Right to Appear and Participate in Proceedings. — The attorney for the county board of education shall be given notice of all proceedings regarding offenses involving impaired driving related to a motor vehicle subject to forfeiture. However, the notice requirement under this subsection does not apply to proceedings conducted under G.S. 20-28.3(e1). The attorney for the county board of education shall also have the right to appear and to be heard on all issues relating to the seizure, possession, release, forfeiture, sale, and other matters related to the seized vehicle under this section. With the prior consent of the county board of education, the district attorney may delegate to the attorney for the county board of education any or all of the duties of the district attorney under this section. Clerks of superior court, law enforcement agencies, and all other agencies with information relevant to the seizure, impoundment, release, or forfeiture of motor vehicles are authorized and directed to provide county boards of education with access to that information and to do so by electronic means when existing technology makes this type of transmission possible.

(l) Payment of Fees Upon Conviction. — If the driver of a motor vehicle seized pursuant to this section is convicted of an offense involving impaired driving, the defendant shall be ordered to pay as restitution to the county board of education, the motor vehicle owner, or the lienholder the cost paid or owing for the towing, storage, and sale of the motor vehicle to the extent the costs were not covered by the proceeds from the forfeiture and sale of the motor vehicle. In addition, a civil judgment for the costs under this section in favor of the party to whom the restitution is owed shall be docketed by the clerk of superior court. If the defendant is sentenced to an active term of imprisonment, the civil judgment shall become effective and be docketed when the defendant's conviction becomes final. If the defendant is placed on probation, the civil judgment in the amount found by a judge during the probation revocation or termination hearing to be due shall become effective and be docketed by the clerk when the defendant's probation is revoked or terminated.

(m) Trial Priority. — District court trials of impaired driving offenses involving forfeitures of motor vehicles pursuant to G.S. 20-28.2 shall be scheduled on the arresting officer's next court date or within 30 days of the offense, whichever comes first.

Once scheduled, the case shall not be continued unless all of the following conditions are met:

- (1) A written motion for continuance is filed with notice given to the opposing party prior to the motion being heard.
- (2) The judge makes a finding of a "compelling reason" for the continuance.
- (3) The motion and finding are attached to the court case record.

Upon a determination of guilt, the issue of vehicle forfeiture shall be heard by the judge immediately, or as soon thereafter as feasible, and the judge shall issue the appropriate orders pursuant to G.S. 20-28.2(d).

Should a defendant appeal the conviction to superior court, any party who has not previously been heard on a petition for pretrial release under subsection (e1) or (e3) of this section or any party whose motor vehicle has not been the subject of a forfeiture hearing held pursuant to G.S. 20-28.2(d) may be heard on a petition for pretrial release pursuant to subsection (e1) or (e3) of this section. The provisions of subsection (e) of this section shall also apply to seized motor vehicles pending trial in superior court. Where a motor vehicle was released pursuant to subsection (e) of this section pending trial in district court, the release of the motor vehicle continues, and the terms and conditions of the original bond remain the same as those required for the initial release of the motor vehicle under subsection (e) of this section, pending the resolution of the underlying offense involving impaired driving in superior court.



(n) Any order issued pursuant to this section authorizing the release of a seized vehicle shall require the payment of all towing and storage charges incurred as a result of the seizure and impoundment of the motor vehicle. This requirement shall not be waived. (1997-379, s. 1.2; 1997-456, s. 31; 1998-182, s. 3; 1998-217, s. 62(a)-(c); 2000-169, s. 29; 2001-362, ss. 1, 2, 3, 4, 5, 6; 2001-487, s. 9; 2006-253, s. 32.)

**Editor's Note. —**

Session Laws 2006-253, s. 1, provides: "This act shall be known as 'The Motor Vehicle Driver Protection Act of 2006.'"

**Effect of Amendments. —** Session Laws

2006-253, s. 32, effective December 1, 2006, and applicable to offenses committed on or after that date, added "or without license and insurance" to the end of the section catchline and rewrote subsection (a).

## § 20-34. Unlawful to permit violations of this Article.

### CASE NOTES

**No Duty to Inquire Further into Driving Credentials. —** Grant of summary judgment in favor of the rental company in the administratrix's wrongful death and survival action was appropriate under G.S. 20-34 where the driver presented the rental company with an

unexpired New Jersey driver's license and the rental company had no duty to inquire further into the driver's driving credentials. *Cowan v. Jack*, 922 So. 2d 559, 2005 La. App. LEXIS 2885 (Dec. 21, 2005).

### ARTICLE 2B.

#### *Special Identification Cards for Nonoperators.*

## § 20-37.7. Special identification card.

(a) Eligibility. — A person who is a resident of this State is eligible for a special identification card.

(b) Application. — To obtain a special identification card from the Division, a person must complete the application form used to obtain a drivers license.

(b1) Search National Sex Offender Public Registry. — The Division shall not issue a special identification card to an applicant who has resided in this State for less than 12 months until the Division has searched the National Sex Offender Public Registry to determine if the person is currently registered as a sex offender in another state.

- (1) If the Division finds that the person is currently registered as a sex offender in another state, the Division shall not issue a special identification card to the person until the person submits proof of registration pursuant to Article 27A of Chapter 14 of the General Statutes issued by the sheriff of the county where the person resides.
- (2) If the person does not appear on the National Sex Offender Public Registry, the Division shall issue a special identification card but shall require the person to sign an affidavit acknowledging that the person has been notified that if the person is a sex offender, then the person is required to register pursuant to Article 27A of Chapter 14 of the General Statutes.
- (3) If the Division is unable to access all states' information contained in the National Sex Offender Public Registry, but the person is otherwise qualified to obtain a special identification card, then the Division shall issue the card but shall first require the person to sign an affidavit stating that: (i) the person does not appear on the National Sex Offender Public Registry and (ii) acknowledging that the person has



been notified that if the person is a sex offender, then the person is required to register pursuant to Article 27A of Chapter 14 of the General Statutes. The Division shall search the National Sex Offender Public Registry for the person within a reasonable time after access to the Registry is restored. If the person does appear in the National Sex Offender Public Registry, the person is in violation of G.S. 20-37.8, and the Division shall promptly notify the sheriff of the county where the person resides of the offense.

- (4) Any person denied a special identification card by the Division pursuant to this subsection shall have a right to file a petition within 30 days thereafter for a hearing in the matter in the superior court of the county wherein such person shall reside, or to the resident judge of the district or judge holding the court of that district, or special or emergency judge holding a court in such district, and such court or judge is hereby vested with jurisdiction, and it shall be its or his duty to set the matter for hearing upon 30 days' written notice to the Division, and thereupon to take testimony and examine into the facts of the case and to determine whether the petitioner is entitled to a special identification card under the provisions of this subsection and whether the petitioner is in violation of G.S. 20-37.8.

(c) Format. — A special identification card shall be similar in size, shape, and design to a drivers license, but shall clearly state that it does not entitle the person to whom it is issued to operate a motor vehicle. A special identification card issued to an applicant must have the same background color that a drivers license issued to the applicant would have.

(d) Expiration and Fee. — A special identification card issued to a person for the first time under this section expires when a drivers license issued on the same day to that person would expire. A special identification card renewed under this section expires when a drivers license renewed by the card holder on the same day would expire.

The fee for a special identification card is the same as the fee set in G.S. 20-14 for a duplicate license. The fee does not apply to a special identification card issued to a resident of this State who is legally blind, is at least 70 years old, or is homeless. To obtain a special identification card without paying a fee, a homeless person must present a letter to the Division from the director of a facility that provides care or shelter to homeless persons verifying that the person is homeless.

(e) Offense. — Any fraud or misrepresentation in the application for or use of a special identification card issued under this section is a Class 2 misdemeanor.

(f) Records. — The Division shall maintain a record of all recipients of a special identification card.

(g) No State Liability. — The fact of issuance of a special identification card pursuant to this section shall not place upon the State of North Carolina or any agency thereof any liability for the misuse thereof and the acceptance thereof as valid identification is a matter left entirely to the discretion of any person to whom such card is presented.

(h) Advertising. — The Division may utilize the various communications media throughout the State to inform North Carolina residents of the provisions of this section. (1973, c. 438, s. 1; 1975, c. 716, s. 5; 1979, c. 469, c. 667, s. 30; 1981, c. 673, ss. 1, 2; c. 690, s. 12; 1981 (Reg. Sess., 1982), c. 1257, s. 3; 1983, c. 443, s. 2; 1983 (Reg. Sess., 1984), c. 1062, s. 7; 1985, c. 141, s. 5; 1991, c. 689, s. 328; 1993, c. 368, s. 3; c. 490, ss. 1, 2; c. 539, s. 325; c. 553, s. 77; 1994, Ex. Sess., c. 24, s. 14(c); 1993 (Reg. Sess., 1994), c. 750, s. 2; 2006-247, s. 19(d).)

**Editor's Note. —**

Session Laws 2006-247, s. 1(a), provides: "This act shall be known as 'An Act To Protect North Carolina's Children/Sex Offender Law Changes.'"

Session Laws 2006-247, s. 21 is a severability clause.

**Effect of Amendments. —** Session Laws 2006-247, s. 19(d), effective December 1, 2006, and applicable to all applications for a drivers license, learner's permit, instruction permit, or special identification card submitted on or after that date, added subsection (b1).

## ARTICLE 2C.

*Commercial Driver License.***§ 20-37.20. Notification of traffic convictions.**

(a) Out-of-state Resident. — Within 10 days after receiving a report of the conviction of any nonresident holder of a commercial driver license for any violation of State law or local ordinance relating to motor vehicle traffic control, other than parking violations, committed in a commercial vehicle, the Division shall notify the driver licensing authority in the licensing state of the conviction.

(b) **(For effective date, see note)** Foreign Diplomat. — The Division must notify the United States Department of State within 15 days after it receives one or more of the following reports for a holder of a drivers license issued by the United States Department of State:

- (1) A report of a conviction for a violation of State law or local ordinance relating to motor vehicle traffic control, other than parking violations.
- (2) A report of a civil revocation order. (1989, c. 771, s. 2; 2001-498, s. 7; 2002-159, s. 31; 2006-209, s. 7.)

**Editor's Note. —** Session Laws 2001-498, s. 8, as amended by Session Laws 2006-209, s. 7, provides that s. 7, which amended this section,

"becomes effective at the earliest practical date, but no later than January 1, 2003."

**§ 20-38:** Repealed by Session Laws 1973, c. 1330, s. 39.

**Editor's Note. —** G.S. 20-38 was enacted as Part 1 of Article 3. It was transferred as a result of the enactment of Article 2C.

## ARTICLE 2D.

*Implied-Consent Offense Procedures.***§ 20-38.1. Applicability.**

The procedures set forth in this Article shall be followed for the investigation and processing of an implied-consent offense as defined in G.S. 20-16.2. The trial procedures shall apply to any implied-consent offense litigated in the District Court Division. (2006-253, s. 5.)

**Editor's Note. —** Session Laws 2006-253, s. 1, provides: "This act shall be known as 'The Motor Vehicle Driver Protection Act of 2006.'" Session Laws 2006-253, s. 33, made this

Article effective December 1, 2006, and applicable to offenses committed on or after that date.

## § 20-38.2. Investigation.

A law enforcement officer who is investigating an implied-consent offense or a vehicle crash that occurred in the officer's territorial jurisdiction is authorized to investigate and seek evidence of the driver's impairment anywhere in-state or out-of-state, and to make arrests at any place within the State. (2006-253, s. 5.)

## § 20-38.3. Police processing duties.

Upon the arrest of a person, with or without a warrant, but not necessarily in the order listed, a law enforcement officer:

- (1) Shall inform the person arrested of the charges or a cause for the arrest.
- (2) May take the person arrested to any place within the State for one or more chemical analyses at the request of any law enforcement officer and for any evaluation by a law enforcement officer, medical professional, or other person to determine the extent or cause of the person's impairment.
- (3) May take the person arrested to some other place within the State for the purpose of having the person identified, to complete a crash report, or for any other lawful purpose.
- (4) May take photographs and fingerprints in accordance with G.S. 15A-502.
- (5) Shall take the person arrested before a judicial official for an initial appearance after completion of all investigatory procedures, crash reports, chemical analyses, and other procedures provided for in this section. (2006-253, s. 5.)

## § 20-38.4. Initial appearance.

(a) Appearance Before a Magistrate. — Except as modified in this Article, a magistrate shall follow the procedures set forth in Article 24 of Chapter 15A of the General Statutes.

- (1) A magistrate may hold an initial appearance at any place within the county and shall, to the extent practicable, be available at locations other than the courthouse when it will expedite the initial appearance.
- (2) In determining whether there is probable cause to believe a person is impaired, the magistrate may review all alcohol screening tests, chemical analyses, receive testimony from any law enforcement officer concerning impairment and the circumstances of the arrest, and observe the person arrested.
- (3) If there is a finding of probable cause, the magistrate shall consider whether the person is impaired to the extent that the provisions of G.S. 15A-534.2 should be imposed.
- (4) The magistrate shall also:
  - a. Inform the person in writing of the established procedure to have others appear at the jail to observe his condition or to administer an additional chemical analysis if the person is unable to make bond; and
  - b. Require the person who is unable to make bond to list all persons he wishes to contact and telephone numbers on a form that sets forth the procedure for contacting the persons listed. A copy of this form shall be filed with the case file.

(b) The Administrative Office of the Courts shall adopt forms to implement this Article. (2006-253, s. 5.)



### § 20-38.5. Facilities.

(a) The Chief District Court Judge, the Department of Health and Human Services, the district attorney, and the sheriff shall:

- (1) Establish a written procedure for attorneys and witnesses to have access to the chemical analysis room.
- (2) Approve the location of written notice of implied-consent rights in the chemical analysis room in accordance with G.S. 20-16.2.
- (3) Approve a procedure for access to a person arrested for an implied-consent offense by family and friends or a qualified person contacted by the arrested person to obtain blood or urine when the arrested person is held in custody and unable to obtain pretrial release from jail.

(b) Signs shall be posted explaining to the public the procedure for obtaining access to the room where the chemical analysis of the breath is administered and to any person arrested for an implied-consent offense. The initial signs shall be provided by the Department of Transportation, without costs. The signs shall thereafter be maintained by the county for all county buildings and the county courthouse.

(c) If the instrument for performing a chemical analysis of the breath is located in a State or municipal building, then the head of the highway patrol for the county, the chief of police for the city or that person's designee shall be substituted for the sheriff when determining signs and access to the chemical analysis room. The signs shall be maintained by the owner of the building. When a breath testing instrument is in a motor vehicle or at a temporary location, the Department of Health and Human Services shall alone perform the functions listed in subdivisions (a)(1) and (a)(2) of this section. (2006-253, s. 5.)

### § 20-38.6. Motions and district court procedure.

(a) The defendant may move to suppress evidence or dismiss charges only prior to trial, except the defendant may move to dismiss the charges for insufficient evidence at the close of the State's evidence and at the close of all of the evidence without prior notice. If, during the course of the trial, the defendant discovers facts not previously known, a motion to suppress or dismiss may be made during the trial.

(b) Upon a motion to suppress or dismiss the charges, other than at the close of the State's evidence or at the close of all the evidence, the State shall be granted reasonable time to procure witnesses or evidence and to conduct research required to defend against the motion.

(c) The judge shall summarily grant the motion to suppress evidence if the State stipulates that the evidence sought to be suppressed will not be offered in evidence in any criminal action or proceeding against the defendant.

(d) The judge may summarily deny the motion to suppress evidence if the defendant failed to make the motion pretrial when all material facts were known to the defendant.

(e) If the motion is not determined summarily, the judge shall make the determination after a hearing and finding of facts. Testimony at the hearing shall be under oath.

(f) The judge shall set forth in writing the findings of fact and conclusions of law and preliminarily indicate whether the motion should be granted or denied. If the judge preliminarily indicates the motion should be granted, the judge shall not enter a final judgment on the motion until after the State has appealed to superior court or has indicated it does not intend to appeal. (2006-253, s. 5.)

### § 20-38.7. Appeal to superior court.

(a) The State may appeal to superior court any district court preliminary determination granting a motion to suppress or dismiss. If there is a dispute about the findings of fact, the superior court shall not be bound by the findings of the district court but shall determine the matter de novo. Any further appeal shall be governed by Article 90 of Chapter 15A of the General Statutes.

(b) The defendant may not appeal a denial of a pretrial motion to suppress or to dismiss but may appeal upon conviction as provided by law.

(c) Notwithstanding the provisions of G.S. 15A-1431, for any implied-consent offense that is first tried in district court and that is appealed to superior court by the defendant for a trial de novo as a result of a conviction, the sentence imposed by the district court is vacated upon giving notice of appeal. The case shall only be remanded back to district court with the consent of the prosecutor and the superior court. When an appeal is withdrawn or a case is remanded back to district court, the district court shall hold a new sentencing hearing and shall consider any new convictions and, if the defendant has any pending charges of offenses involving impaired driving, shall delay sentencing in the remanded case until all cases are resolved. (2006-253, s. 5.)

## ARTICLE 3.

### *Motor Vehicle Act of 1937.*

#### Part 1. General Provisions.

§ 20-38.100: Reserved for future codification purposes.

#### Part 2. Authority and Duties of Commissioner and Division.

### § 20-45. Seizure of documents and plates.

(a) The Division is hereby authorized to take possession of any certificate of title, registration card, permit, license, or registration plate issued by it upon expiration, revocation, cancellation, or suspension thereof, or which is fictitious, or which has been unlawfully or erroneously issued, or which has been unlawfully used.

(b) The Division may give notice to the owner, licensee or lessee of its authority to take possession of any certificate of title, registration card, permit, license, or registration plate issued by it and require that person to surrender it to the Commissioner or his officers or agents. Any person who fails to surrender the certificate of title, registration card, permit, license, or registration plate or any duplicate thereof, upon personal service of notice or within 10 days after receipt of notice by mail as provided in G.S. 20-48, shall be guilty of a Class 2 misdemeanor.

(c) Any sworn law enforcement officer with jurisdiction, including a member of the State Highway Patrol, is authorized to seize the certificate of title, registration card, permit, license, or registration plate, if the officer has electronic or other notification from the Division that the item has been revoked or cancelled, or otherwise has probable cause to believe that the item has been revoked or cancelled under any law or statute, including G.S. 20-309(e). If a criminal proceeding relating to a certificate of title, registration card, permit, or license is pending, the law enforcement officer in possession of that item shall retain the item pending the entry of a final judgment by a court with jurisdiction. If there is no criminal proceeding pending, the law enforcement officer shall deliver the item to the Division.



(d) Any law enforcement officer who seizes a registration plate pursuant to this section shall report the seizure to the Division within 48 hours of the seizure and shall return the registration plate, but not a fictitious registration plate, to the Division within 10 business days of the seizure. (1937, c. 407, s. 10; 1975, c. 716, s. 5; 1981, c. 938, s. 2; 1993, c. 539, s. 329; 1994, Ex. Sess., c. 24, s. 14(c); 2005-357, s. 1; 2006-105, ss. 2.1, 2.2; 2006-264, s. 98.1.)

**Editor's Note.** — Session Laws 2006-105, s. 4, is a severability clause.

**Effect of Amendments.** —

Session Laws 2006-105, ss. 2.1 and 2.2, effective July 13, 2006, substituted “a certificate of title, registration card, permit, or license” for “the item” in the second sentence of subsection (c); and substituted “seizure and shall return the registration plate, but not a fictitious reg-

istration plate, to the Division within 10 business days of the seizure” for “seizure” in subsection (d).

Session Laws 2006-264, s. 98.1, effective August 27, 2006, substituted “jurisdiction, including a member of the State Highway Patrol” for “jurisdiction” in the first sentence of subsection (c).

## § 20-48. Giving of notice.

(a) Whenever the Division is authorized or required to give any notice under this Chapter or other law regulating the operation of vehicles, unless a different method of giving such notice is otherwise expressly prescribed, such notice shall be given either by personal delivery thereof to the person to be so notified or by deposit in the United States mail of such notice in an envelope with postage prepaid, addressed to such person at his address as shown by the records of the Division. The giving of notice by mail is complete upon the expiration of four days after such deposit of such notice. Proof of the giving of notice in either such manner may be made by a notation in the records of the Division that the notice was sent to a particular address and the purpose of the notice. A certified copy of the Division's records may be sent by the Police Information Network, facsimile, or other electronic means. A copy of the Division's records sent under the authority of this section is admissible as evidence in any court or administrative agency and is sufficient evidence to discharge the burden of the person presenting the record that notice was sent to the person named in the record, at the address indicated in the record, and for the purpose indicated in the record. There is no requirement that the actual notice or letter be produced.

(b) Notwithstanding any other provision of this Chapter at any time notice is now required by registered mail with return receipt requested, certified mail with return receipt requested may be used in lieu thereof and shall constitute valid notice to the same extent and degree as notice by registered mail with return receipt requested.

(c) The Commissioner shall appoint such agents of the Division as may be needed to serve revocation notices required by this Chapter. The fee for service of a notice shall be fifty dollars (\$50.00). (1937, c. 407, s. 13; 1955, c. 1187, s. 21; 1971, c. 1231, s. 1; 1975, c. 326, s. 3; c. 716, s. 5; 1983, c. 761, s. 148; 1985, c. 479, s. 171; 2006-253, s. 21.)

**Editor's Note.** — Session Laws 2006-253, s. 1, provides: “This act shall be known as ‘The Motor Vehicle Driver Protection Act of 2006.’”

**Effect of Amendments.** — Session Laws

2006-253, s. 21, effective December 1, 2006, and applicable to offenses committed on or after that date, rewrote subsection (a).

## CASE NOTES

**Knowledge of Revocation.** — Trial court erred in denying defendant's motion to dismiss

the charge against him of driving while license revoked, as the state did not present sufficient



evidence that defendant knew his license was revoked, in part because the state was unable to show that defendant had been notified of the

alleged revocation. *State v. Cruz*, 173 N.C. App. 689, 620 S.E.2d 251, 2005 N.C. App. LEXIS 2288 (2005).

### Part 3. Registration and Certificates of Titles of Motor Vehicles.

#### § 20-50. Owner to secure registration and certificate of title; temporary registration markers.

**Local Modification.** — Moore: 1995, c. 13, s. 3; 2002-82, s. 2; city of Saluda: 2006-27, s. 2; town of Beech Mountain: 2003-124, s. 1; town of Benson: 2005-11, s. 1, as amended by 2006-149, s. 1; town of Bladenboro: 2005-11, s. 1; 2006-152, s.1; town of Cary: 2005-117, s. 1; town of Caswell Beach: 2006-149, s. 1.1; town of Chadbourn: 2005-11, s. 1, as amended by 2006-149, s. 1; town of Clarkton: 2005-11; 2006-152,

s. 1; town of Elizabethtown: 2005-11, s. 1; 2006-152, s. 1; town of Faison: 2006-27, s. 2; town of Lake Waccamaw: 2001-356, s. 6; town of Rose Hill: 2005-11, s. 1; 2006-152, s. 1; town of Seven Devils: 2003-124, s. 1, as amended by 2004-58, s. 1; town of Tabor City: 2006-11, s. 1; as amended by 2006-149, s. 1; village of Whispering Pines: 2002-82, s. 1.

#### § 20-50.3. (For contingent repeal, see note) Division to furnish county assessors registration lists.

On the tenth day of each month the Division shall send to each county assessor a list of vehicles registered under the staggered system for which registration was renewed or a new registration was obtained in that county during the second month preceding that date, with the name and address of each vehicle owner. On the tenth day of March the Division shall send to each county assessor a list of the following vehicles registered under the annual system with the name and address of each vehicle owner:

- (1) Vehicles for which registration was renewed in that county during the period beginning the preceding December 1.
- (2) Vehicles for which a new registration was obtained in that county during the preceding December. (1991, c. 624, s. 5; 1991 (Reg. Sess., 1992), c. 961, s. 11; 2005-294, s. 10; 2006-259, s. 31.5.)

**Contingent repeal of this section.** — Session Laws 2005-294, s. 10, repeals this section. Session Laws 2005-294, s. 13, as amended by Session Laws 2006-259, s. 31.5, makes it effective July 1, 2010, or when the Division of Motor Vehicles and the Department of Revenue certify that the integrated computer system for registration renewal and property tax collection for motor vehicles is in operation, whichever occurs first.

**Editor's Note.** — Session Laws 2005-294, s. 13, as amended by Session Laws 2006-259, s. 31.5, provides: "Sections 4 and 8 of this act

become effective January 1, 2006. Sections 1, 2, 3, 5, 6, 7, 9, 10, and 11 of this act become effective July 1, 2010, or when the Division of Motor Vehicles and the Department of Revenue certify that the integrated computer system for registration renewal and property tax collection for motor vehicles is in operation, whichever occurs first. Sections 12 and 13 of this act are effective when they become law. Nothing in this act shall require the General Assembly to appropriate funds to implement it for the biennium ending June 30, 2007."

#### § 20-50.4. (For effective date, see note) Division to refuse to register vehicles on which county and municipal taxes and fees are not paid and when there is a failure to meet court-ordered child support obligations.

(a) **Property Taxes Paid with Registration.** — The Division shall refuse to register a vehicle on which county and municipal taxes and fees have not been paid.

## G.S. 20-50.4 is set out twice. See notes.

(b) Delinquent Child Support Obligations. — Upon receiving a report from a child support enforcement agency that sanctions pursuant to G.S. 110-142.2(a)(3) have been imposed, the Division shall refuse to register a vehicle for the owner named in the report until the Division receives certification pursuant to G.S. 110-142.2 that the payments are no longer considered delinquent. (1991, c. 624, s. 5; 1995, c. 538, s. 2(g); 1995 (Reg. Sess., 1996), c. 741, ss. 1, 2; 2005-294, s. 11; 2006-259, s. 31.5.)

**Section Set Out Twice.** — The section above is contingently effective July 1, 2010. For the section as in effect until July 1, 2010, see the main volume.

**Editor's Note.** — Session Laws 2005-294, s. 13, as amended by Session Laws 2006-259, s. 31.5, provides that "Sections 4 and 8 of this act become effective January 1, 2006. Sections 1, 2, 3, 5, 6, 7, 9, 10, and 11 of this act become effective July 1, 2010, or when the Division of

Motor Vehicles and the Department of Revenue certify that the integrated computer system for registration renewal and property tax collection for motor vehicles is in operation, whichever occurs first. Sections 12 and 13 of this act are effective when they become law. Nothing in this act shall require the General Assembly to appropriate funds to implement it for the biennium ending June 30, 2007."

## § 20-51. Exempt from registration.

The following shall be exempt from the requirement of registration and certificate of title:

- (1) Any such vehicle driven or moved upon a highway in conformance with the provisions of this Article relating to manufacturers, dealers, or nonresidents.
- (2) Any such vehicle which is driven or moved upon a highway only for the purpose of crossing such highway from one property to another.
- (3) Any implement of husbandry, farm tractor, road construction or maintenance machinery or other vehicle which is not self-propelled that was designed for use in work off the highway and which is operated on the highway for the purpose of going to and from such nonhighway projects.
- (4) Any vehicle owned and operated by the government of the United States.
- (5) Farm tractors equipped with rubber tires and trailers or semitrailers when attached thereto and when used by a farmer, his tenant, agent, or employee in transporting his own farm implements, farm supplies, or farm products from place to place on the same farm, from one farm to another, from farm to market, or from market to farm. This exemption shall extend also to any tractor, implement of husbandry, and trailer or semitrailer while on any trip within a radius of 10 miles from the point of loading, provided that the vehicle does not exceed a speed of 35 miles per hour. This section shall not be construed as granting any exemption to farm tractors, implements of husbandry, and trailers or semitrailers which are operated on a for-hire basis, whether money or some other thing of value is paid or given for the use of such tractors, implements of husbandry, and trailers or semitrailers.
- (6) Any trailer or semitrailer attached to and drawn by a properly licensed motor vehicle when used by a farmer, his tenant, agent, or employee in transporting unginne cotton, peanuts, soybeans, corn, hay, tobacco, silage, cucumbers, potatoes, all vegetables, fruits, greenhouse and nursery plants and flowers, Christmas trees, fertilizers or chemicals purchased or owned by the farmer or tenant for personal use in



implementing husbandry, irrigation pipes, loaders, or equipment owned by the farmer or tenant from place to place on the same farm, from one farm to another, from farm to gin, from farm to dryer, or from farm to market, and when not operated on a for-hire basis. The term "transporting" as used herein shall include the actual hauling of said products and all unloaded travel in connection therewith.

- (7) Those small farm trailers known generally as tobacco-handling trailers, tobacco trucks or tobacco trailers when used by a farmer, his tenant, agent or employee, when transporting or otherwise handling tobacco in connection with the pulling, tying or curing thereof.
- (8) Any vehicle which is driven or moved upon a highway only for the purpose of crossing or traveling upon such highway from one side to the other provided the owner or lessee of the vehicle owns the fee or a leasehold in all the land along both sides of the highway at the place or crossing.
- (9) Mopeds as defined in G.S. 20-4.01(27)d1.
- (10) Devices which are designed for towing private passenger motor vehicles or vehicles not exceeding 5,000 pounds gross weight. These devices are known generally as "tow dollies." A tow dolly is a two-wheeled device without motive power designed for towing disabled motor vehicles and is drawn by a motor vehicle in the same manner as a trailer.
- (11) Devices generally called converter gear or dollies consisting of a tongue attached to either a single or tandem axle upon which is mounted a fifth wheel and which is used to convert a semitrailer to a full trailer for the purpose of being drawn behind a truck tractor and semitrailer.
- (12) Motorized wheelchairs or similar vehicles not exceeding 1,000 pounds gross weight when used for pedestrian purposes by a handicapped person with a mobility impairment as defined in G.S. 20-37.5.
- (13) Any vehicle registered in another state and operated temporarily within this State by a public utility, a governmental or cooperative provider of utility services, or a contractor for one of these entities for the purpose of restoring utility services in an emergency outage.
- (14) Electric personal assistive mobility devices as defined in G.S. 20-4.01(7a).
- (15) Any vehicle that meets all of the following:
  - a. Is designed for use in work off the highway.
  - b. Is used for agricultural quarantine programs under the supervision of the Department of Agriculture and Consumer Services.
  - c. Is driven or moved on the highway for the purpose of going to and from nonhighway projects.
  - d. Is identified in a manner approved by the Division of Motor Vehicles.
  - e. Is operated by a person who possesses an identification card issued by the Department of Agriculture and Consumer Services. (1937, c. 407, s. 16; 1943, c. 500; 1949, c. 429; 1951, c. 705, s. 2; 1953, c. 826, ss. 2, 3; c. 1316, s. 1; 1961, cc. 334, 817; 1963, c. 145; 1965, c. 1146; 1971, c. 107; 1973, cc. 478, 757, 964; 1979, c. 574, s. 6; 1981 (Reg. Sess., 1982), c. 1286; 1983, cc. 288, 732; 1987, c. 608; 1989, c. 157, s. 2; 1991, c. 411, s. 4; 1995, c. 50, s. 4; 1999-281, s. 2; 2002-98, s. 4; 2002-150, s. 1; 2006-135, s. 2.)

**Effect of Amendments.** — Session Laws 2006-135, s. 2, effective July 19, 2006, substituted "potatoes, all vegetables, fruits, green-

house and nursery plants and flowers, Christmas trees," for "potatoes," in subdivision (6).



## § 20-54. Authority for refusing registration or certificate of title.

**Local Modification.** — Moore: 1995, c. 13, s. 3; 2002-82, s. 2; city of Saluda: 2006-27, s. 2; town of Beech Mountain: 2003-124, s. 1; town of Benson: 2005-11, s. 1, as amended by 2006-149, s. 1; town of Bladenboro: 2005-11, s. 1; town of Cary: 2005-117, s. 1; town of Caswell Beach: 2006-149, s. 1.1; town of Chadbourn: 2005-11, s. 1, as amended by 2006-149, s. 1; town of

Elizabethtown: 2005-11, s. 1; town of Faison: 2006-27, s. 2; town of Lake Waccamaw: 2001-356, s. 6; town of Rose Hill: 2005-11, s. 1; town of Seven Devils: 2003-124, s. 1, as amended by 2004-58, s. 1; town of Tabor City: 2005-11, s. 1, as amended by 2006-149, s. 1; village of Whispering Pines: 2002-82, s. 1.

## § 20-58.4. Release of security interest.

### CASE NOTES

**Failure to Comply.** — Notwithstanding the full payment and discharge of the claim, the creditor failed for months and months to comply with G.S. 20-58.4, which required a secured creditor to release its lien on the title to a motor vehicle or a mobile home within 30 days of the full payment or within 10 days after receipt of written demand from the debtors or the attorney for the debtors following a final payment. A violation of this lien-release statute could also

constitute a violation of the North Carolina Retail Installment Sales Act and furthermore an Unfair and Deceptive Trade Practice in Violation N.C. Gen. Stat. ch. 75; these statutes applied to bankruptcy debtors. The creditor was subject to statutory damages, legal fees, and expenses for its failure to comply with the North Carolina lien release statute. In re Sipe, — Bankr. —, 2001 Bankr. LEXIS 2199 (Bankr. W.D.N.C. July 18, 2001).

## § 20-63. Registration plates furnished by Division; requirements; replacement of regular plates with First in Flight plates; surrender and reissuance; displaying; preservation and cleaning; alteration or concealment of numbers; commission contracts for issuance.

(a) The Division upon registering a vehicle shall issue to the owner one registration plate for a motorcycle, trailer or semitrailer and for every other motor vehicle. Registration plates issued by the Division under this Article shall be and remain the property of the State, and it shall be lawful for the Commissioner or his duly authorized agents to summarily take possession of any plate or plates which he has reason to believe is being illegally used, and to keep in his possession such plate or plates pending investigation and legal disposition of the same. Whenever the Commissioner finds that any registration plate issued for any vehicle pursuant to the provisions of this Article has become illegible or is in such a condition that the numbers thereon may not be readily distinguished, he may require that such registration plate, and its companion when there are two registration plates, be surrendered to the Division. When said registration plate or plates are so surrendered to the Division, a new registration plate or plates shall be issued in lieu thereof without charge. The owner of any vehicle who receives notice to surrender illegible plate or plates on which the numbers are not readily distinguishable and who willfully refuses to surrender said plates to the Division shall be guilty of a Class 2 misdemeanor.

(b) Every license plate shall have displayed upon it the registration number assigned to the vehicle for which it is issued, the name of the State of North Carolina, which may be abbreviated, and the year number for which it is issued or the date of expiration. A plate issued for a commercial vehicle, as defined in G.S. 20-4.2(1), and weighing 26,001 pounds or more, must bear the word "commercial," unless the plate is a special registration plate authorized

in G.S. 20-79.4 or the commercial vehicle is a trailer or is licensed for 6,000 pounds or less. The plate issued for vehicles licensed for 7,000 pounds through 26,000 pounds must bear the word "weighted".

Except as otherwise provided in this subsection, a registration plate issued by the Division for a private passenger vehicle or for a private hauler vehicle licensed for 6,000 pounds or less shall be a "First in Flight" plate. A "First in Flight" plate shall have the words "First in Flight" printed at the top of the plate above all other letters and numerals. The background of the plate shall depict the Wright Brothers biplane flying over Kitty Hawk Beach, with the plane flying slightly upward and to the right. The following special registration plates do not have to be a "First in Flight" plate. The design of the plates that are not "First in Flight" plates must be approved by the Division and the State Highway Patrol for clarity and ease of identification.

- (1) Friends of the Great Smoky Mountains National Park.
- (2) Rocky Mountain Elk Foundation.
- (3) Blue Ridge Parkway Foundation.
- (4) Friends of the Appalachian Trail.
- (5) NC Coastal Federation.
- (6) In God We Trust.
- (7) Stock Car Racing Theme.
- (8) Buddy Pelletier Surfing Foundation.
- (9) Guilford Battleground Company.
- (10) National Wild Turkey Federation.
- (11) North Carolina Aquarium Society.
- (12) First in Forestry.
- (13) North Carolina Wildlife Habitat Foundation.
- (14) NC Trout Unlimited.
- (15) Ducks Unlimited.
- (16) Lung Cancer Research.
- (17) NC State Parks.
- (18) Support Our Troops.
- (19) US Equine Rescue League.
- (20) Fox Hunting.

(c) Such registration plate and the required numerals thereon, except the year number for which issued, shall be of sufficient size to be plainly readable from a distance of 100 feet during daylight.

(d) Registration plates issued for a motor vehicle other than a motorcycle, trailer, or semitrailer shall be attached thereto, one in the front and the other in the rear: Provided, that when only one registration plate is issued for a motor vehicle other than a truck-tractor, said registration plate shall be attached to the rear of the motor vehicle. The registration plate issued for a truck-tractor shall be attached to the front thereof. Provided further, that when only one registration plate is issued for a motor vehicle and this motor vehicle is transporting a substance that may adhere to the plate so as to cover or discolor the plate or if the motor vehicle has a mechanical loading device that may damage the plate, the registration plate may be attached to the front of the motor vehicle.

Any motor vehicle of the age of 35 years or more from the date of manufacture may bear the license plates of the year of manufacture instead of the current registration plates, if the current registration plates are maintained within the vehicle and produced upon the request of any person.

The Division shall provide registered owners of motorcycles and motorcycle trailers with suitably reduced size registration plates.

(e) Preservation and Cleaning of Registration Plates. — It shall be the duty of each and every registered owner of a motor vehicle to keep the registration plates assigned to such motor vehicle reasonably clean and free from dust and dirt, and such registered owner, or any person in his employ, or who operates



such motor vehicle by his authority, shall, upon the request of any proper officer, immediately clean such registration plates so that the numbers thereon may be readily distinguished, and any person who shall neglect or refuse to so clean a registration plate, after having been requested to do so, shall be guilty of a Class 3 misdemeanor.

(f) Operating with False Numbers. — Any person who shall willfully operate a motor vehicle with a registration plate which has been repainted or altered or forged shall be guilty of a Class 2 misdemeanor.

(g) Alteration, Disguise, or Concealment of Numbers. — Any operator of a motor vehicle who shall willfully mutilate, bend, twist, cover or cause to be covered or partially covered by any bumper, light, spare tire, tire rack, strap, or other device, or who shall paint, enamel, emboss, stamp, print, perforate, or alter or add to or cut off any part or portion of a registration plate or the figures or letters thereon, or who shall place or deposit or cause to be placed or deposited any oil, grease, or other substance upon such registration plates for the purpose of making dust adhere thereto, or who shall deface, disfigure, change, or attempt to change any letter or figure thereon, or who shall display a number plate in other than a horizontal upright position, shall be guilty of a Class 2 misdemeanor. Any operator of a motor vehicle who shall willfully cover or cause to be covered any part or portion of a registration plate or the figures or letters thereon by any device designed or intended to prevent or interfere with the taking of a clear photograph of a registration plate by a traffic control system using cameras commits an infraction and shall be fined under G.S. 14-3.1. Any operator of a motor vehicle who shall otherwise intentionally cover any number or registration renewal sticker on a registration plate with any material that makes the number or registration renewal sticker illegible commits an infraction and shall be fined under G.S. 14-3.1. Nothing in this subsection shall prohibit the use of transparent covers that are not designed or intended to prevent or interfere with the taking of a clear photograph of a registration plate by a traffic control system using cameras.

(h) Commission Contracts for Issuance of Plates and Certificates. — All registration plates, registration certificates, and certificates of title issued by the Division, outside of those issued from the Raleigh offices of the Division and those issued and handled through the United States mail, shall be issued insofar as practicable and possible through commission contracts entered into by the Division for the issuance of the plates and certificates in localities throughout North Carolina with persons, firms, corporations or governmental subdivisions of the State of North Carolina. The Division shall make a reasonable effort in every locality, except as noted above, to enter into a commission contract for the issuance of the plates and certificates and a record of these efforts shall be maintained in the Division. In the event the Division is unsuccessful in making commission contracts, it shall issue the plates and certificates through the regular employees of the Division. Whenever registration plates, registration certificates, and certificates of title are issued by the Division through commission contract arrangements, the Division shall provide proper supervision of the distribution. Nothing contained in this subsection will allow or permit the operation of fewer outlets in any county in this State than are now being operated.

Commission contracts entered into by the Division under this subsection shall provide for the payment of compensation on a per transaction basis. The collection of the highway use tax shall be considered a separate transaction for which one dollar and twenty-seven cents (\$1.27) compensation shall be paid. The performance at the same time of one or more of the remaining transactions listed in this subsection shall be considered a single transaction for which one dollar and forty-three cents (\$1.43) compensation shall be paid.

A transaction is any of the following activities:

- (1) Issuance of a registration plate, a registration card, a registration renewal sticker, or a certificate of title.



- (2) Issuance of a handicapped placard or handicapped identification card.
  - (3) Acceptance of an application for a personalized registration plate.
  - (4) Acceptance of a surrendered registration plate, registration card, or registration renewal sticker, or acceptance of an affidavit stating why a person cannot surrender a registration plate, registration card, or registration renewal sticker.
  - (5) Cancellation of a title because the vehicle has been junked.
  - (6) Acceptance of an application for, or issuance of, a refund for a fee or a tax, other than the highway use tax.
  - (7) **(Effective until July 1, 2008)** Receipt of the civil penalty imposed by G.S. 20-309 for a lapse in financial responsibility or receipt of the restoration fee imposed by that statute.
  - (7) **(Effective July 1, 2008)** Receipt of the civil penalty imposed by G.S. 20-311 for a lapse in financial responsibility or receipt of the restoration fee imposed by that statute.
  - (8) Acceptance of a notice of failure to maintain financial responsibility for a motor vehicle.
  - (8a) Collection of civil penalties imposed for violations of G.S. 20-183.8A.
  - (8b) Sale of one or more inspection stickers in a single transaction to a licensed inspection station.
  - (9) Collection of the highway use tax.
  - (10) Acceptance of a temporary lien filing.
- (h1) Commission contracts entered into by the Division under this subsection shall also provide for the payment of an additional one dollar (\$1.00) of compensation to commission contract agents for any transaction assessed a fee under subdivision (a)(1), (a)(2), (a)(3), (a)(7), (a)(8), or (a)(9) of G.S. 20-85.
- (i) **Electronic Applications and Collections.** — The Division is authorized to accept electronic applications for the issuance of registration plates, registration certificates, and certificates of title, and to electronically collect fees and penalties. (1937, c. 407, s. 27; 1943, c. 726; 1951, c. 102, ss. 1-3; 1955, c. 119, s. 1; 1961, c. 360, s. 4; c. 861, s. 2; 1963, c. 552, s. 6; c. 1071; 1965, c. 1088; 1969, c. 1140; 1971, c. 945; 1973, c. 629; 1975, c. 716, s. 5; 1979, c. 470, s. 1; c. 604, s. 1; c. 917, s. 4; 1981, c. 750; c. 859, s. 76; 1983, c. 253, ss. 1-3; 1985, c. 257; 1991 (Reg. Sess., 1992), c. 1007, s. 32; 1993, c. 539, ss. 333-336; 1994, Ex. Sess., c. 24, s. 14(c); 1997-36, s. 1; 1997-443, s. 32.7(a); 1997-461, s. 1; 1998-160, s. 3; 1998-212, ss. 15.4(a), 27.6(a); 1999-452, ss. 13, 14; 2000-182, s. 3; 2001-424, s. 27.21; 2001-487, s. 50(c); 2002-159, s. 31.1; 2003-424, s. 1; 2004-77, s. 1; 2004-79, s. 1; 2004-131, s. 1; 2004-185, s. 1; 2005-216, s. 1; 2006-209, s. 1; 2006-213, s. 4.)

**Subdivision (h)(7) is set out twice.** — The first version of subdivision (h)(7) set out above is effective until July 1, 2008. The second version of subdivision (h)(7) set out above is effective July 1, 2008.

**Effect of Amendments.** —

Session Laws 2006-209, s. 1, effective August

8, 2006, added subdivisions (b)(15) through (b)(20).

Session Laws 2006-213, s. 4, effective July 1, 2008, and applicable to lapses occurring on or after that date, substituted "G.S. 20-311" for "G.S. 20-309" in subdivision (h)(7).

## Part 4. Transfer of Title or Interest.

### § 20-72. Transfer by owner.

#### CASE NOTES

**Cited in** *Hernandez v. Nationwide Mut. Ins. Co.*, 171 N.C. App. 510, 615 S.E.2d 425, 2005

N.C. App. LEXIS 1360 (2005), cert. denied, 360 N.C. 63, 621 S.E.2d 624 (2005).

## Part 5. Issuance of Special Plates.

### § 20-79.4. Special registration plates.

(a) General. — Upon application and payment of the required registration fees, a person may obtain from the Division a special registration plate for a motor vehicle registered in that person's name if the person qualifies for the registration plate. A holder of a special registration plate who becomes ineligible for the plate, for whatever reason, must return the special plate within 30 days. A special registration plate may not be issued for a vehicle registered under the International Registration Plan. A special registration plate may be issued for a commercial vehicle that is not registered under the International Registration Plan. A special registration plate may not be developed using a name or logo for which a trademark has been issued unless the holder of the trademark licenses, without charge, the State to use the name or logo on the special registration plate.

(b) Types. — The Division shall issue the following types of special registration plates:

- (1) 82nd Airborne Division Association Member. — Issuable to a member of the 82nd Airborne Division Association, Inc. The plate shall bear the insignia of the 82nd Airborne Division Association, Inc. The Division may not issue the plate authorized by this subdivision unless it receives at least 300 applications for the plate.
- (2) Administrative Officer of the Courts. — Issuable to the Director of the Administrative Office of the Courts. The plate shall bear the phrase "J-20".
- (3) Air Medal Recipient. — Issuable to the recipient of the Air Medal. The plate shall bear the emblem of the Air Medal and the words "Air Medal".
- (4) Alpha Kappa Alpha Sorority. — Issuable to the registered owner of a motor vehicle. The plate shall bear the sorority's symbol and name. The Division may not issue the plate authorized by this subdivision unless it receives at least 300 applications for the plate.
- (5) Alpha Phi Alpha Fraternity. — Issuable to a member or supporter of the Alpha Phi Alpha Fraternity in accordance with G.S. 20-81.12. The plate shall bear the fraternity's symbol and name.
- (6) Alternative Fuel Vehicles. — Issuable to the registered owner of an alternative fuel vehicle. The plate shall bear the words "Alternative Fuel Vehicle". The Division must receive 300 or more applications for the plate before it may be developed.
- (7) Amateur Radio Operator. — Issuable to an amateur radio operator who holds an unexpired and unrevoked amateur radio license issued by the Federal Communications Commission and who asserts to the Division that a portable transceiver is carried in the vehicle. The plate shall bear the phrase "Amateur Radio". The plate shall bear the operator's official amateur radio call letters, or call letters with numerical or letter suffixes so that an owner of more than one vehicle may have the call letters on each.
- (8) American Legion. — Issuable to a member of the American Legion. The plate shall bear the words "American Legion" and the emblem of the American Legion. The Division may not issue the plate authorized by this subdivision unless it receives at least 300 applications for the plate.
- (9) Animal Lovers. — Issuable to the registered owner of a motor vehicle in accordance with G.S. 20-81.12. The plate may bear a picture of a dog and cat and the phrase "I Care."



- (10) ARC of North Carolina. — Issuable to the registered owner of a motor vehicle in accordance with G.S. 20-81.12. The plate shall bear the logo of The ARC of North Carolina, Inc., and the phrase “The ARC”.
- (11) Audubon North Carolina. — Issuable to the registered owner of a motor vehicle in accordance with G.S. 20-81.12. The plate shall bear the National Audubon Society, Inc., logo and a representation of a bird native to North Carolina.
- (12) Autism Society of North Carolina. — Issuable to the registered owner of a motor vehicle in accordance with G.S. 20-81.12. The plate shall bear the phrase “Autism Society of North Carolina”, the phrase “Providing Support, Promoting Opportunities”, and the logo of the Autism Society.
- (13) Aviation Maintenance Technician. — Issuable to a person who is a Federal Aviation Authority certified Aviation Maintenance Technician. The plate shall bear the logo of the F.A.A. Airworthiness Program and the initials “A.M.T.” The Division may not issue the plate authorized by this subdivision unless it receives at least 300 applications for the plate.
- (14) Be Active NC. — Issuable to the registered owner of a motor vehicle in accordance with G.S. 20-81.12. The plate shall bear the phrase “Be Active NC” and a representation of the “Be Active NC” logo.
- (15) Breast Cancer Awareness. — Issuable to the registered owner of a motor vehicle in accordance with G.S. 20-81.12. The plate shall bear the phrase “Early Detection Saves Lives” and a representation of a pink ribbon.
- (16) Bronze Star Recipient. — Issuable to a recipient of the Bronze Star. The plate shall bear the emblem of the Bronze Star and the words “Bronze Star”.
- (17) Buddy Pelletier Surfing Foundation. — Issuable to the registered owner of a motor vehicle in accordance with G.S. 20-81.12. The plate shall bear the words “Buddy Pelletier Surfing Foundation” and bear the logo of the Foundation.
- (18) Buffalo Soldiers. — Issuable to the registered owner of a motor vehicle in accordance with G.S. 20-81.12. The plate shall bear the words “The Buffalo Soldiers” and the logo of the 9th & 10th (Horse) Cavalry Association of the Buffalo Soldiers Greater North Carolina Chapter (BSGNCC).
- (19) Carolina’s Aviation Museum. — This plate is issuable to the registered owner of a motor vehicle in accordance with G.S. 20-81.12. The plate shall bear the phrase “Carolina’s Aviation Museum” and a logo provided by the museum.
- (20) Celebrate Adoption. — Issuable to the registered owner of a motor vehicle. The plate shall bear the phrase “Celebrate Adoption” and a representation of a white ribbon with a red heart on it. The Division must receive 300 or more applications for the plate before it may be developed.
- (21) Civic Club. — Issuable to a member of a nationally recognized civic organization whose member clubs in the State are exempt from State corporate income tax under G.S. 105-130.11(a)(5). Examples of these clubs include Jaycees, Kiwanis, Optimist, Rotary, Ruritan, and Shrine. The plate shall bear a word or phrase identifying the civic club and the emblem of the civic club. The Division may not issue a civic club plate authorized by this subdivision unless it receives at least 300 applications for that civic club plate.
- (22) Civil Air Patrol Member. — Issuable to an active member of the North Carolina Wing of the Civil Air Patrol. The plate shall bear the



- phrase "Civil Air Patrol". A plate issued to an officer member shall begin with the number "201" and the number shall reflect the seniority of the member; a plate issued to an enlisted member, a senior member, or a cadet member shall begin with the number "501".
- (23) Class D Citizen's Radio Station Operator. — Issuable to a Class D citizen's radio station operator. For an operator who has been issued Class D citizen's radio station call letters by the Federal Communications Commission, the plate shall bear the operator's official Class D citizen's radio station call letters. For an operator who has not been issued Class D citizen's radio station call letters by the Federal Communications Commission, the plate shall bear the phrase "Citizen's Band Radio".
- (24) Clerk of Superior Court. — Issuable to a current or retired clerk of superior court. A plate issued to a current clerk shall bear the phrase "Clerk Superior Court" and the letter "C" followed by a number that indicates the county the clerk serves. A plate issued to a retired clerk shall bear the phrase "Clerk Superior Court, Retired", the letter "C" followed by a number that indicates the county the clerk served, and the letter "X" indicating the clerk's retired status.
- (25) Coast Guard Auxiliary Member. — Issuable to an active member of the United States Coast Guard Auxiliary. The plate shall bear the phrase "Coast Guard Auxiliary".
- (26) Coastal Conservation Association. — Issuable to the registered owner of a motor vehicle in accordance with G.S. 20-81.12. The plate shall bear the logo and name of the Coastal Conservation Association.
- (27) Cold War Veteran. — Issuable to a veteran of the armed services of the United States who served during the Cold War era, September 2, 1945, through December 26, 1991, and who was separated from the armed services under honorable conditions. The plate shall bear the words "Cold War Veteran" and an insignia representing the Cold War era. The Division may not issue the plate authorized by this subdivision unless it receives at least 300 applications for the plate.
- (28) Collegiate Insignia Plate. — Issuable to the registered owner of a motor vehicle in accordance with G.S. 20-81.12. The plate may bear a phrase or an insignia representing a public or private college or university.
- (29) Combat Infantry Badge Recipient. — Issuable to a recipient of the Combat Infantry Badge. The plate shall bear the phrase "Combat Infantry Badge" and a representation of the Combat Infantry Badge. The Division may not issue the plate authorized by this subdivision unless it receives at least 300 applications for the plate.
- (30) Combat Veteran. — Issuable to a veteran of the armed forces who served in a combat zone, or in waters adjacent to a combat zone, during a period of war and who was separated from the armed forces under honorable conditions. The Division may not issue the plate authorized by this subdivision unless it receives at least 300 applications for the plate. A "period of war" is any of the following:
- a. World War I, which began April 16, 1917, and ended November 11, 1918.
  - b. World War II, which began December 7, 1941, and ended December 31, 1946.
  - c. The Korean Conflict, which began June 27, 1950, and ended January 31, 1955.
  - d. The Vietnam Era, which began August 5, 1964, and ended May 7, 1975.
  - e. The Persian Gulf War.

- f. Any other campaign, expedition, or engagement for which the United States Department of Defense authorizes a campaign badge or medal.
- (31) Commercial Fishing. — Issuable to the registered owner of a motor vehicle in accordance with G.S. 20-81.12. The plate may bear a phrase and picture appropriate to the subject of commercial fishing in North Carolina. The Division may not issue the plate authorized by this subdivision unless it receives at least 300 applications for the plate.
- (32) Corvette Club. — Issuable to the registered owner of a motor vehicle. The plate shall bear the flags logo of the Chevrolet Corvette. The Division may not issue the plate authorized by this subdivision unless it receives at least 300 applications for the plate.
- (33) County Commissioner. — Issuable to a county commissioner of a county in this State. The plate shall bear the words "County Commissioner" followed first by a number representing the commissioner's county and then by a letter or number that distinguishes plates issued to county commissioners of the same county. The number of a county shall be the order of the county in an alphabetical list of counties that assigns number one to the first county in the list and a letter or number to distinguish different cars owned by the county commissioners in that county. The Division may not issue the plate authorized by this subdivision unless it receives at least 300 applications for the plate.
- (34) Crystal Coast. — Issuable to the registered owner of a motor vehicle in accordance with G.S. 20-81.12. The plate shall bear the words "Crystal Coast Artificial Reef Association" and a representation of a SCUBA diving flag.
- (35) Daughters of the American Revolution. — Issuable to the registered owner of a motor vehicle. The plate may bear a phrase and picture appropriate to the organization. The Division may not issue the plate authorized by this subdivision unless it receives at least 300 applications for the plate.
- (36) Delta Sigma Theta Sorority. — Issuable to the registered owner of a motor vehicle. The plate shall bear the sorority's name and symbol. The Division must receive 300 or more applications for the plate before it may be developed.
- (37) Disabled Veteran. — Issuable to a veteran of the armed forces of the United States who suffered a 100% service-connected disability.
- (38) Distinguished Flying Cross. — Issuable to a recipient of the Distinguished Flying Cross. The plate shall bear the emblem of the Distinguished Flying Cross and the words "Distinguished Flying Cross".
- (39) District Attorney. — Issuable to a North Carolina or United States District Attorney. The plate issuable to a North Carolina district attorney shall bear the letters "DA" followed by a number that represents the prosecutorial district the district attorney serves. The plate for a United States attorney shall bear the phrase "U.S. Attorney" followed by a number that represents the district the attorney serves, with 1 being the Eastern District, 2 being the Middle District, and 3 being the Western District.
- (40) Ducks Unlimited. — Issuable to the registered owner of a motor vehicle in accordance with G.S. 20-81.12. The plate shall bear the logo of Ducks Unlimited, Inc., and shall bear the words: "Ducks Unlimited".
- (41) Eagle Scout. — Issuable to a young man who has been certified as an Eagle Scout by the Boy Scouts of America, or to his parents or



guardians. The plate shall bear the insignia of the Boy Scouts of America and shall bear the words "Eagle Scout". The Division may not issue the plate authorized by this subdivision unless it receives at least 300 applications for the plate.

- (42) El Pueblo. — Issuable to the registered owner of a motor vehicle in accordance with G.S. 20-18.12. The plate shall bear the El Pueblo logo and the words "El Pueblo". The Division may not issue the plate authorized by this subdivision unless it receives at least 300 applications for the plate.
- (43) Emergency Medical Technician. — Issuable to an emergency medical technician, as defined in G.S. 131E-155. The plate shall bear the Star of Life logo and the letters "EMT". The Division may not issue the plate authorized by this subdivision unless it receives at least 300 applications for the plate.
- (44) Fire Department or Rescue Squad Member. — Issuable to an active regular member or volunteer member of a fire department, rescue squad, or both a fire department and rescue squad. The plate shall bear the words "Firefighter", "Rescue Squad", or "Firefighter-Rescue Squad".
- (45) First in Forestry. — Issuable to the registered owner of a motor vehicle. The plate shall bear the words "First in Forestry". The Division may not issue the plate authorized by this subdivision unless it receives at least 300 applications for the plate.
- (46) Fox Hunting. — Issuable to the registered owner of a motor vehicle. The plate may bear a phrase and a picture representing fox hunting. The Division may not issue the plate authorized by this subdivision unless it receives at least 300 applications for the plate.
- (47) Fraternal Order of Police. — The plate authorized by this subdivision shall bear a representation of the Fraternal Order of Police emblem containing the letters "FOP". The Division must receive 300 applications for the plate before it may be developed. The plate is issuable to one of the following:
  - a. A person who presents proof of active membership in the State Lodge, Fraternal Order of Police for the year in which the license plate is sought.
  - b. The surviving spouse of a person who was a member of the State Lodge, Fraternal Order of Police, so long as the surviving spouse continues to renew the plate and does not remarry.
- (48) Future Farmers of America. — Issuable to a member or a supporter of the National Future Farmers of America Organization. The plate shall bear the emblem of the organization and the letters "FFA". The Division may not issue the plate authorized by this subdivision unless it receives at least 300 applications for the plate.
- (49) Girl Scout Gold Award recipient. — Issuable to a young woman who has been certified as a Girl Scout Gold Award recipient by the Girl Scouts of the U.S.A., or to her parents or guardians. The plate shall bear the insignia of the Girl Scouts of the U.S.A. and shall bear the words "Girl Scout Gold Award". The Division may not issue the plate authorized by this subdivision unless it receives at least 300 applications for the plate.
- (50) Goodness Grows. — Issuable to the registered owner of a motor vehicle in accordance with G.S. 20-81.12. The plate shall bear the "Goodness Grows in North Carolina" logo and the phrase "Agriculture: NC's #1 Industry".
- (51) Greyhound Friends of North Carolina. — Issuable to the registered owner of a motor vehicle in accordance with G.S. 20-81.12. The plate



shall bear the phrase “Greyhound Friends of North Carolina” and a picture of a greyhound.

- (52) Guilford Battleground Company. — Issuable to the registered owner of a motor vehicle in accordance with G.S. 20-81.12. The plate shall bear the phrase “Revolutionary” used by the Guilford Battleground Company and an image that depicts General Nathaniel Greene.
- (53) Harley Owners’ Group. — Issuable to the registered owner of a motor vehicle in accordance with G.S. 20-81.12. The plate shall be designed in consultation with and approved by the Harley-Davidson Motor Company, Inc., and shall bear the words and trademark of the “Harley Owners’ Group”.
- (54) Gold Star Lapel Button. — Issuable to the recipient of the Gold Star lapel button. The plate shall bear the emblem of the Gold Star lapel button and the words “Gold Star”. The Division may not issue the plate authorized by this subdivision unless it receives at least 300 applications for the plate.
- (55) Historic Vehicle Owner. — Issuable for a motor vehicle that is at least 35 years old measured from the date of manufacture. The plate for an historic vehicle shall bear the word “Antique” unless the vehicle is a model year 1943 or older. The plate for a vehicle that is a model year 1943 or older shall bear the word “Antique” or the words “Horseless Carriage”, at the option of the vehicle owner.
- (56) Historical Attraction Plate. — Issuable to the registered owner of a motor vehicle in accordance with G.S. 20-81.12. The plate may bear a phrase or an insignia representing a publicly owned or nonprofit historical attraction located in North Carolina.
- (57) HOMES4NC Plate. — Issuable to the registered owner of a motor vehicle in accordance with G.S. 20-81.12. The plate shall bear “HOMES4NC”, the logo of the North Carolina Association of Realtors Housing Opportunity Foundation, and shall be developed in conjunction with that organization. The Division may not issue the plate authorized by this subdivision unless it receives at least 300 applications for the plate.
- (58) Honorary Plate. — Issuable to a member of the Honorary Consular Corps, who has been certified by the U. S. State Department, the plate shall bear the words “Honorary Consular Corps” and a distinguishing number based on the order of issuance.
- (59) In God We Trust. — Issuable to the registered owner of a motor vehicle in accordance with G.S. 20-81.12. The plate shall bear the phrase “In God We Trust.”
- (60) International Association of Fire Fighters. — The plate authorized by this subdivision shall bear the logo of the International Association of Fire Fighters. The Division may not issue the plate unless it receives at least 300 applications for the plate. The plate is issuable to one of the following:
  - a. A person who presents proof of active membership in the International Association of Fire Fighters for the year in which the license plate is sought.
  - b. The surviving spouse of a person who was a member of the International Association of Fire Fighters, so long as the surviving spouse continues to renew the plate and does not remarry.
- (61) Judge or Justice. — Issuable to a sitting or retired judge or justice in accordance with G.S. 20-79.6.
- (62) Kids First. — Issuable to the registered owner of a motor vehicle in accordance with G.S. 20-81.12. The plate may bear the phrase “Kids First” and a logo of children’s hands.

- (63) Kappa Alpha Psi Fraternity. — Issuable to the registered owner of a motor vehicle. The plate shall bear the fraternity's symbol and name. The Division may not issue the plate authorized by this subdivision unless it receives at least 300 applications for the plate.
- (64) Legion of Valor. — Issuable to a recipient of one of the following military decorations: the Congressional Medal of Honor, the Distinguished Service Cross, the Navy Cross, or the Air Force Cross. The plate shall bear the emblem and name of the recipient's decoration.
- (65) Legislator. — Issuable to a member of the North Carolina General Assembly. The plate shall bear "The Great Seal of the State of North Carolina" and, as appropriate, the word "Senate" or "House" followed by the Senator's or Representative's assigned seat number.
- (66) Litter Prevention. — Issuable to the registered owner of a motor vehicle in accordance with G.S. 20-81.12. The plate may bear a phrase and picture appropriate to the subject of litter prevention in North Carolina.
- (67) Leukemia & Lymphoma Society. — Issuable to the registered owner of a motor vehicle in accordance with G.S. 20-81.12. The plate shall bear the phrase and logo provided by The Leukemia & Lymphoma Society that reflects "TEAM IN TRAINING".
- (68) Lung Cancer Research. — Issuable to the registered owner of a motor vehicle in accordance with G.S. 20-81.12. The plate shall bear the phrase "Lung Cancer Research" and a representation of the American Lung Association's Red Cross.
- (69) Magistrate. — Issuable to a current or retired North Carolina magistrate. A plate issued to a current magistrate shall bear the letters "MJ" followed by a number indicating the district court district the magistrate serves, then by a hyphen, and then by a number indicating the seniority of the magistrate. The Division shall use the number "9" to designate District Court Districts 9 and 9B. A plate issued to a retired magistrate shall bear the phrase "Magistrate, Retired ", the letters "MJX " followed by a hyphen and the number that indicates the district court district the magistrate served, followed by a letter based on the order of issuance of the plates.
- (70) March of Dimes. — Issuable to the registered owner of a motor vehicle in accordance with G.S. 20-81.12. The plate may bear a phrase or an insignia representing the March of Dimes Foundation.
- (71) Marine Corps League. — Issuable to a member of the Marine Corps League. The plate shall bear the words "Marine Corps League" or the letters "MCL" and the emblem of the Marine Corps League. The Division may not issue the plate authorized by this subdivision unless it receives at least 300 applications for the plate.
- (72) Marshal. — Issuable to a United States Marshal. The plate shall bear the phrase "U.S. Marshal" followed by a number that represents the district the Marshal serves, with 1 being the Eastern District, 2 being the Middle District, and 3 being the Western District.
- (73) Military Reservist. — Issuable to a member of a reserve component of the armed forces of the United States. The plate shall bear the name and insignia of the appropriate reserve component. Plates shall be numbered sequentially for members of a component with the numbers 1 through 5000 reserved for officers, without regard to rank.
- (74) Military Retiree. — Issuable to an individual who has retired from the armed forces of the United States. The plate shall bear the word "Retired" and the name and insignia of the branch of service from which the individual retired.
- (75) Military Veteran. — Issuable to an individual who served honorably in the armed services of the United States. The plate shall bear the



words “U.S. Military Veteran” and the name and insignia of the branch of service in which the individual served. The Division may not issue the plate authorized by this subdivision unless it receives at least 300 applications for the plate.

- (76) Military Wartime Veteran. — Issuable to either a member or veteran of the armed services of the United States who served during a period of war. If the person is a veteran of the armed services, then the veteran must be separated from the armed services under honorable conditions. The plate shall bear a word or phrase identifying the period of war and a replica of the campaign badge or medal awarded for that war. Except for World War II and Korean Conflict plates, the Division may not issue a plate authorized by this subdivision unless it receives at least 300 applications for that plate. A “period of war” is any of the following:
- a. World War I, meaning the period beginning April 16, 1917, and ending November 11, 1918.
  - b. World War II, meaning the period beginning December 7, 1941, and ending December 31, 1946.
  - c. The Korean Conflict, meaning the period beginning June 27, 1950, and ending January 31, 1955.
  - d. The Vietnam Era, meaning the period beginning August 5, 1964, and ending May 7, 1975.
  - e. Desert Storm, meaning the period beginning August 2, 1990, and ending April 11, 1991.
  - f. Operation Enduring Freedom, meaning the period beginning October 24, 2001, and ending at a date to be determined.
  - g. Operation Iraqi Freedom, meaning the period beginning March 19, 2003, and ending at a date to be determined.
  - h. Any other campaign, expedition, or engagement for which the United States Department of Defense authorizes a campaign badge or medal.
- (77) Mothers Against Drunk Driving. — Issuable to the registered owner of a motor vehicle. The plate shall bear the letters “M.A.D.D.” and the words “Mothers Against Drunk Driving”. The Division must receive 300 or more applications for the plate before it may be developed.
- (78) National Guard Member. — Issuable to an active or a retired member of the North Carolina National Guard. The plate shall bear the phrase “National Guard”. A plate issued to an active member shall bear a number that reflects the seniority of the member; a plate issued to a commissioned officer shall begin with the number “1”; a plate issued to a noncommissioned officer with a rank of E7, E8, or E9 shall begin with the number “1601”; a plate issued to an enlisted member with a rank of E6 or below shall begin with the number “3001”. The plate issued to a retired or separated member shall indicate the member’s retired status.
- (79) National Multiple Sclerosis Society. — Issuable to the registered owner of a motor vehicle in accordance with G.S. 20-81.12. The plate shall have the logo of the National Multiple Sclerosis Society and the telephone number “1-800-FIGHT MS” on the plate.
- (80) National Rifle Association. — Issuable to the registered owner of a motor vehicle. The plate shall bear a phrase or insignia representing the National Rifle Association of America. The Division must receive 300 or more applications for the plate before it may be developed.
- (81) National Wild Turkey Federation. — Issuable to the registered owner of a motor vehicle. The plate shall bear the design of a strutting wild turkey and dogwood blossoms and the words “Working For The Wild



Turkey.” The Division must receive 300 or more applications for the plate before it may be developed.

- (82) Native American. — Issuable to the registered owner of a motor vehicle. The plate may bear a phrase or an insignia representing Native Americans. The Division must receive 300 or more applications for the plate before it may be developed.
- (83) NC Agribusiness. — Issuable to the registered owner of a motor vehicle in accordance with G.S. 20-81.12. The plate shall bear the logo of the North Carolina Agribusiness Council, Inc., and the phrase “NC’s #1 Industry”.
- (84) NC Children’s Promise. — Issuable to the registered owner of a motor vehicle in accordance with G.S. 20-81.12. The plate shall bear the phrase “N.C. Children’s Promise” and a logo representing the North Carolina Children’s Promise organization.
- (85) NC Coastal Federation. — Issuable to the registered owner of a motor vehicle in accordance with G.S. 20-81.12. The plate shall bear a phrase used by the North Carolina Coastal Federation and an image that depicts the coastal area of the State.
- (86) NC Trout Unlimited. — Issuable to the registered owner of a motor vehicle in accordance with G.S. 20-81.12. The plate shall bear the phrase “Back the Brookie” and an image that depicts a North Carolina brook trout.
- (87) North Carolina 4-H Development Fund. — Issuable to the registered owner of a motor vehicle in accordance with G.S. 20-81.12. The plate may bear a phrase or insignia representing The North Carolina 4-H Development Fund.
- (88) North Carolina Libraries. — Issuable to the registered owner of a motor vehicle in accordance with G.S. 20-81.12. The plate shall bear the words “North Carolina Libraries” and bear the international logo for libraries. The Division must receive 300 or more applications for the plate before it may be developed.
- (89) North Carolina Wildlife Habitat Foundation. — Issuable to the owner of a motor vehicle in accordance with G.S. 20-81.12. The plate shall bear the logo of the North Carolina Wildlife Habitat Foundation on the left side and the background of the entire plate shall be beige or tan color. The numbers or other writing on the plate shall be black and the border shall be black. The plate shall be developed by the Division in consultation with and approved by the North Carolina Wildlife Habitat Foundation. The Division may not issue the plate authorized by this subdivision unless it receives at least 300 applications for the plate.
- (90) Nurses. — Issuable to the registered owner of a motor vehicle in accordance with G.S. 20-81.12. The plate shall bear the phrase “First in Nursing” and a representation relating to nursing.
- (91) Olympic Games. — Issuable to the registered owner of a motor vehicle in accordance with G.S. 20-81.12. The plate may bear a phrase or insignia representing the Olympic Games.
- (92) Omega Psi Phi Fraternity. — Issuable to the registered owner of a motor vehicle in accordance with G.S. 20-81.12. The plate shall bear the fraternity’s symbol and name.
- (93) Paramedics. — Issuable to an emergency medical technician-paramedic, as defined in G.S. 131E-155. The plate shall bear the Star of Life logo and the phrase “Professional Paramedic”. The Division may not issue the plate authorized by this subdivision unless it receives at least 300 applications for the plate.
- (94) Partially Disabled Veteran. — Issuable to a veteran of the armed forces of the United States who suffered a service connected disability of less than 100%.

- (95) Pearl Harbor Survivor. — Issuable to a veteran of the armed forces of the United States who was present at and survived the attack on Pearl Harbor on December 7, 1941. The plate will bear the phrase "Pearl Harbor Survivor" and the insignia of the Pearl Harbor Survivors' Association.
- (96) Personalized. — Issuable to the registered owner of a motor vehicle. The plate will bear the letters or letters and numbers requested by the owner. The Division may refuse to issue a plate with a letter combination that is offensive to good taste and decency. The Division may not issue a plate that duplicates another plate.
- (97) POW/MIA. — Issuable to the owner of a motor vehicle. The plate shall bear the official POW/MIA logo. The Division must receive 300 or more applications for the plate before it may be developed.
- (98) Prince Hall Mason. — This plate is issuable to the registered owner of a motor vehicle in accordance with G.S. 20-81.12. The plate shall bear the phrase "Prince Hall Mason" and a picture of the Masonic symbol.
- (99) Prisoner of War. — Issuable to the following:
  - a. A member or veteran member of the armed forces of the United States who has been captured and held prisoner by forces hostile to the United States while serving in the armed forces.
  - b. The surviving spouse of a person who had a prisoner of war plate at the time of death so long as the surviving spouse continues to renew the plate and does not remarry.
- (100) Professional Sports Fan. — Issuable to the registered owner of a motor vehicle. The plate shall bear the logo of a professional sports team located in North Carolina. The Division shall receive 300 or more applications for a professional sports fan plate before a plate may be issued.
- (101) Purple Heart Recipient. — Issuable to a recipient of the Purple Heart award. The plate shall bear the phrase "Purple Heart Veteran, Combat Wounded" and the letters "PH".
- (102) Red Hat Society. — Issuable to the registered owner of a motor vehicle. The plate shall bear a representation of The Red Hat Society. The Division must receive 300 or more applications for the plate before it may be developed.
- (103) Register of Deeds. — Issuable to a register of deeds. The plate shall bear the words "Register of Deeds" and the letter "R" followed by a number representing the county of the register of deeds. The number of a county shall be the order of the county in an alphabetical list of counties that assigns number one to the first county in the list.
- (104) Retired Highway Patrol. — The plate authorized by this subdivision shall bear the phrase "SHP, Retired." The Division may not issue the plate authorized by this subdivision unless it receives at least 300 applications for the plate. The plate is issuable to one of the following:
  - a. An individual who has retired from the North Carolina Highway Patrol.
  - b. The surviving spouse of a person who had a retired highway patrol plate at the time of death so long as the surviving spouse continues to renew the plate and does not remarry.
  - c. The surviving spouse of a person who qualified for a retired highway patrol plate so long as the surviving spouse applies for the plate within ninety (90) days of the qualifying spouse's death and does not remarry.
- (105) Retired Law Enforcement Officers. — The plate authorized by this subdivision shall bear the phrase "Retired Law Enforcement Officer"



and a representation of a law enforcement badge. The Division must receive 300 or more applications for the plate before it may be developed. The plate is issuable to one of the following:

- a. A retired law enforcement officer presenting to the Division, along with the application for the plate, a copy of the officer's retired identification card or letter of retirement.
  - b. The surviving spouse of a person who had a retired law enforcement officer plate at the time of death so long as the surviving spouse continues to renew the plate and does not remarry.
- (106) Rocky Mountain Elk Foundation. — Issuable to the registered owner of a motor vehicle in accordance with G.S. 20-81.12. The plate shall bear the phrase "Rocky Mountain Elk Foundation" and a logo approved by the Rocky Mountain Elk Foundation, Inc.
- (107) Save the Sea Turtles. — Issuable to the registered owner of a motor vehicle in accordance with G.S. 20-81.12. The plate may bear the phrase "Save the Sea Turtles" and a representation related to sea turtles.
- (108) Scenic Rivers. — Issuable to the registered owner of a motor vehicle in accordance with G.S. 20-81.12. The plate shall bear the words "Scenic Rivers" and a picture representing the unique beauty of the scenic rivers of North Carolina.
- (109) School Technology. — Issuable to the registered owner of a motor vehicle in accordance with G.S. 20-81.12. The plate may bear a phrase or an insignia representing the public school system in North Carolina.
- (110) SCUBA. — Issuable to the registered owner of a motor vehicle in accordance with G.S. 20-81.12. The plate shall bear the phrase "SCUBA" and a logo of the Diver Down Flag.
- (111) Shag Dancing. — Issuable to the registered owner of a motor vehicle in accordance with G.S. 20-81.12. The plate may bear the phrase "I'd Rather Be Shaggin'" and a picture representing shag dancing.
- (112) Share the Road. — Issuable to the registered owner of a motor vehicle in accordance with G.S. 20-81.12. The plate shall bear a representation of a bicycle and the phrase "Share the Road".
- (113) Sheriff. — Issuable to a current sheriff or to a retired sheriff who served as sheriff for at least 10 years before retiring. A plate issued to a current sheriff shall bear the word "Sheriff" and the letter "S" followed by a number that indicates the county the sheriff serves. A plate issued to a retired sheriff shall bear the phrase "Sheriff, Retired", the letter "S" followed by a number that indicates the county the sheriff served, and the letter "X" indicating the sheriff's retired status.
- (114) Silver Star Recipient. — Issuable to a recipient of the Silver Star. The plate shall bear the emblem of the Silver Star and the words "Silver Star".
- (115) Soil and Water Conservation. — Issuable to the registered owner of a motor vehicle in accordance with G.S. 20-81.12. The plate may bear a phrase and picture appropriate to the subject of water quality and environmental protection in North Carolina.
- (116) Special Forces Association. — Issuable to the registered owner of a motor vehicle in accordance with G.S. 20-81.12. The plate shall bear a representation of the Special Forces Association shoulder patch with tabs and shall bear the words "Special Forces Association."
- (117) Special Olympics. — Issuable to the registered owner of a motor vehicle in accordance with G.S. 20-81.12. The plate may bear a phrase or an insignia representing the North Carolina Special Olympics.



- (118) Sport Fishing. — Issuable to the registered owner of a motor vehicle in accordance with G.S. 20-81.12. The plate may bear a phrase and picture appropriate to the subject of sport fishing in North Carolina. The Division may not issue the plate authorized by this subdivision unless it receives at least 300 applications for the plate.
- (119) Square Dance Clubs. — Issuable to a member of a recognized square dance organization exempt from corporate income tax under G.S. 105-130.11(a)(5). The plate shall bear a word or phrase identifying the club and the emblem of the club. The Division shall not issue a dance club plate authorized by this subdivision unless it receives at least 300 applications for that dance club plate.
- (120) State Government Official. — Issuable to elected and appointed members of State government in accordance with G.S. 20-79.5.
- (121) State Attraction. — Issuable to the registered owner of a motor vehicle in accordance with G.S. 20-81.12. The plate may bear a phrase or an insignia representing a publicly owned or nonprofit State or federal attraction located in North Carolina.
- (122) Stock Car Racing Theme. — Issuable to the registered owner of a motor vehicle pursuant to G.S. 20-81.12. This is a series of plates bearing an emblem, seal, other symbol or design displaying themes of professional stock car auto racing, or professional stock car auto racing drivers. The Division shall not develop any plate in the series without a license to use copyrighted or registered words, symbols, trademarks, or designs associated with the plate. The plate shall be designed in consultation with and approved by the person authorized to provide the State with the license to use the words, symbols, trademarks, or designs associated with the plate. The Division shall not pay a royalty for the license to use the copyrighted or registered words, symbols, trademarks, or designs associated with the plate.
- (123) Street Rod Owner. — Issuable to the registered owner of a modernized private passenger motor vehicle manufactured prior to the year 1949 or designed to resemble a vehicle manufactured prior to the year 1949. The plate shall bear the phrase "Street Rod". The Division may not issue the plate authorized by this subdivision unless it receives at least 300 applications for the plate.
- (124) Support Our Troops. — Issuable to the registered owner of a motor vehicle in accordance with G.S. 20-81.12. The plate shall bear a picture of a soldier and a child and shall bear the words: "Support Our Troops".
- (125) Surveyor Plate. — Issuable to the registered owner of a motor vehicle in accordance with G.S. 20-81.12. The plate shall bear the words "Following In Their Footsteps" and shall bear a picture of a transit.
- (126) Sweet Potato. — Issuable to the registered owner of a motor vehicle. The plate may bear a phrase and picture representing the State's official vegetable, the sweet potato. The Division may not issue the plate authorized by this subdivision unless it receives at least 300 applications for the plate.
- (127) Tarheel Classic Thunderbird Club. — Issuable to the registered owner of a motor vehicle. The plate shall bear the logo of the Tarheel Classic Thunderbird Club and the phrase "Tarheel Classic Thunderbird Club". The Division may not issue the plate authorized by this subdivision unless it receives at least 300 applications for the plate.
- (128) Tobacco Heritage. — Issuable to the registered owner of a motor vehicle. The plate shall bear a picture of a tobacco leaf and plow. The

Division may not issue the plate authorized by this subdivision unless it receives at least 300 applications for the plate.

- (129) Transportation Personnel. — Issuable to various members of the Divisions of the Department of Transportation. The plate shall bear the letters "DOT" followed by a number from 1 to 85, as designated by the Governor.
  - (130) U.S. Navy Specialty. — Issuable to a veteran of the United States Navy Submariner Service. The plate shall bear the phrase "Silent Service Veteran" and shall bear a representation of the Submarine Service Qualification pin. The Division may not issue the plate authorized by this subdivision unless it receives at least 300 applications for the plate.
  - (131) US Equine Rescue League. — Issuable to the registered owner of a motor vehicle in accordance with G.S. 20-81.12. The plate shall bear the phrase "United States Equine Rescue League", and a depiction of two horses in a circle.
  - (132) U.S. Representative. — Issuable to a United States Representative for North Carolina. The plate shall bear the phrase "U.S. House" and shall be issued on the basis of Congressional district numbers.
  - (133) U.S. Senator. — Issuable to a United States Senator for North Carolina. The plates shall bear the phrase "U.S. Senate" and shall be issued on the basis of seniority represented by the numbers 1 and 2.
  - (134) University Health Systems of Eastern Carolina. — Issuable to the registered owner of a motor vehicle in accordance with G.S. 20-81.12. The plate may bear a phrase or insignia representing the University Health Systems of Eastern Carolina.
  - (135) The V Foundation for Cancer Research. — Issuable to the registered owner of a motor vehicle in accordance with G.S. 20-81.12. The plate shall bear a phrase and insignia representing The V Foundation for Cancer Research.
  - (136) Veterans of Foreign Wars. — Issuable to a member or a supporter of the Veterans of Foreign Wars. The plate shall bear the words "Veterans of Foreign Wars" or "VFW" and the emblem of the VFW. The Division may not issue the plate authorized by this subdivision unless it receives at least 300 applications for the plate.
  - (137) Watermelon. — Issuable to the registered owner of a motor vehicle. The plate shall bear a picture representing a slice of watermelon. The Division may not issue the plate authorized by this subdivision unless it receives at least 300 applications for the plate.
  - (138) Wildlife Resources. — Issuable to the registered owner of a motor vehicle in accordance with G.S. 20-81.12. The plate shall bear a picture representing a native wildlife species occurring in North Carolina.
  - (139) Zeta Phi Beta Sorority. — Issuable to the registered owner of a motor vehicle in accordance with G.S. 20-81.12. The plate shall bear the sorority's name and symbol.
- (c) Repealed by Session Laws 1991 (Regular Session, 1992), c. 1042, s. 1. (1991, c. 672, s. 2; c. 726, s. 23; 1991 (Reg. Sess., 1992), c. 1042, s. 1; 1993, c. 543, s. 2; 1995, c. 326, ss. 1-3; c. 433, ss. 1, 4.1; 1997-156, s. 1; 1997-158, s. 1; 1997-339, s. 1; 1997-427, s. 1; 1997-461, ss. 2-4; 1997-477, s. 1; 1997-484, ss. 1-3; 1998-155, s. 1; 1998-160, ss. 1, 2; 1998-163, ss. 3-5; 1999-220, s. 3.1; 1999-277, s. 1; 1999-314, s. 1; 1999-403, s. 1; 1999-450, s. 1; 1999-452, s. 16; 2000-159, ss. 1, 2; 2001-40, s. 1; 2001-483, s. 1; 2001-498, ss. 1(a), 1(b), 2; 2002-134, ss. 1-4; 2002-159, s. 68; 2003-10, s. 1; 2003-11, s. 1; 2003-68, s. 1; 2003-424, s. 2; 2004-131, s. 2; 2004-182, s. 1; 2004-185, s. 2; 2004-200, s. 1; 2005-216, ss. 2, 3; 2006-209, ss. 2, 7.)



**Editor’s Note. —**

Session Laws 2001-498, s. 8, provided that the amendment by Session Laws 2001-498, s. 1(b), which added subdivisions (b)(16c) and (b)(36b) [now subdivisions (53) and (106)], relating to the Harley Owners’ Group and the Rocky Mountain Elk Foundation, would expire on June 30, 2006. However, Session Laws 2006-209, s. 7, amended Session Laws 2001-498, s. 8, to delete the sunset provision, so special plates for Harley Owners’ Group and Rocky Mountain Elk Foundation will not expire.

Session Laws 2006-209, s. 8 provides: “As applied to G.S. 20-79.4, the authority in G.S. 164-10 for the Division of Legislative Drafting and Codification to reletter or renumber section subdivisions includes the authority to renumber all the subdivisions in G.S. 20-79.4(b) in sequential and alphabetical order and to eliminate mixed number-letter subdivision designations. This section expires July 1, 2011.”

Subdivisions (b)(1) through (b)(52) of this section were renumbered as subdivisions (b)(1)

through (b)(139), respectively, pursuant to Session Laws 2006-209, s. 8, which authorized the Revisor of Statutes to renumber subdivisions in subsection (b) in sequential and alphabetical order and to eliminate mixed number-letter subdivision designations. This authority continues until 2011.

**Effect of Amendments. —**

Session Laws 2006-209, s. 2, effective August 8, 2006, in subdivision (b)(3h) [now (b)(15)], added “in accordance with G.S. 20-81.12” at the end of the first sentence, and deleted the third sentence, which read: “The Division must receive 300 or more applications for the plate before it may be developed.”; added subdivisions (b)(3n), (b)(14e), (b)(15c), (b)(16b), (b)(16f), (b)(20f), (b)(22c), (b)(22k), (b)(28k), (b)(22g), (b)(45a), and (b)(46c) [now (b)(19), (b)(43), (b)(46), (b)(51), (b)(54), (b)(63), (b)(67), (b)(68), (b)(84), (b)(124), (b)(131)]; rewrote subdivision (b)(19b) [now (b)(60)]; and added sub-subdivision (b)(36a)c [now (b)(104)d.].

**§ 20-79.5. (Effective July 1, 2007) Special registration plates for elected and appointed State government officials.**

(a) Plates. — The State government officials listed in this section are eligible for a special registration plate under G.S. 20-79.4. The plate shall bear the number designated in the following table for the position held by the official.

Position	Number on Plate
Governor	1
Lieutenant Governor	2
Speaker of the House of Representatives	3
President Pro Tempore of the Senate	4
Secretary of State	5
State Auditor	6
State Treasurer	7
Superintendent of Public Instruction	8
Attorney General	9
Commissioner of Agriculture	10
Commissioner of Labor	11
Commissioner of Insurance	12
Speaker Pro Tempore of the House	13
Legislative Services Officer	14
Secretary of Administration	15
Secretary of Environment and Natural Resources	16
Secretary of Revenue	17
Secretary of Health and Human Services	18
Secretary of Commerce	19
Secretary of Correction	20
Secretary of Cultural Resources	21



**G.S. 20-79.5 is set out twice. See notes.**

Position	Number on Plate
Secretary of Crime Control and Public Safety	22
Secretary of Juvenile Justice and Delinquency Prevention	23
Governor's Staff	24-29
State Budget Officer	30
State Personnel Director	31
Chair of the State Board of Education	42
President of the U.N.C. System	43
Alcoholic Beverage Control Commission	44-46
Assistant Commissioners of Agriculture	47-48
Deputy Secretary of State	49
Deputy State Treasurer	50
Assistant State Treasurer	51
Deputy Commissioner for the Department of Labor	52
Chief Deputy for the Department of Insurance	53
Assistant Commissioner of Insurance	54
Deputies and Assistant to the Attorney General	55-65
Board of Economic Development Nonlegislative Member	66-88
State Ports Authority Nonlegislative Member	89-96
Utilities Commission Member	97-104
Post-Release Supervision and Parole Commission Member	105-109
State Board Member, Commission Member, or State Employee Not Named in List	110-200

(b) Designation. — When the table in subsection (a) designates a range of numbers for certain officials, the number given an official in that group shall be assigned. The Governor shall assign a number for members of the Governor's staff, nonlegislative members of the Board of Economic Development, nonlegislative members of the State Ports Authority, members of State boards and commissions, and for State employees. The Attorney General shall assign a number for the Attorney General's deputies and assistants.

The first number assigned to the Alcoholic Beverage Control Commission is reserved for the Chair of that Commission. The remaining numbers shall be assigned to the Alcoholic Beverage Control Commission members on the basis of seniority. The first number assigned to the Utilities Commission is reserved for the Chair of that Commission. The remaining numbers shall be assigned to the Utilities Commission members on the basis of seniority. The first number assigned to the Parole Commission is reserved for the Chair of that Commission. The remaining numbers shall be assigned to the Parole Commission members on the basis of seniority. (1991, c. 672, s. 2; c. 726, s. 23; 1991 (Reg. Sess., 1992), c. 959, s. 1; 1996, 2nd Ex. Sess., c. 18, s. 8(a); 1997-443, ss. 11A.118(a), 11A.119(a); 2000-137, s. 4.(e); 2006-203, s. 14.)

**Section Set Out Twice.** — The section as in effect until July 1, 2007, see the main volume. above is effective July 1, 2007. For the section

**Effect of Amendments.** — Session Laws 2006-203, s. 14, effective July 1, 2007, deleted “Advisory Budget Commission Nonlegislative Member 32-41” from the list of government officials eligible for a special registration plate

in subsection (a); and deleted “nonlegislative members of the Advisory Budget Commission” following “Governor’s staff” in the first sentence of subsection (b).

**§ 20-79.7. Fees for special registration plates and distribution of the fees.**

(a) Fees. — Upon request, the Division shall provide and issue free of charge one registration plate to a recipient of a Legion of Valor award, a 100% disabled veteran, and an ex-prisoner of war. All other special registration plates, including additional Legion of Valor, 100% Disabled Veteran, and Ex-Prisoner of War plates, are subject to the regular motor vehicle registration fee in G.S. 20-87 or G.S. 20-88 plus an additional fee in the following amount:

<u>Special Plate</u>	<u>Additional Fee Amount</u>
Coastal Conservation Association	\$30.00
Crystal Coast	\$30.00
El Pueblo	\$30.00
First in Forestry	\$30.00
Historical Attraction	\$30.00
HOMES4NC	\$30.00
In God We Trust	\$30.00
North Carolina 4-H Development Fund	\$30.00
North Carolina Libraries	\$30.00
Personalized	\$30.00
Share the Road	\$30.00
State Attraction	\$30.00
Stock Car Racing Theme	\$30.00
Support Our Troops	\$30.00
Buffalo Soldiers	\$25.00
Collegiate Insignia	\$25.00
Goodness Grows	\$25.00
High School Insignia	\$25.00
Kids First	\$25.00
Olympic Games	\$25.00
National Multiple Sclerosis Society	\$25.00
National Wild Turkey Federation	\$25.00
NC Agribusiness	\$25.00
NC Children’s Promise	\$25.00
NC Coastal Federation	\$25.00
Nurses	\$25.00
Rocky Mountain Elk Foundation	\$25.00
Special Olympics	\$25.00
Surveyor Plate	\$25.00
The V Foundation for Cancer Research Division	\$25.00
University Health Systems of Eastern Carolina	\$25.00
Alpha Phi Alpha Fraternity	\$20.00
Animal Lovers	\$20.00
ARC of North Carolina	\$20.00
Audubon North Carolina	\$20.00
Autism Society of North Carolina	\$20.00

<u>Special Plate</u>	<u>Additional Fee Amount</u>
Be Active NC	\$20.00
Breast Cancer Awareness	\$20.00
Buddy Pelletier Surfing Foundation	\$20.00
Daughters of the American Revolution	\$20.00
Ducks Unlimited	\$20.00
Greyhound Friends of North Carolina	\$20.00
Guilford Battleground Company	\$20.00
Harley Owners' Group	\$20.00
Litter Prevention	\$20.00
March of Dimes	\$20.00
NC Trout Unlimited	\$20.00
NC Wildlife Habitat Foundation	\$20.00
Omega Psi Phi Fraternity	\$20.00
Prince Hall Mason	\$20.00
Save the Sea Turtles	\$20.00
Scenic Rivers	\$20.00
School Technology	\$20.00
SCUBA	\$20.00
Soil and Water Conservation	\$20.00
Special Forces Association	\$20.00
Support Public Schools	\$20.00
US Equine Rescue League	\$20.00
Wildlife Resources	\$20.00
Zeta Phi Beta Sorority	\$20.00
Carolina's Aviation Museum	\$15.00
Leukemia & Lymphoma Society	\$15.00
Lung Cancer Research	\$15.00
Shag Dancing	\$15.00
Active Member of the National Guard	None
100% Disabled Veteran	None
Ex-Prisoner of War	None
Legion of Valor	None
Purple Heart Recipient	None
Silver Star Recipient	None
All Other Special Plates	\$10.00.

(b) Distribution of Fees. — The Special Registration Plate Account and the Collegiate and Cultural Attraction Plate Account are established within the Highway Fund. The Division must credit the additional fee imposed for the special registration plates listed in subsection (a) among the Special Registration Plate Account (SRPA), the Collegiate and Cultural Attraction Plate Account (CCAPA), the Natural Heritage Trust Fund (NHTF), which is established under G.S. 113-77.7, and the Parks and Recreation Trust Fund, which is established under G.S. 113-44.15, as follows:

<u>Special Plate</u>	<u>SRPA</u>	<u>CCAPA</u>	<u>NHTF</u>	<u>PRTF</u>
Alpha Phi Alpha Fraternity	\$10	\$10	0	0
Animal Lovers	\$10	\$10	0	0
ARC of North Carolina	\$10	\$10	0	0
Audubon North Carolina	\$10	\$10	0	0
Autism Society of North Carolina	\$10	\$10	0	0
Be Active NC	\$10	\$10	0	0



<u>Special Plate</u>	<u>SRPA</u>	<u>CCAPA</u>	<u>NHTF</u>	<u>PRTF</u>
Breast Cancer Awareness	\$10	\$10	0	0
Buddy Pelletier Surfing Foundation	\$10	\$10	0	0
Buffalo Soldiers	\$10	\$15	0	0
Carolina's Aviation Museum	\$10	\$5	0	0
Coastal Conservation Association	\$10	\$20	0	0
Crystal Coast	\$10	\$20	0	0
Daughters of the American Revolution	\$10	\$10	0	0
Ducks Unlimited	\$10	\$10	0	0
El Pueblo	\$10	\$20	0	0
First in Forestry	\$10	\$10	\$10	0
Goodness Grows	\$10	\$15	0	0
Greyhound Friends of North Carolina	\$10	\$10	0	0
Guilford Battleground Company	\$10	\$10	0	0
Harley Owners' Group	\$10	\$10	0	0
High School Insignia	\$10	\$15	0	0
Historical Attraction	\$10	\$20	0	0
HOMES4NC	\$10	\$20	0	0
In God We Trust	\$10	\$20	0	0
In-State Collegiate Insignia	\$10	\$15	0	0
Kids First	\$10	\$15	0	0
Leukemia & Lymphoma Society	\$10	\$5	0	0
Litter Prevention	\$10	\$10	0	0
Lung Cancer Research	\$10	\$5	0	0
March of Dimes	\$10	\$10	0	0
National Multiple Sclerosis Society	\$10	\$15	0	0
National Wild Turkey Federation	\$10	\$15	0	0
NC Agribusiness	\$10	\$15	0	0
NC Children's Promise	\$10	\$15	0	0
NC Coastal Federation	\$10	\$15	0	0
NC 4-H Development Fund	\$10	\$20	0	0
NC Trout Unlimited	\$10	\$10	0	0
North Carolina Libraries	\$10	\$20	0	0
NC Wildlife Habitat Foundation	\$10	\$10	0	0
Nurses	\$10	\$15	0	0
Olympic Games	\$10	\$15	0	0
Omega Psi Phi Fraternity	\$10	\$10	0	0
Out-of-state Collegiate Insignia	10	0	\$15	0
Personalized	\$10	0	\$15	\$5
Prince Hall Mason	\$10	\$10	0	0
Rocky Mountain Elk Foundation	\$10	\$15	0	0
Save the Sea Turtles	\$10	\$10	0	0
Scenic Rivers	\$10	\$10	0	0

<u>Special Plate</u>	<u>SRPA</u>	<u>CCAPA</u>	<u>NHTF</u>	<u>PRTF</u>
School Technology	\$10	\$10	0	0
SCUBA	\$10	\$10	0	0
Shag Dancing	\$10	\$5	0	0
Share the Road	\$10	\$20	0	0
Soil and Water Conservation	\$10	\$10	0	0
Special Forces Association	\$10	\$10	0	0
Special Olympics	\$10	\$15	0	0
State Attraction	\$10	\$20	0	0
Stock Car Racing Theme	\$10	\$20	0	0
Support Our Troops	\$10	\$20	0	0
Support Public Schools	\$10	\$10	0	0
Surveyor Plate	\$10	\$15	0	0
The V Foundation for Cancer Research	\$10	\$15	0	0
University Health Systems of Eastern Carolina	\$10	\$15	0	0
US Equine Rescue League	\$10	\$10	0	0
Wildlife Resources	\$10	\$10	0	0
Zeta Phi Beta Sorority	\$10	\$10	0	0
All other Special Plates	\$10	0	0	0.

(c) Use of Funds in Special Registration Plate Account. —

- (1) The Division shall deduct the costs of special registration plates, including the costs of issuing, handling, and advertising the availability of the special plates, from the Special Registration Plate Account.
- (2) From the funds remaining in the Special Registration Plate Account after the deductions in accordance with subdivision (1) of this subsection, there is annually appropriated from the Special Registration Plate Account the sum of one million dollars (\$1,000,000) to provide operating assistance for the Visitor Centers:
  - a. on U.S. Highway 17 in Camden County, (\$100,000);
  - b. on U.S. Highway 17 in Brunswick County, (\$100,000);
  - c. on U.S. Highway 441 in Macon County, (\$100,000);
  - d. in the Town of Boone, Watauga County, (\$100,000);
  - e. on U.S. Highway 29 in Caswell County, (\$100,000);
  - f. on U.S. Highway 70 in Carteret County, (\$100,000);
  - g. on U.S. Highway 64 in Tyrrell County, (\$100,000);
  - h. at the intersection of U.S. Highway 701 and N.C. 904 in Columbus County, (\$100,000);
  - i. on U.S. Highway 221 in McDowell County, (\$100,000); and
  - j. on Staton Road in Transylvania County, (\$100,000).
- (3) The Division shall transfer the remaining revenue in the Account quarterly as follows:
  - a. Thirty-three percent (33%) to the account of the Department of Commerce to aid in financing out-of-state print and other media advertising under the program for the promotion of travel and industrial development in this State.
  - b. Fifty percent (50%) to the Department of Transportation to be used solely for the purpose of beautification of highways other than those designated as interstate. These funds shall be administered by the Department of Transportation for beautification purposes not inconsistent with good landscaping and engineering principles.
  - c. Seventeen percent (17%) to the account of the Department of Health and Human Services to promote travel accessibility for

disabled persons in this State. These funds shall be used to collect and update site information on travel attractions designated by the Department of Commerce in its publications, to provide technical assistance to travel attractions concerning accommodation of disabled tourists, and to develop, print, and promote the publication ACCESS NORTH CAROLINA as provided in G.S. 168-2. Any funds allocated for these purposes that are neither spent nor obligated at the end of the fiscal year shall be transferred to the Department of Administration for removal of man-made barriers to disabled travelers at State-funded travel attractions. Guidelines for the removal of man-made barriers shall be developed in consultation with the Department of Health and Human Services. (1967, c. 413; 1971, c. 42; 1973, c. 507, s. 5; c. 1262, s. 86; 1975, c. 716, s. 5; 1977, c. 464, s. 3; c. 771, s. 4; 1979, c. 126, ss. 1, 2; 1981 (Reg. Sess., 1982), c. 1258, s. 6; 1983, c. 848; 1985, c. 766; 1987, c. 252; c. 738, s. 140; c. 830, ss. 113(a), 116(a)-(c); 1989, c. 751, s. 7(1); c. 774, s. 1; 1989 (Reg. Sess., 1990), c. 814, s. 31; 1991, c. 672, s. 3; c. 726, s. 23; 1991 (Reg. Sess., 1992), c. 959, s. 2; c. 1042, s. 2; c. 1044, ss. 33, 34; 1993, c. 321, s. 169.3(a); c. 543, s. 3; 1995, c. 163, s. 2; c. 324, s. 18.7(a); c. 433, ss. 2, 3; c. 507, s. 18.17(a); 1996, 2nd Ex. Sess., c. 18, s. 19.11(e); 1997-443, s. 11A.118(a); 1997-477, ss. 2, 3; 1997-484, ss. 4, 5; 1998-163, s. 1; 1999-277, ss. 2, 3; 1999-403, ss. 2, 3; 1999-450, ss. 2, 3; 2000-159, ss. 3, 4; 2001-414, s. 32; 2001-498, ss. 3(a), 3(b), 4(a), 4(b); 2002-134, ss. 5, 6; 2003-11, ss. 2, 3; 2003-68, ss. 2, 3; 2003-424, ss. 3, 4; 2004-124, s. 30.3A; 2004-131, ss. 3, 4; 2004-185, ss. 3, 4; 2004-200, ss. 2, 3; 2005-216, ss. 4, 5; 2005-276, s. 28.16; 2006-209, ss. 3, 4, 7.)

**Editor's Note. —**

Session Laws 2001-498, s. 8, provided that the amendments to this section by ss. 3(b) and 4(b) would expire on June 30, 2006. However, Session Laws 2006-209, s. 7, amended Session Laws 2001-498, s. 8, to delete the sunset provision, so entries for the following Special Plates in subsections (a) and (b): Harley Owners' Group and Rocky Mountain Elk Foundation, will not expire.

Session Laws 2006-209, s. 9, provides in part

that the increase in the additional fee for the Breast Cancer Awareness Special Plate, as amended in Section 3 of this act, becomes effective January 1, 2007, and applies to plates issued or renewed on or after that date.

**Effect of Amendments. —**

Session Laws 2006-209, ss. 3, 4, effective August 8, 2006, added numerous entries for the special plate fees in subsections (a) and (b). See Editor's note.

## § 20-81.12. Collegiate insignia plates and certain other special plates.

(a) Collegiate Insignia Plates. — The Division must receive 300 or more applications for a collegiate insignia license plate for a college or university before a collegiate license plate may be developed. The color, design, and material for the plate must be approved by both the Division and the alumni or alumnae association of the appropriate college or university. The Division must transfer quarterly the money in the Collegiate and Cultural Attraction Plate Account derived from the sale of in-State collegiate insignia plates to the Board of Governors of The University of North Carolina for in-State, public colleges and universities and to the respective board of trustees for in-State, private colleges and universities in proportion to the number of collegiate plates sold representing that institution for use for academic enhancement.

(b) Historical Attraction Plates. — The Division must receive 300 or more applications for an historical attraction plate representing a publicly owned or



nonprofit historical attraction located in North Carolina and listed below before the plate may be developed. The Division must transfer quarterly the money in the Collegiate and Cultural Attraction Plate Account derived from the sale of historical attraction plates to the organizations named below in proportion to the number of historical attraction plates sold representing that organization:

- (1) Historical Attraction Within Historic District. — The revenue derived from the special plate shall be transferred quarterly to the appropriate Historic Preservation Commission, or entity designated as the Historic Preservation Commission, and used to maintain property in the historic district in which the attraction is located. As used in this subdivision, the term “historic district” means a district created under G.S. 160A-400.4.
- (2) Nonprofit Historical Attraction. — The revenue derived from the special plate shall be transferred quarterly to the nonprofit corporation that is responsible for maintaining the attraction for which the plate is issued and used to develop and operate the attraction.
- (3) State Historic Site. — The revenue derived from the special plate shall be transferred quarterly to the Department of Cultural Resources and used to develop and operate the site for which the plate is issued. As used in this subdivision, the term “State historic site” has the same meaning as in G.S. 121-2(11).

(b1) Special Olympics Plates. — The Division must receive 300 or more applications for a special olympics plate before the plate may be developed. The Division must transfer quarterly the money in the Collegiate and Cultural Attraction Plate Account derived from the sale of special olympics plates to the North Carolina Special Olympics, Inc., to be used to train volunteers to assist in the statewide games and to help pay the costs of the statewide games.

(b2) State Attraction Plates. — The Division must receive 300 or more applications for a State attraction plate before the plate may be developed. The Division must transfer quarterly the money in the Collegiate and Cultural Attraction Plate Account derived from the sale of State attraction plates to the organizations named below in proportion to the number of State attraction plates sold representing that organization:

- (1) Blue Ridge Parkway Foundation. — The revenue derived from the special plate shall be transferred quarterly to Blue Ridge Parkway Foundation for use in promoting and preserving the Blue Ridge Parkway as a scenic attraction in North Carolina.
- (1c) Friends of the Great Smoky Mountains National Park. — The revenue derived from the special plate shall be transferred quarterly to the Friends of the Great Smoky Mountains National Park, Inc., to be used for educational materials, preservation programs, capital improvements for the portion of the Great Smoky Mountains National Park that is located in North Carolina, and operating expenses of the Great Smoky Mountains National Park.
- (1g) Friends of the Appalachian Trail. — The revenue derived from the special plate shall be transferred quarterly to The Appalachian Trail Conference to be used for educational materials, preservation programs, trail maintenance, railway and viewshed acquisitions, railway and viewshed easement acquisitions, capital improvements for the portions of the Appalachian Trail and connecting trails that are located in North Carolina, and related administrative and operating expenses.
- (1i) North Carolina State Parks. — One-half of the revenue derived from the special plate shall be transferred quarterly to Natural Heritage Trust Fund established under G.S. 113-77.7, and the remaining

revenue shall be transferred quarterly to the Parks and Recreation Trust Fund established under G.S. 113-44.15.

- (1j) The North Carolina Aquariums. — The revenue derived from the special plate shall be transferred quarterly to the North Carolina Aquarium Society, Inc., for its programs in support of the North Carolina Aquariums.
- (1m) The North Carolina Arboretum. — The revenue derived from the special plate shall be transferred quarterly to The North Carolina Arboretum Society and used to help the Society obtain grants for the North Carolina Arboretum and for capital improvements to the North Carolina Arboretum.
- (1p) The North Carolina Maritime Museum. — The revenue derived from the special plate shall be transferred quarterly to Friends of the Museum, North Carolina Maritime Museum, Inc., to be used for educational programs and conservation programs and for operating expenses of the North Carolina Maritime Museum.
- (1t) The North Carolina Museum of Natural Sciences. — The revenue derived from the special plate shall be transferred quarterly to the Friends of the North Carolina State Museum of Natural Sciences for its programs in support of the museum.
- (2) The North Carolina Zoological Society. — The revenue derived from the special plate shall be transferred quarterly to The North Carolina Zoological Society, Incorporated, to be used for educational programs and conservation programs at the North Carolina Zoo at Asheboro and for operating expenses of the North Carolina Zoo at Asheboro.
- (b3) Wildlife Resources Plates. — The Division must receive 300 or more applications for a wildlife resources plate with a picture representing a particular native wildlife species occurring in North Carolina before the plate may be developed. The Division must transfer quarterly the money in the Collegiate and Cultural Attraction Plate Account derived from the sale of wildlife resources plates to the Wildlife Conservation Account established by G.S. 143-247.2.
- (b4) Olympic Games. — The Division may not issue an Olympic Games special plate unless it receives 300 or more applications for the plate and the U.S. Olympic Committee licenses, without charge, the State to develop a plate bearing the Olympic Games symbol and name. The Division must transfer quarterly the money in the Collegiate and Cultural Attraction Plate Account derived from the sale of Olympic Games plates to the N.C. Health and Fitness Foundation, Inc., which will allocate the funds as follows:
  - (1) Fifty percent (50%) to the U.S. Olympic Committee to assist in training olympic athletes.
  - (2) Twenty-five percent (25%) to North Carolina Amateur Sports to assist with administration of the State Games of North Carolina.
  - (3) Twenty-five percent (25%) to the Governor's Council on Physical Fitness and Health to support local fitness council development throughout North Carolina.
- (b5) March of Dimes Plates. — The Division must receive 300 or more applications for a March of Dimes plate before the plate may be developed. The Division shall transfer quarterly the money in the Collegiate and Cultural Attraction Plate Account derived from the sale of March of Dimes plates to the Eastern Carolina Chapter of the March of Dimes Birth Defects Foundation. The Eastern Carolina Chapter shall disperse the revenue proportionately among the Eastern Carolina Chapter, the Western Carolina Chapter, the Greater Triad Chapter, and the Greater Piedmont Chapter of the March of Dimes Birth Defects Foundation based upon the population of the area each Chapter represents. The money must be used for the prevention of birth



defects through local community services and educational programs and through research and development.

(b6) School Technology Plates. — The Division must receive 300 or more applications for a School Technology plate before the plate may be developed. The Division shall transfer quarterly the money in the Collegiate and Cultural Attraction Plate Account derived from the sale of School Technology plates to the State School Technology Fund, which is established under G.S. 115C-102.6D.

(b7) Scenic Rivers Plates. — The Division must receive 300 or more applications for a Scenic Rivers plate before the plate may be developed. The Division shall transfer quarterly the money in the Collegiate and Cultural Attraction Plate Account derived from the sale of Scenic Rivers plates to the Clean Water Management Trust Fund established in G.S. 113A-253.

(b8) Soil and Water Conservation Plates. — The Division must receive 300 or more applications for a soil and water conservation plate before the plate may be developed. The Division shall transfer quarterly the money in the Collegiate and Cultural Attraction Plate Account derived from the sale of the soil and water conservation plates to the Soil and Water Conservation Account established in G.S. 143B-297.1.

(b9) Kids First Plates. — The Division must receive 300 or more applications for a Kids First plate before the plate may be developed. The Division shall transfer quarterly the money in the Collegiate and Cultural Attraction Plate Account derived from the sale of Kids First plates to the North Carolina Children's Trust Fund established in G.S. 7B-1302.

(b10) University Health Systems of Eastern Carolina. — The Division must receive 300 or more applications for a University Health Systems of Eastern Carolina plate before the plate may be developed. The Division shall transfer quarterly the money in the Collegiate and Cultural Attraction Plate Account derived from the sale of University Health Systems of Eastern Carolina plates to the Pitt Memorial Hospital Foundation, Inc., for use in the Children's Hospital of Eastern North Carolina.

(b11) Animal Lovers Plates. — The Division must receive 300 or more applications before an animal lovers plate may be developed. The Division shall transfer quarterly the money in the Collegiate and Cultural Attraction Plate Account derived from the sale of the animal lovers plate to the Spay/Neuter Account established in G.S. 19A-60.

(b12) Support Public Schools Plates. — The Division must receive 300 or more applications for a Support Public Schools plate before the plate may be developed. The Division shall transfer quarterly the money in the Collegiate and Cultural Attraction Plate Account derived from the sale of Support Public Schools plates to the Fund for the Reduction of Class Size in Public Schools created pursuant to G.S. 115C-472.10.

(b13) Ducks Unlimited Plates. — The Division must receive 300 or more applications for a Ducks Unlimited plate and receive any necessary licenses from Ducks Unlimited, Inc., for use of their logo before the plate may be developed. The Division shall transfer quarterly the money in the Collegiate and Cultural Attraction Plate Account derived from the sale of Ducks Unlimited plates to the Wildlife Resources Commission to be used to support the conservation programs of Ducks Unlimited, Inc., in this State.

(b14) Omega Psi Phi Fraternity Plates. — The Division must receive 300 or more applications for an Omega Psi Phi Fraternity plate and receive any necessary licenses, without charge, from Omega Psi Phi Fraternity, Incorporated, before the plate may be developed. The Division shall transfer quarterly the money in the Collegiate and Cultural Attraction Plate Account derived from the sale of Omega Psi Phi Fraternity plates to the United Negro College Fund, Inc., through the Winston-Salem Area Office for the benefit of UNCF colleges in this State.



(b15) Litter Prevention Plates. — The Division must receive 300 or more applications for a Litter Prevention plate before the plate may be developed. The Division shall transfer quarterly the money in the Collegiate and Cultural Attraction Plate Account derived from the sale of the litter prevention plates to the Litter Prevention Account created pursuant to G.S. 136-125.1.

(b16) Goodness Grows Plates. — The Division must receive 300 or more applications for a Goodness Grows plate before the plate may be developed. The Division shall transfer quarterly the money in the Collegiate and Cultural Attraction Plate Account derived from the sale of Goodness Grows plates to the North Carolina Agricultural Promotions, Inc., to be used to promote the sale of North Carolina agricultural products.

(b17) Audubon North Carolina Plates. — The Division must receive 300 or more applications for an Audubon North Carolina plate before the plate may be developed. The Division must transfer quarterly the money in the Collegiate and Cultural Attraction Plate Account derived from the sale of Audubon North Carolina plates to the National Audubon Society, Inc., a nonprofit corporation, for the account of the NC State Office to be used for bird and other wildlife conservation and educational activities in the State of North Carolina.

(b18) Special Forces Association. — The Division must receive 300 or more applications for a Special Forces Association plate before the plate may be developed. The Division shall transfer quarterly the money in the Collegiate and Cultural Attraction Plate Account derived from the sale of Special Forces Association plates to the Airborne & Special Operations Museum in Fayetteville, North Carolina.

(b19) The V Foundation for Cancer Research. — The Division must receive 300 or more applications for a V Foundation plate before the plate may be developed. The Division shall transfer quarterly the money in the Collegiate and Cultural Attraction Plate Account derived from the sale of V Foundation plates to The V Foundation for Cancer Research to fund cancer research grants.

(b20) Save the Sea Turtles. — The Division must receive 300 or more applications for a Save the Sea Turtles plate before the plate may be developed. The Division must transfer quarterly the money in the Collegiate and Cultural Attraction Plate Account derived from the sale of Save the Sea Turtles plates to The Karen Beasley Sea Turtle Rescue and Rehabilitation Center.

(b21) Harley Owners' Group. — The Division must receive 300 or more applications for a Harley Owners' Group plate before the plate may be developed. The Division shall transfer quarterly the money in the Collegiate and Cultural Attraction Plate Account derived from the sale of Harley Owners' Group plates to the State Board of Community Colleges to support the motorcycle safety instruction program established pursuant to G.S. 115D-72.

(b22) Rocky Mountain Elk Foundation. — The Division must receive 300 or more applications for a Rocky Mountain Elk Foundation plate before the plate may be developed. The Division must transfer quarterly the money in the Collegiate and Cultural Attraction Account derived from the sale of Rocky Mountain Elk Foundation plates to Rocky Mountain Elk Foundation, Inc.

(b23) NC Agribusiness. — The Division must receive 300 or more applications for a NC Agribusiness plate before the plate may be developed. The Division must transfer quarterly the money in the Collegiate and Cultural Attraction Plate Account derived from the sale of NC Agribusiness plates to the North Carolina Agribusiness Council, Inc., to be used to promote awareness of the importance of agribusiness in North Carolina.

(b24) Nurses. — The Division must receive 300 or more applications for a Nurses plate before the plate may be developed. The Division shall transfer quarterly the money in the Collegiate and Cultural Attraction Plate Account derived from the sale of Nurses plates to the NC Foundation for Nursing for nursing scholarships for citizens of North Carolina to be awarded annually.

(b25) NC Coastal Federation. — The Division must receive 300 or more applications for a NC Coastal Federation plate before the plate may be developed. The Division shall transfer quarterly the money in the Collegiate and Cultural Attraction Plate Account derived from the sale of NC Coastal Federation plates to the North Carolina Coastal Federation, Inc.

(b26) Be Active NC. — The Division must receive 300 or more applications for the Be Active NC plate before the plate may be developed. The Division shall transfer quarterly the money in the Collegiate and Cultural Attraction Plate Account derived from the sale of the Be Active NC plates to Be Active North Carolina, Inc., to be used to promote physical activity in North Carolina communities.

(b27) Buffalo Soldiers. — The Division must receive 300 or more applications for the Buffalo Soldiers plate before the plate may be developed. The Division shall transfer quarterly the money in the Collegiate and Cultural Attraction Plate Account derived from the sale of the Buffalo Soldiers plates to the 9th & 10th (Horse) Cavalry Association of the Buffalo Soldiers Greater North Carolina Chapter (BSGNCC) for its public outreach programs.

(b28) Crystal Coast. — The Division must receive 300 or more applications for the Crystal Coast plate before the plate may be developed. The Division shall transfer quarterly the money in the Collegiate and Cultural Attraction Plate Account derived from the sale of Crystal Coast plates to the Crystal Coast Artificial Reef Association to be used to promote scuba diving off the Crystal Coast.

(b29) Surveyor Plate. — The Division must receive 300 or more applications for a Surveyor plate before the plate may be developed. The Division shall transfer quarterly the money in the Collegiate and Cultural Attraction Plate Account derived from the sale of Surveyor plates to The North Carolina Society of Surveyors Education Foundation, Inc., for public educational programs.

(b30) Zeta Phi Beta Sorority. — The Division must receive 300 or more applications for a Zeta Phi Beta Sorority plate before the plate may be developed. The Division shall transfer quarterly the money in the Collegiate and Cultural Attraction Plate Account derived from the sale of Zeta Phi Beta Sorority plates to the Zeta Phi Beta Sorority Education Foundation, through the Raleigh office, for the benefit of undergraduate scholarships in this State.

(b31) In God We Trust. — The Division must receive 300 or more applications for the In God We Trust plate before the plate may be developed. The Division shall transfer quarterly the money in the Collegiate and Cultural Attraction Plate Account derived from the sale of the In God We Trust plates to the Department of Crime Control and Public Safety to be deposited into The N.C. National Guard Soldiers and Airmen Assistance Fund of The Minuteman Partnership to help provide assistance to the families of North Carolina National Guardsmen who have been activated and deployed in federal service.

(b32) North Carolina 4-H Development Fund. — The Division must receive 300 or more applications for a North Carolina 4-H Development Fund plate before the plate may be developed. The Division shall transfer quarterly the money in the Collegiate and Cultural Attraction Plate Account derived from the sale of North Carolina 4-H Development Fund plates to The North Carolina 4-H Development Fund, to be used to support county and State 4-H programs and to provide funding for repairs and renovations at North Carolina 4-H camps and conference centers.

(b33) High School Insignia Plate. — The Division must receive 300 or more applications for a high school insignia plate for a public high school in North Carolina before a high school insignia plate may be issued for that school. The Division must transfer quarterly the money in the Collegiate and Cultural Attraction Plate Account derived from the sale of high school insignia plates to the Department of Public Instruction to be deposited into the State Aid to Local



School Administrative Units account. The Division must also send the Department of Public Instruction information as to the number of plates sold representing a particular high school. The Department of Public Instruction must annually transfer the money in the State Aid to Local School Administrative Units account that is derived from the sale of the high school insignia plates to the high schools which have a high school insignia plate in proportion to the number of high school insignia plates sold representing that school. The high school must use the money for academic enhancement.

(b34) HOMES4NC. — The Division must receive 300 or more applications for the HOMES4NC plate before the plate may be developed. The Division shall transfer quarterly the money in the Collegiate and Cultural Attraction Plate Account derived from the sale of the HOMES4NC plates to the NCAR Housing Opportunity Foundation to promote safe, decent, and affordable housing for all in North Carolina.

(b35) First in Forestry. — The Division must receive 300 or more applications for the First in Forestry plate before the plate may be developed. The Division shall transfer quarterly one-half of the money in the Collegiate and Cultural Attraction Plate Account derived from the sale of the First in Forestry plates to the Division of Forest Resources for a State forests and forestry education program and shall transfer quarterly one-half of the money in the Collegiate and Cultural Attraction Plate Account derived from the sale of the First in Forestry plates to the Forest Education and Conservation Foundation for their programs.

(b36) El Pueblo. — The Division must receive 300 or more applications for the El Pueblo plate before the plate may be developed. The Division shall transfer quarterly the money in the Collegiate and Cultural Plate Account derived from the sale of the El Pueblo plates to El Pueblo, Inc., for its Scholarship Fund which provides scholarships for Latino students entering any community college, college, or university in North Carolina.

(b37) Daughters of the American Revolution. — The Division must receive 300 or more applications for a Daughters of the American Revolution plate before the plate may be developed. The Division shall transfer quarterly the money in the Collegiate and Cultural Attraction Plate Account derived from the sale of Daughters of the American Revolution plates to the North Carolina Daughters of the American Revolution License Plate Trust Fund located in Wilmington, North Carolina, to be used to carry out the objectives of the National Society Daughters of the American Revolution including the protection of historical spots and the erection of monuments, the encouragement and support of historical research and educational endeavors, the preservation of historical documents and relics, and the promotion of all patriotic celebrations.

(b38) Stock Car Racing Theme. — The Division may issue any plate in this series without a minimum number of applications if the person providing the State with the license to use the words, logos, trademarks, or designs associated with the plate produces the plate for the State without a minimum order quantity.

The cost of the Stock Car Racing Theme plate shall include all costs to produce blank plates for issuance by the Division. Notwithstanding G.S. 66-58(b), the Division or the Department of Correction may contract for the production of the blank plates in this series to be issued by the Division, provided the plates meet or exceed the State's specifications including durability and retroreflectivity, and provided the plates are manufactured using high-quality embossable aluminum. The cost of the blank plates to the State shall be substantially equivalent to the price paid to the Department of Correction for license tags, as provided in G.S. 66-58(b)(15).

The Division shall transfer quarterly the money in the Collegiate and Cultural Attraction Plate Account derived from the sale of Stock Car Racing Theme plates to the North Carolina Motorsports Foundation, Inc.



(b39) Alpha Phi Alpha Fraternity. — The Division must receive 300 or more applications for the Alpha Phi Alpha Fraternity plate before the plate may be developed. The Division shall transfer quarterly the money in the Collegiate and Cultural Attraction Plate Account derived from the sale of the Alpha Phi Alpha Fraternity plates to the Association of North Carolina Alphas (ANCA) Educational Foundation for scholarships for the benefit of African-American males in ANCA attending accredited North Carolina colleges and universities.

(b40) ARC of North Carolina. — The Division must receive 300 or more applications for the Arc of North Carolina plate before the plate may be developed. The Division shall transfer quarterly the money in the Collegiate and Cultural Attraction Plate Account derived from the sale of the Arc of North Carolina plates to The Arc of North Carolina, Inc., for its programs in support of retarded citizens in North Carolina.

(b41) Autism Society of North Carolina. — The Division must receive 300 or more applications for an Autism Society of North Carolina plate before the plate may be developed. The Division must transfer quarterly the money in the Collegiate and Cultural Attraction Plate Account derived from the sale of Autism Society of North Carolina plates to the Autism Society of North Carolina, Inc., for support services to individuals with autism and their families.

(b42) Buddy Pelletier Surfing Foundation. — The Division must receive 300 or more applications for the Buddy Pelletier Surfing Foundation plate before the plate may be developed. The Division shall transfer quarterly the money in the Collegiate and Cultural Attraction Plate Account derived from the sale of the Buddy Pelletier Surfing Foundation to the Foundation to fund the Foundation's scholastic and humanitarian aid programs.

(b43) Coastal Conservation Association. — The Division must receive 300 or more applications for the Coastal Conservation Association plate before the plate may be developed. The Division shall transfer quarterly the money in the Collegiate and Cultural Attraction Plate Account derived from the sale of the Coastal Conservation Association plates to the Division of Marine Fisheries for its conservation programs.

(b44) Guilford Battleground Company. — The Division must receive 300 or more applications for a Guilford Battleground Company plate before the plate may be developed. The Division shall transfer quarterly the money in the Collegiate and Cultural Attraction Plate Account derived from the sale of Guilford Battleground Company plates to the Guilford Battleground Company for its programs.

(b45) National Multiple Sclerosis Society. — The Division must receive 300 or more applications for the National Multiple Sclerosis Society plate before the plate may be developed. The Division shall transfer quarterly the money in the Collegiate and Cultural Attraction Plate Account derived from the sale of the National Multiple Sclerosis Society plates to the National Multiple Sclerosis Society for its public awareness programs.

(b46) National Wild Turkey Federation. — The Division must receive 300 or more applications for the National Wild Turkey Federation plate before the plate may be developed. The Division shall transfer quarterly the money in the Collegiate and Cultural Attraction Plate Account derived from the sale of the National Wild Turkey Federation plates to the North Carolina State Chapter of the National Wild Turkey Federation for special projects to benefit the public.

(b47) SCUBA. — The Division must receive 300 or more applications for the SCUBA plate before the plate may be developed. The Division shall transfer quarterly the money in the Collegiate and Cultural Plate Account derived from the sale of the SCUBA plates to the Division of Marine Fisheries for the purpose of developing the State's artificial reefs.

(b48) Share the Road. — The Division must receive 300 or more applications for the Share the Road plate before the plate may be developed. The Division shall transfer quarterly the money in the Collegiate and Cultural Attraction Plate Account derived from the sale of the Share the Road plates to the Department of Transportation, Division of Bicycle and Pedestrian Transportation, for its programs.

(b49) North Carolina Wildlife Habitat Foundation. — The Division must receive 300 or more applications for the North Carolina Wildlife Habitat Foundation plate before the plate may be developed. The Division shall transfer quarterly the money in the Collegiate and Cultural Attraction Plate Account derived from the sale of the North Carolina Wildlife Habitat Foundation plates to the North Carolina Wildlife Habitat Foundation for its programs.

(b50) Shag Dancing. — The Division must receive 300 or more applications for the Shag Dancing plate before the plate may be developed. The Division shall transfer quarterly the money in the Collegiate and Cultural Attraction Plate Account derived from the sale of Shag Dancing plates to the Hall of Fame Foundation.

(b51) North Carolina Libraries. — The Division must receive 300 or more applications for the North Carolina Libraries plate before the plate may be developed. The Division shall transfer quarterly the money in the Collegiate and Cultural Attraction Plate Account derived from the sale of the North Carolina Libraries plates to the North Carolina Library Association, Inc., for the Association's public programs.

(b52) NC Trout Unlimited. — The Division must receive 300 or more applications for an NC Trout Unlimited plate before the plate may be developed. The Division shall transfer quarterly the money in the Collegiate and Cultural Attraction Plate Account derived from the sale of NC Trout Unlimited plates to North Carolina Trout Unlimited for its programs.

(b53) Breast Cancer Awareness. — The Division must receive 300 or more applications for a Breast Cancer Awareness plate before the plate may be developed. The Division must transfer quarterly the money in the Collegiate and Cultural Attraction Plate Account derived from the sale of Breast Cancer Awareness plates to Friends for an Earlier Breast Cancer Test, Inc., to support services to detect breast cancer earlier.

(b54) Carolina's Aviation Museum. — The Division must receive 300 or more applications for a Carolina's Aviation Museum plate before the plate may be developed. The Division must transfer quarterly the money in the Collegiate and Cultural Attraction Plate Account derived from the sale of Carolina's Aviation Museum plates to the Carolina's Historic Aviation Commission, a domestic nonprofit corporation, to be used to help continue operation of the Museum.

(b55) Greyhound Friends of North Carolina. — The Division must receive 300 or more applications for a Greyhound Friends of North Carolina plate before the plate may be developed. The Division must transfer quarterly the money in the Collegiate and Cultural Attraction Plate Account derived from the sale of the Greyhound Friends of North Carolina plates to the Greyhound Friends of North Carolina, Inc., to be used for the care and upkeep of retired greyhound racers that are awaiting adoption.

(b56) Leukemia & Lymphoma Society. — The Division must receive 300 or more applications for a Leukemia & Lymphoma Society plate before the plate may be developed. The Division must transfer quarterly the money in the Collegiate and Cultural Attraction Plate Account derived from the sale of Leukemia & Lymphoma Society plates to the Eastern Chapter of the North Carolina Leukemia & Lymphoma Society, a State-chartered chapter of the national nonprofit organization known as The Leukemia & Lymphoma Society, Inc., a duly registered New York nonprofit corporation. These funds may be



divided between the Eastern and Western chapters of the North Carolina Leukemia & Lymphoma Society which shall each use the funds for blood cancer research, awareness, and education.

(b57) Lung Cancer Research. — The Division must receive 300 or more applications for the Lung Cancer Research plate before the plate may be developed. The Division must transfer quarterly the money in the Collegiate and Cultural Attraction Plate Account derived from the sale of Lung Cancer Research plates to the American Lung Association of North Carolina, Inc., to be used for eliminating lung disease and fostering healthy breathing for all people through prevention, outreach, education, research, and advocacy.

(b58) NC Children's Promise. — The Division must receive 300 or more applications for a N.C. Children's Promise plate before the plate may be developed. The Division must transfer quarterly the money in the Collegiate and Cultural Attraction Plate Account derived from the sale of NC Children's Promise plates to The Medical Foundation of North Carolina, Incorporated, to be used to support the North Carolina Children's Promise.

(b59) Prince Hall Mason. — The Division must receive 300 or more applications for a Prince Hall Mason plate before the plate may be developed. The Division must transfer quarterly the money in the Collegiate and Cultural Attraction Plate Account derived from the sale of Prince Hall Mason plates to The Most Worshipful Prince Hall Grand Lodge of Free and Accepted Masons of North Carolina and Jurisdiction, Inc., to be used for scholarships, family assistance, and other charitable causes.

(b60) Support Our Troops. — The Division must receive 300 or more applications for a Support Our Troops plate before the plate may be developed. The Division shall transfer quarterly the money in the Collegiate and Cultural Attraction Plate Account derived from the sale of Support Our Troops plates to NC Support Our Troops, Inc., to be used to provide support and assistance to the troops and their families.

(b61) US Equine Rescue League. — The Division must receive 300 or more applications for the US Equine Rescue League plate before the plate may be developed. The Division must transfer quarterly the money in the Collegiate and Cultural Attraction Plate Account derived from the sale of US Equine Rescue League plates to the United States Equine Rescue League, Inc., to be used for the care and upkeep of rescued equines.

(c) General. — An application for a special license plate named in this section may be made at any time during the year. If the application is made to replace an existing current valid plate, the special plate must be issued with the appropriate decals attached. No refund shall be made to the applicant for any unused portion remaining on the original plate. The request for a special license plate named in this section may be combined with a request that the plate be a personalized license plate.

(d) through (g) Repealed by Session Laws 1991 (Regular Session, 1992), c. 1042, s. 3. (1991, c. 758, s. 1; 1991 (Reg. Sess., 1992), c. 1007, s. 33; c. 1042, s. 3; 1993, c. 543, s. 5; 1995, c. 433, s. 4; 1997-427, s. 2; 1997-477, s. 4; 1997-484, s. 6; 1999-277, s. 4; 1999-403, s. 4; 1999-450, s. 4; 2000-159, ss. 5, 6; 2000-163, s. 3; 2001-498, ss. 6(a), 6(b); 2002-134, s. 7; 2003-11, s. 4; 2003-68, s. 4; 2003-424, ss. 5, 6; 2004-131, s. 5; 2004-185, s. 5; 2004-200, s. 4; 2005-216, ss. 6, 7; 2005-435, s. 40; 2006-209, ss. 5, 6, 7.)

**Editor's Note. —**

Session Laws 2001-498, s. 8, provided that s. 6(b), which amended this section by adding subsections (b21) and (b22), would expire on June 30, 2006. However, Session Laws 2006-209, s. 7, amended Session Laws 2001-498, s. 8,

to delete the sunset provision, so subsections (b21) and (b22) will not expire.

**Effect of Amendments. —**

Session Laws 2006-209, ss. 5, 6, effective August 8, 2006, added subdivision (b2)(1i); and added subsections (b53) through (b61).



## Part 7. Title and Registration Fees.

### § 20-85. (See Editor's Note) Schedule of fees.

(a) The following fees are imposed concerning a certificate of title, a registration card, or a registration plate for a motor vehicle. These fees are payable to the Division and are in addition to the tax imposed by Article 5A of Chapter 105 of the General Statutes.

(1) Each application for certificate of title .....	\$40.00
(2) Each application for duplicate or corrected certificate of title .....	15.00
(3) Each application of reposessor for certificate of title .....	15.00
(4) Each transfer of registration .....	15.00
(5) Each set of replacement registration plates .....	15.00
(6) Each application for duplicate registration card .....	15.00
(7) Each application for recording supplementary lien .....	15.00
(8) Each application for removing a lien from a certificate of title .....	15.00
(9) Each application for certificate of title for a motor vehicle transferred to a manufacturer, as defined in G.S. 20-286, or a motor vehicle retailer for the purpose of resale .....	15.00
(10) Each application for a salvage certificate of title made by an insurer .....	15.00
(11) Each set of replacement Stock Car Racing Theme plates issued under G.S. 20-79.4 .....	25.00.

(a1) One dollar (\$1.00) of the fee imposed for any transaction assessed a fee under subdivision (a)(1), (a)(2), (a)(3), (a)(7), (a)(8), or (a)(9) of this section shall be credited to the North Carolina Highway Fund. The Division shall use the fees derived from transactions with the Division for technology improvements. The Division shall use the fees derived from transactions with commission contract agents for the payment of compensation to commission contract agents. An additional one dollar (\$1.00) of the fee imposed for any transaction assessed a fee under subdivision (a)(1) of this section shall be credited to the Mercury Pollution Prevention Account in the Department of Environment and Natural Resources.

(b) Except as otherwise provided in subsection (a1) of this section, the fees collected under subdivisions (a)(1) through (a)(9) of this section shall be credited to the North Carolina Highway Trust Fund. The fees collected under subdivision (a)(10) of this section shall be credited to the Highway Fund. Fifteen dollars (\$15.00) of each title fee credited to the Trust Fund under subdivision (a)(1) shall be added to the amount allocated for secondary roads under G.S. 136-176 and used in accordance with G.S. 136-44.5.

(c) The Division shall not collect a fee for a certificate of title for a motor vehicle entitled to a permanent registration plate under G.S. 20-84. (1937, c. 407, s. 49; 1943, c. 648; 1947, c. 219, s. 9; 1955, c. 554, s. 4; 1961, c. 360, s. 19; c. 835, s. 11; 1975, c. 430; c. 716, s. 5; c. 727; c. 875, s. 4; c. 879, s. 46; 1979, c. 801, s. 11; 1981, c. 690, s. 19; 1989, c. 692, s. 2.1; c. 700, s. 1; c. 770, s. 74.11; 1991, c. 193, s. 8; 1993, c. 467, s. 5; 1995, c. 50, s. 2; c. 390, s. 34; c. 509, s. 135.2(i), (j); 1999-220, s. 2; 2004-77, s. 2; 2004-185, s. 6; 2005-276, s. 44.1(k); 2005-384, s. 2; 2006-255, s. 5; 2006-264, s. 35.5.)

#### Editor's Note. —

Session Laws 2005-384, which in s. 2, amended subsections (a) and (a1), in s. 4, as amended by Session Laws 2006-255, s. 5, provides that the amendments become effective October 1, 2005, and expire July 1, 2026.

Session Laws 2005-384, s. 4, as amended by Session Laws 2006-255, s. 5, provided: "Sections 1, 3, and 4 of this act are effective when this act becomes law, except that G.S. 130A-310.53, 130A-310.54(c), and 130A-310.55 become effective 1 July 2007. Section 2 of this act

becomes effective 1 October 2005. Each vehicle manufacturer that is subject to the requirements of this act shall provide the information required by G.S. 130A-310.52(b), either individually or as a group of manufacturers, on or before 1 January 2007. This act expires on 1 July 2026.”

**Effect of Amendments.** — Session Laws 2006-264, s. 35.5, effective August 27, 2006, substituted “Except as otherwise provided in subsection (a1) of this section, the” for “the” in subsection (b).

**§ 20-97. Taxes credited to Highway Fund; municipal vehicle taxes.**

CASE NOTES

**Village of Bald Head Island Exempt.** — General assembly has explicitly authorized the Village of Bald Head Island, North Carolina, to exempt itself from G.S. ch. 20, art. 2, which

includes G.S. 20-97. Bald Head Island, Ltd. v. Village of Bald Head Island, — N.C. App. —, 624 S.E.2d 406, 2006 N.C. App. LEXIS 177 (2006).

Part 8. Anti-Theft and Enforcement Provisions.

**§ 20-114.3. Law enforcement and municipal employee motorized all-terrain vehicles permitted on highways with speed limits of 35 miles per hour or less.**

(a) Law enforcement officers enforcing the laws of the State and municipal employees may use motorized all-terrain vehicles, as defined in G.S. 14-159.3(b) and owned or leased by the governmental agency, on public highways where the speed limit is 35 miles per hour or less. Law enforcement officers and municipal employees may operate motorized all-terrain vehicles on nonfully controlled access highways with higher speeds for the purpose of traveling from a speed zone to an adjacent speed zone where the speed limit is 35 miles per hour or less.

(b) The term “municipal employee” shall include employees of a county.

(c) This section applies to the Towns of Cramerton, Dallas, Duck, Kill Devil Hills, Kitty Hawk, Nags Head, Ocean Isle Beach, Surf City, and Stanley, the Cities of Belmont, Cherryville, Gastonia, Kings Mountain and Mount Holly, and the Counties of Cleveland, Currituck, Gaston, Surry, and Wilkes only. (2004-108, ss. 2, 3; 2005-305, s. 1; 2006-25, s. 1; 2006-116, s. 2, 2006-166, ss. 1, 2; 2006-264, s. 36(b).)

**Editor’s Note.** — Session Laws 2004-108, s. 2, as amended, now applies to 10 or more jurisdictions, and has been codified as this section at the direction of the Revisor of Statutes.

Session Laws 2006-116, s. 1, which amended section 3 of 2004-108 [now subsection (c) of this section], was contingent on Senate Bill 1199, 2005 Regular Session [2006-166], not becoming law, which it did. Session Laws 2006-116, s. 1, has not been given effect.

**Effect of Amendments.** — Session Laws 2006-25, s. 1, effective June 26, 2006, added the sentence “The term ‘municipal employee’ shall include employees of a county.”[which has been

codified as subsection (b)], and added the municipalities of Highlands, Cramerton, Dallas, and Currituck.

Session Laws 2006-116, s. 2, effective July 13, 2006, inserted the municipalities of Ocean Isle Beach, Surf City, Gaston, Surry and Wilkes in subsection (c).

Session Laws 2006-166, s. 1, inserted the municipalities of Stanley, Belmont, Cherryville, Gastonia, Mount Holly and Cleveland in subsection (c).

Session Laws 2006-264, s. 36(b), effective August 27, 2006, added “motorized” preceding “all-terrain” in the section catchline and twice in subsection (a).

Part 9. The Size, Weight, Construction and Equipment of Vehicles.

§ 20-118. Weight of vehicles and load.

- (a) For the purposes of this section, the following definitions shall apply:
- (1) Single-axle weight. — The gross weight transmitted by all wheels whose centers may be included between two parallel transverse vertical planes 40 inches apart, extending across the full width of the vehicle.
  - (2) Tandem-axle weight. — The gross weight transmitted to the road by two or more consecutive axles whose centers may be included between parallel vertical planes spaced more than 40 inches and not more than 96 inches apart, extending across the full width of the vehicle.
  - (3) Axle group. — Any two or more consecutive axles on a vehicle or combination of vehicles.
  - (4) Gross weight. — The weight of any single axle, tandem axle, or axle group of a vehicle or combination of vehicles plus the weight of any load thereon.
  - (5) Light-traffic roads. — Any highway on the State Highway System, excepting routes designated I, U.S. or N.C., posted by the Department of Transportation to limit the axle weight below the statutory limits.
- (b) The following weight limitations shall apply to vehicles operating on the highways of the State:
- (1) The single-axle weight of a vehicle or combination of vehicles shall not exceed 20,000 pounds.
  - (2) The tandem-axle weight of a vehicle or combination of vehicles shall not exceed 38,000 pounds.
  - (3) The gross weight imposed upon the highway by any axle group of a vehicle or combination of vehicles shall not exceed the maximum weight given for the respective distance between the first and last axle of the group of axles measured longitudinally to the nearest foot as set forth in the following table:

<i>Distance Between Axles*</i>		<i>Maximum Weight in Pounds for any Group of Two or More Consecutive Axles</i>				
	<i>2 Axles</i>	<i>3 Axles</i>	<i>4 Axles</i>	<i>5 Axles</i>	<i>6 Axles</i>	<i>7 Axles</i>
4	38000					
5	38000					
6	38000					
7	38000					
8 or less	38000	38000				
more than 8						
9	38000	42000				
10	39000	42500				
11	40000	43500				
12		44000				
13		45000	50000			
14		45500	50500			
15		46500	51500			
16		47000	52000			
		48000	52500	58000		



<i>Distance Between Axles*</i>	<i>Maximum Weight in Pounds for any Group of Two or More Consecutive Axles</i>					
	<i>2 Axles</i>	<i>3 Axles</i>	<i>4 Axles</i>	<i>5 Axles</i>	<i>6 Axles</i>	<i>7 Axles</i>
17		48500	53500	58500		
18		49500	54000	59000		
19		50000	54500	60000		
20		51000	55500	60500	66000	
21		51500	56000	61000	66500	
22		52500	56500	61500	67000	
23		53000	57500	62500	68000	
24		54000	58000	63000	68500	74000
25		54500	58500	63500	69000	74500
26		55500	59500	64000	69500	75000
27		56000	60000	65000	70000	75500
28		57000	60500	65500	71000	76500
29		57500	61500	66000	71500	77000
30		58500	62000	66500	72000	77500
31		59000	62500	67500	72500	78000
32		60000	63500	68000	73000	78500
33			64000	68500	74000	79000
34			64500	69000	74500	80000
35			65500	70000	75000	
36			66000**	70500	75500	
37			66500**	71000	76000	
38			67500**	72000	77000	
39			68000	72500	77500	
40			68500	73000	78000	
41			69500	73500	78500	
42			70000	74000	79000	
43			70500	75000	80000	
44			71500	75500		
45			72000	76000		
46			72500	76500		
47			73500	77500		
48			74000	78000		
49			74500	78500		
50			75500	79000		
51			76000	80000		
52			76500			
53			77500			
54			78000			
55			78500			
56			79500			
57			80000			

\*Distance in Feet Between the Extremes of any Group of Two or More Consecutive Axles.

\*\*See exception in G.S. 20-118(c)(1).

- (4) The Department of Transportation may establish light-traffic roads and further restrict the axle weight limit on such light-traffic roads lower than the statutory limits. The Department of Transportation shall have authority to designate any highway on the State Highway System, excluding routes designated by I, U.S. and N.C., as a

light-traffic road when in the opinion of the Department of Transportation, such road is inadequate to carry and will be injuriously affected by vehicles using the said road carrying the maximum axle weight. All such roads so designated shall be conspicuously posted as light-traffic roads and the maximum axle weight authorized shall be displayed on proper signs erected thereon.

(c) Exceptions. — The following exceptions apply to G.S. 20-118(b) and 20-118(e).

- (1) Two consecutive sets of tandem axles may carry a gross weight of 34,000 pounds each without penalty provided the overall distance between the first and last axles of the consecutive sets of tandem axles is 36 feet or more.
- (2) When a vehicle is operated in violation of G.S. 20-118(b)(1), 20-118(b)(2), or 20-118(b)(3), but the gross weight of the vehicle or combination of vehicles does not exceed that permitted by G.S. 20-118(b)(3), the owner of the vehicle shall be permitted to shift the load within the vehicle, without penalty, from one axle to another to comply with the weight limits in the following cases:
  - a. Where the single-axle load exceeds the statutory limits, but does not exceed 21,000 pounds.
  - b. Where the vehicle or combination of vehicles has tandem axles, but the tandem-axle weight does not exceed 40,000 pounds.
- (3) When a vehicle is operated in violation of G.S. 20-118(b)(4) the owner of the vehicle shall be permitted, without penalty, to shift the load within the vehicle from one axle to another to comply with the weight limits where the single-axle weight does not exceed the posted limit by 2,500 pounds.
- (4) A truck or other motor vehicle shall be exempt from such light-traffic road limitations provided for pursuant to G.S. 20-118(b)(4), when transporting supplies, material or equipment necessary to carry out a farming operation engaged in the production of meats and agricultural crops and livestock or poultry by-products or a business engaged in the harvest or processing of seafood when the destination of such vehicle and load is located solely upon said light-traffic road.
- (5) The light-traffic road limitations provided for pursuant to subdivision (b)(4) of this section do not apply to a vehicle while that vehicle is transporting only the following from its point of origin on a light-traffic road to either one of the two nearest highways that is not a light-traffic road:
  - a. Processed or unprocessed seafood transported from boats or any other point of origin to a processing plant or a point of further distribution.
  - b. Meats or agricultural crop products transported from a farm to first market.
  - c. Forest products originating and transported from a farm or from woodlands to first market without interruption or delay for further packaging or processing after initiating transport.
  - d. Livestock or poultry transported from their point of origin to first market.
  - e. Livestock by-products or poultry by-products transported from their point of origin to a rendering plant.
  - f. Recyclable material transported from its point of origin to a scrap-processing facility for processing. As used in this subpart, the terms “recyclable material” and “processing” have the same meaning as in G.S. 130A-290(a).
  - g. Garbage collected by the vehicle from residences or garbage dumpsters if the vehicle is fully enclosed and is designed specif-

- ically for collecting, compacting, and hauling garbage from residences or from garbage dumpsters. As used in this subpart, the term "garbage" does not include hazardous waste as defined in G.S. 130A-290(a), spent nuclear fuel regulated under G.S. 20-167.1, low-level radioactive waste as defined in G.S. 104E-5, or radioactive material as defined in G.S. 104E-5.
- h. Treated sludge collected from a wastewater treatment facility.
  - i. Apples when transported from the orchard to the first processing or packing point.
  - j. Trees grown as Christmas trees from the field, farm, stand, or grove to first processing point.
- (6) A truck or other motor vehicle shall be exempt from such light-traffic road limitations provided by G.S. 20-118(b)(4) when such motor vehicles are owned, operated by or under contract to a public utility, electric or telephone membership corporation or municipality and such motor vehicles are used in connection with installation, restoration or emergency maintenance of utility services.
  - (7) A wrecker may tow any disabled truck or other motor vehicle or combination of vehicles to a place for repairs, parking, or storage within 50 miles from the point that the vehicle was disabled and may tow a truck, tractor, or other replacement vehicle to the site of the disabled vehicle without being in violation of G.S. 20-118 provided that the wrecker and towed vehicle or combination of vehicles otherwise meet all requirements of this section.
  - (8) A firefighting vehicle operated by any member of a municipal or rural fire department in the performance of his duties, regardless of whether members of that fire department are paid or voluntary and any vehicle of a voluntary lifesaving organization, when operated by a member of that organization while answering an official call shall be exempt from such light-traffic road limitations provided by G.S. 20-118(b)(4).
  - (9) Repealed by Session Laws 1993 (Reg. Sess., 1994), c. 761, s. 12.
  - (10) Fully enclosed motor vehicles designed specifically for collecting, compacting and hauling garbage from residences, or from garbage dumpsters shall, when operating for those purposes, be allowed a single axle weight not to exceed 23,500 pounds on the steering axle on vehicles equipped with a boom, or on the rear axle on vehicles loaded from the rear. This exemption shall not apply to vehicles operating on interstate highways, vehicles transporting hazardous waste as defined in G.S. 130A-290(a)(8), spent nuclear fuel regulated under G.S. 20-167.1, low-level radioactive waste as defined in G.S. 104E-5(9a), or radioactive material as defined in G.S. 104E-5(14).
  - (11) A truck or other motor vehicle shall be exempt for light-traffic road limitations issued under subdivision (b)(4) of this section when transporting heating fuel for on-premises use at a destination located on the light-traffic road.
  - (12) Subsections (b) and (e) of this section do not apply to a vehicle that (i) is hauling agricultural crops from the farm where they were grown to first market, (ii) is within 35 miles of that farm, (iii) does not operate on an interstate highway or posted bridge while hauling the crops, and meets one of the following descriptions:
    - a. Is a five-axle combination with a gross weight of no more than 90,000 pounds, a single-axle weight of no more than 22,000 pounds, a tandem-axle weight of no more than 42,000 pounds, and a length of at least 51 feet between the first and last axles of the combination.



- b. Repealed by Session Laws 1993 (Reg. Sess., 1994), c. 761, s. 13.
  - c. Is a four-axle combination with a gross weight that does not exceed the limit set in subdivision (b)(3) of this section, a single-axle weight of no more than 22,000 pounds, and a tandem-axle weight of no more than 42,000 pounds.
- (13) Vehicles specifically designed for fire fighting that are owned by a municipal or rural fire department. This exception does not apply to vehicles operating on interstate highways.
- (14) Subsections (b) and (e) of this section do not apply to a vehicle that meets all of the conditions below, but all other enforcement provisions of this Article remain applicable:
- a. Is hauling aggregates from a distribution yard or a State-permitted production site located within a North Carolina county contiguous to the North Carolina State border to a destination in another state adjacent to that county as verified by a weight ticket in the driver's possession and available for inspection by enforcement personnel.
  - b. Does not operate on an interstate highway or posted bridge.
  - c. Does not exceed 69,850 pounds gross vehicle weight and 53,850 pounds per axle grouping for tri-axle vehicles. For purposes of this subsection, a tri-axle vehicle is a single power unit vehicle with a three consecutive axle group on which the respective distance between any two consecutive axles of the group, measured longitudinally center to center to the nearest foot, does not exceed eight feet. For purposes of this subsection, the tolerance provisions of subsection (h) of this section do not apply, and vehicles must be licensed in accordance with G.S. 20-88.
  - d. Repealed by Session Laws 2001-487, s. 10, effective December 16, 2001.
- (15) Subsections (b) and (e) of this section do not apply to a vehicle or vehicle combination that meets all of the conditions below, but all other enforcement provisions of this Article remain applicable:
- a. Is hauling wood residuals, including wood chips, sawdust, mulch, or tree bark from any site; or is transporting bulk soil, bulk rock, sand, sand rock, or asphalt millings from a site that does not have a certified scale for weighing the vehicle.
  - b. Does not operate on an interstate highway, a posted light-traffic road, or a posted bridge.
  - c. Does not exceed a maximum gross weight 4,000 pounds in excess of what is allowed in subsection (b) of this section.
  - d. Does not exceed a single-axle weight of more than 22,000 pounds and a tandem-axle weight of more than 42,000 pounds.
- (d) The Department of Transportation is authorized to abrogate certain exceptions. The exceptions provided for in G.S. 20-118(c)(4) and 20-118(c)(5) as applied to any light-traffic road may be abrogated by the Department of Transportation upon a determination of the Department of Transportation that undue damage to such light-traffic road is resulting from such vehicles exempted by G.S. 20-118(c)(4) and 20-118(c)(5). In those cases where the exemption to the light-traffic roads are abrogated by the Department of Transportation, the Department shall post the road to indicate no exemptions.
- (e) Penalties. —
- (1) Except as provided in subdivision (2) of this subsection, for each violation of the single-axle or tandem-axle weight limits set in subdivision (b)(1), (b)(2), or (b)(4) of this section or axle weights authorized by special permit according to G.S. 20-119(a), the Department of Crime Control and Public Safety shall assess a civil penalty

against the owner or registrant of the vehicle in accordance with the following schedule: for the first 1,000 pounds or any part thereof, four cents (4¢) per pound; for the next 1,000 pounds or any part thereof, six cents (6¢) per pound; and for each additional pound, ten cents (10¢) per pound. These penalties apply separately to each weight limit violated. In all cases of violation of the weight limitation, the penalty shall be computed and assessed on each pound of weight in excess of the maximum permitted.

- (2) The penalty for a violation of the single-axle or tandem-axle weight limits by a vehicle that is transporting an item listed in subdivision (c)(5) of this section is one-half of the amount it would otherwise be under subdivision (1) of this subsection.
- (3) If an axle-group weight of a vehicle exceeds the weight limit set in subdivision (b)(3) of this section plus any tolerance allowed in subsection (h) of this section or axle-group weights or gross weights authorized by special permit under G.S. 20-119(a), the Department of Crime Control and Public Safety shall assess a civil penalty against the owner or registrant of the motor vehicle. The penalty shall be assessed on the number of pounds by which the axle-group weight exceeds the limit set in subdivision (b)(3), as follows: for the first 2,000 pounds or any part thereof, two cents (2¢) per pound; for the next 3,000 pounds or any part thereof, four cents (4¢) per pound; for each pound in excess of 5,000 pounds, ten cents (10¢) per pound. Tolerance pounds in excess of the limit set in subdivision (b)(3) are subject to the penalty if the vehicle exceeds the tolerance allowed in subsection (h) of this section. These penalties apply separately to each axle-group weight limit violated.
- (4) The penalty for a violation of an axle-group weight limit by a vehicle that is transporting an item listed in subdivision (c)(5) of this section is one-half of the amount it would otherwise be under subdivision (3) of this subsection.
- (5) A violation of a weight limit in this section or of a permitted weight under G.S. 20-119 is not punishable under G.S. 20-176.
- (6) The penalty for violating the gross weight or axle-group weight by a dump truck or dump trailer vehicle transporting bulk soil, bulk rock, sand, sand rock, or asphalt millings intrastate from a site that does not have a certified scale for weighing the vehicle is one-half of the amount it otherwise would be under subdivisions (1) and (3) of this subsection.
- (7) The clear proceeds of all civil penalties, civil forfeitures, and civil fines that are collected by the Department of Transportation pursuant to this section shall be remitted to the Civil Penalty and Forfeiture Fund in accordance with G.S. 115C-457.2.

(f) Repealed by Session Laws 1993 (Reg. Sess., 1994), c. 761, s. 15.

(g) General Statutes 20-118 shall not be construed to permit the gross weight of any vehicle or combination in excess of the safe load carrying capacity established by the Department of Transportation on any bridge pursuant to G.S. 136-72.

(h) Tolerance. — A vehicle may exceed maximum and the inner axle-group weight limitations set forth in subdivision (b)(3) of this section by a tolerance of ten percent (10%). This exception does not authorize a vehicle to exceed either the single-axle or tandem-axle weight limitations set forth in subdivisions (b)(1) and (b)(2) of this section, or the maximum gross weight limit of 80,000 pounds. This exception does not apply to bridges posted under G.S. 136-72 or to vehicles operating on interstate highways. The tolerance allowed under this subsection does not authorize the weight of a vehicle to exceed the



weight for which that vehicle is licensed under G.S. 20-88. No tolerance on the single-axle weight or the tandem-axle weight provided for in subdivisions (b)(1) and (b)(2) of this section shall be granted administratively or otherwise. The Department of Transportation shall report back to the Transportation Oversight Committee and to the General Assembly on the effects of the tolerance granted under this section, any abuses of this tolerance, and any suggested revisions to this section by that Department on or before May 1, 1998.

(i) Repealed by Session Laws 1993 (Reg. Sess., 1994), c. 761, s. 16.

(j) Repealed by Session Laws 1987, c. 392.

(k) From September 1 through March 1 of each year, a vehicle which is equipped with a self-loading bed and which is designed and used exclusively to transport compressed seed cotton from the farm to a cotton gin may operate on the highways of the State, except interstate highways, with a tandem-axle weight not exceeding 44,000 pounds. Such vehicles shall be exempt from light-traffic road limitations only from point of origin on the light-traffic road to the nearest State-maintained road which is not posted to prohibit the transportation of statutory load limits. This exemption does not apply to restricted, posted bridge structures. (1937, c. 407, s. 82; 1943, c. 213, s. 2; cc. 726, 784; 1945, c. 242, s. 2; c. 569, s. 2; c. 576, s. 7; 1947, c. 1079; 1949, c. 1207, s. 2; 1951, c. 495, s. 2; c. 942, s. 1; c. 1013, ss. 5, 6, 8; 1953, cc. 214, 1092; 1959, c. 872; c. 1264, s. 6; 1963, c. 159; c. 610, ss. 3-5; c. 702, s. 5; 1965, cc. 483, 1044; 1969, c. 537; 1973, c. 507, s. 5; c. 1449, ss. 1, 2; 1975, c. 325; c. 373, s. 2; c. 716, s. 5; c. 735; c. 736, ss. 1-3; 1977, c. 461; c. 464, s. 34; 1977, 2nd Sess., c. 1178; 1981, c. 690, ss. 27, 28; c. 726; c. 1127, s. 53.1; 1983, c. 407; c. 724, s. 1; 1983 (Reg. Sess., 1984), c. 1116, ss. 105-109; 1985, c. 54; c. 274; 1987, c. 392; c. 707, ss. 1-4; 1991, c. 202, s. 1; 1991 (Reg. Sess., 1992), c. 905, s. 1; 1993, c. 426, ss. 1, 2; c. 470, s. 1; c. 533, s. 11; 1993 (Reg. Sess., 1994), c. 761, ss. 10-16; 1995, c. 109, s. 3; c. 163, s. 4; c. 332, ss. 1-3; c. 509, s. 135.1(b); 1995 (Reg. Sess., 1996), c. 756, s. 29; 1997-354, s. 1; 1997-373, s. 1; 1997-466, s. 2; 1998-149, ss. 8, 9, 9.1; 1998-177, s. 1; 1999-452, s. 23; 2000-57, s. 1; 2001-487, ss. 10, 50(e); 2002-126, s. 26.16(a); 2004-145, ss. 1, 2; 2005-248, s. 1; 2005-276, s. 6.37(o); 2005-361, s. 3; 2006-135, s. 1; 2006-264, s. 37.)

#### Effect of Amendments. —

Session Laws 2006-135, s. 1, effective July 19, 2006, substituted “bark from any site” for “bark” in subdivision (c)(15)a.

Session Laws 2006-264, s. 37, effective August 27, 2006, added “located” preceding “within a North Carolina county” in subdivision (c)(14)a.

## § 20-123. Trailers and towed vehicles.

### CASE NOTES

**Safety Chains Required for Use of Ball Hitch.** — G.S. 20-123(c) required the use of safety chains or cables when a ball hitch was the primary towing attachment; accordingly, a jury instruction regarding locking pins was not a correct statement of the law as it was undis-

puted that the primary towing attachment used by defendant to tow a trailer with his truck was a ball hitch. *State v. Hall*, 173 N.C. App. 735, 620 S.E.2d 309, 2005 N.C. App. LEXIS 2295 (2005).

## § 20-135.2A. (See Editor’s note) Seat belt use mandatory.

(a) Except as otherwise provided in G.S. 20-137.1, each occupant of a motor vehicle manufactured with seat belts shall have a seatbelt properly fastened about his or her body at all times when the vehicle is in forward motion on a street or highway in this State.



(b) Repealed by Session Laws 2006-140, s. 1, effective December 1, 2006.

(c) This section shall not apply to any of the following:

- (1) A driver or occupant of a noncommercial motor vehicle with a medical or physical condition that prevents appropriate restraint by a safety belt or with a professionally certified mental phobia against the wearing of vehicle restraints;
- (2) A motor vehicle operated by a rural letter carrier of the United States Postal Service while performing duties as a rural letter carrier and a motor vehicle operated by a newspaper delivery person while actually engaged in delivery of newspapers along the person's specified route;
- (3) A driver or passenger frequently stopping and leaving the vehicle or delivering property from the vehicle if the speed of the vehicle between stops does not exceed 20 miles per hour;
- (4) Any vehicle registered and licensed as a property-carrying vehicle in accordance with G.S. 20-88, while being used for agricultural purposes in intrastate commerce;
- (5) A motor vehicle not required to be equipped with seat safety belts under federal law; or
- (6) Any occupant of a motor home, as defined in G.S. 20-4.01(27)d2, other than the driver and front seat passengers.

(d) Evidence of failure to wear a seat belt shall not be admissible in any criminal or civil trial, action, or proceeding except in an action based on a violation of this section or as justification for the stop of a vehicle or detention of a vehicle operator and passengers.

(d1) Failure of a rear seat occupant of a vehicle to wear a seat belt shall not be justification for the stop of a vehicle.

(e) Any driver or front seat passenger who fails to wear a seat belt as required by this section shall have committed an infraction and shall pay a penalty of twenty-five dollars (\$25.00) plus court costs in the sum of seventy-five dollars (\$75.00). Any rear seat occupant of a vehicle who fails to wear a seat belt as required by this section shall have committed an infraction and shall pay a penalty of ten dollars (\$10.00) and no court costs. Court costs assessed under this section are for the support of the General Court of Justice and shall be remitted to the State Treasurer. Conviction of an infraction under this section has no other consequence.

(f) No drivers license points or insurance surcharge shall be assessed on account of violation of this section.

(g) The Commissioner of Motor Vehicles and the Department of Public Instruction shall incorporate in driver education programs and driver licensing programs instructions designed to encourage compliance with this section as an important means of reducing the severity of injury to the users of restraint devices and on the requirements and penalties specified in this law.

(h) Repealed by Session Laws 1999-183, s. 3, effective October 1, 1999. (1985, c. 222, s. 1; 1987, c. 623; 1991, c. 448, s. 1; 1994, Ex. Sess., c. 5, s. 1; 1997-16, s. 2; 1997-443, s. 32.20; 1999-183, ss. 1-3; 2002-126, s. 29A.3(a); 2005-276, s. 43.1(g); 2006-66, s. 21.11; 2006-140, s. 1; 2006-221, s. 21(a).)

**Editor's Note. —**

Session Laws 2006-140, s. 2, provides: "This act becomes effective December 1, 2006, and applies to offenses committed on or after that date. Law enforcement agencies shall issue only warnings for violations of this act with regards to backseat passengers in motor vehicles from December 1, 2006, to June 30, 2007. On July 1, 2007, law enforcement agencies may begin issuing citations or taking other enforce-

ment action, for violations of this act with regards to backseat passengers. Front seat passengers not in compliance with this act may continue to be issued citations to ensure compliance with this section."

Session Laws 2006-221, s. 21(a), provided that if Senate Bill 774 of the 2005 Regular Session [2006-140] becomes law, Session Laws 2006-66, s. 21.11 is repealed. Therefore subsection 20-135.2A(c) is set out above as amended

by Session Laws 2006-140.

**Effect of Amendments. —**

Session Laws 2006-140, s. 1, effective December 1, 2006, substituted “Except as otherwise provided in G.S. 20-137.1, each occupant of a” for “Each front seat occupant who is 16 years of age or older and each driver of a passenger” in subsection (a); repealed subsection (b); inserted “of a non commercial motor vehicle” in subdivi-

sion (c)(1); substituted “purposes in intrastate commerce” for “or commercial purposes” in subdivision (c)(4); made minor punctuation changes in subdivision (c)(5); added subdivision (c)(6) and subsection (d1); in subsection (e), inserted “front seat” near the beginning of the first sentence and inserted the second sentence; deleted “the Division of” following “The Commissioner of” in subsection (g).

### CASE NOTES

**Non-use of Seat Belts Probable Cause. —**

Police officer had probable cause pursuant to U.S. Const. amend. IV and N.C. Const. art. I, § 20 to stop defendant's vehicle because the officer witnessed defendant remove his seat belt while driving, a violation of G.S. 20-135.2A(a). *State v. Hernandez*, 170 N.C. App.

299, 612 S.E.2d 420, 2005 N.C. App. LEXIS 1006 (2005).

**Cited in** *State v. Brewington*, 170 N.C. App. 264, 612 S.E.2d 648, 2005 N.C. App. LEXIS 1011 (2005), cert. denied, 360 N.C. 67, 621 S.E.2d 881 (2005).

## § 20-137.3. Unlawful use of a mobile phone by persons under 18 years of age.

(a) Definitions. — The following definitions apply in this section:

(1) Additional technology. — Any technology that provides access to digital media such as a camera, electronic mail, music, the Internet, or games.

(2) Mobile telephone. — A device used by subscribers and other users of wireless telephone service to access the service. The term includes: (i) a device with which a user engages in a call using at least one hand, and (ii) a device that has an internal feature or function, or that is equipped with an attachment or addition, whether or not permanently part of the mobile telephone, by which a user engages in a call without the use of either hand, whether or not the use of either hand is necessary to activate, deactivate, or initiate a function of such telephone.

(3) Wireless telephone service. — A service that is a two-way real-time voice telecommunications service that is interconnected to a public switched telephone network and is provided by a commercial mobile radio service, as such term is defined by 47 C.F.R. § 20.3.

(b) Offense. — Except as otherwise provided in this section, no person under the age of 18 years shall operate a motor vehicle on a public street or highway or public vehicular area while using a mobile telephone or any additional technology associated with a mobile telephone while the vehicle is in motion. This prohibition shall not apply to the use of a mobile telephone or additional technology in a stationary vehicle.

(c) Seizure. — The provisions of this section shall not be construed as authorizing the seizure or forfeiture of a mobile telephone, unless otherwise provided by law.

(d) Exceptions. — The provisions of subsection (b) of this section shall not apply if the use of a mobile telephone is for the sole purpose of communicating with:

- (1) Any of the following regarding an emergency situation: an emergency response operator; a hospital, physician's office, or health clinic; a public or privately owned ambulance company or service; a fire department; or a law enforcement agency.
- (2) The motor vehicle operator's parent, legal guardian or spouse.



(e) **Penalty.** — Any person violating this section shall have committed an infraction and shall pay a fine of twenty-five dollars (\$25.00). This offense is an offense for which a defendant may waive the right to a hearing or trial and admit responsibility for the infraction pursuant to G.S. 7A-148. No drivers license points, insurance surcharge, or court costs shall be assessed as a result of a violation of this section. (2006-177, s. 1.)

**Editor's Note.** — Session Laws 2006-177, s. 2006, and applicable to offenses committed on 8, makes this section effective December 1, or after that date.

## Part 10. Operation of Vehicles and Rules of the Road.

### § 20-138.1. Impaired driving.

(a) **Offense.** — A person commits the offense of impaired driving if he drives any vehicle upon any highway, any street, or any public vehicular area within this State:

- (1) While under the influence of an impairing substance; or
- (2) After having consumed sufficient alcohol that he has, at any relevant time after the driving, an alcohol concentration of 0.08 or more. The results of a chemical analysis shall be deemed sufficient evidence to prove a person's alcohol concentration; or
- (3) With any amount of a Schedule I controlled substance, as listed in G.S. 90-89, or its metabolites in his blood or urine.

(a1) A person who has submitted to a chemical analysis of a blood sample, pursuant to G.S. 20-139.1(d), may use the result in rebuttal as evidence that the person did not have, at a relevant time after driving, an alcohol concentration of 0.08 or more.

(b) **Defense Precluded.** — The fact that a person charged with violating this section is or has been legally entitled to use alcohol or a drug is not a defense to a charge under this section.

(b1) **Defense Allowed.** — Nothing in this section shall preclude a person from asserting that a chemical analysis result is inadmissible pursuant to G.S. 20-139.1(b2).

(c) **Pleading.** — In any prosecution for impaired driving, the pleading is sufficient if it states the time and place of the alleged offense in the usual form and charges that the defendant drove a vehicle on a highway or public vehicular area while subject to an impairing substance.

(d) **Sentencing Hearing and Punishment.** — Impaired driving as defined in this section is a misdemeanor. Upon conviction of a defendant of impaired driving, the presiding judge shall hold a sentencing hearing and impose punishment in accordance with G.S. 20-179.

(e) **Exception.** — Notwithstanding the definition of "vehicle" pursuant to G.S. 20-4.01(49), for purposes of this section the word "vehicle" does not include a horse. (1983, c. 435, s. 24; 1989, c. 711, s. 2; 1993, c. 285, s. 1; 2006-253, s. 9.)

**Editor's Note.** — Session Laws 2006-253, s. 1, provides: "This act shall be known as 'The Motor Vehicle Driver Protection Act of 2006.'"

**Effect of Amendments.** — Session Laws 2006-253, s. 9, effective December 1, 2006, and applicable to offenses committed on or after

that date, in subdivision (a)(2), added the last sentence; added subdivision (a)(3) and subsections (a1) and (b1); substituted "shall" for "must" in subsection (d); and deleted "bicycle, or lawnmower" at the end of subsection (e).



## CASE NOTES

- I. In General.
- II. Driving Under the Influence.
- III. Driving with 0.10 (Now 0.08) Percent or More Alcohol in Blood.
- IV. Procedure.
- VI. Sentencing.

## I. IN GENERAL.

**Proof of Impaired Driving. —**

Trial court did not err in denying defendant's motion to dismiss the charge against him of driving while impaired, as the trustworthiness of defendant's confessions was adequately corroborated by witnesses who observed defendant arrive at the scene of the fatal accident. *State v. Cruz*, 173 N.C. App. 689, 620 S.E.2d 251, 2005 N.C. App. LEXIS 2288 (2005).

## II. DRIVING UNDER THE INFLUENCE.

**Evidence of Impairment Held Sufficient.**

Conviction for impaired driving was supported by sufficient evidence, including evidence that defendant's driving was erratic, that she accelerated to hit a police vehicle after a police chase, that defendant admitted she had consumed alcohol before driving, a fact confirmed by a breathalyzer result showing a 0.07 breath alcohol concentration, and that an open half-filled bottle of vodka was found in the passenger area of her vehicle. *State v. Wood*, — N.C. App. —, 622 S.E.2d 120, 2005 N.C. App. LEXIS 2614 (2005).

**Prescription Drug as Impairing Substance. —** Expert testimony that Floricet, the drug defendant alleged he took prior to driving, was an impairing substance and that a healthcare professional should have warned defendant of its effects led to the conclusion that defendant knew or should have known that it could impair him, and was thus that he was on notice that, by driving after taking Floricet, he risked crossing over the line into the territory of proscribed conduct. *State v. Highsmith*, 173 N.C. App. 600, 619 S.E.2d 586, 2005 N.C. App. LEXIS 2123 (2005).

**Evidence Held Sufficient to Go to Jury.**

Defendant's electric scooter, which was not self-balancing, with its two wheels in tandem, and which did not fall within the two statutory exceptions from a vehicle under G.S. 20-138.1(e) with regard to horses, bicycles, and

lawnmowers or G.S. 20-4.01(49) as to transportation for a person with a mobility impairment, fell within the legislature's definition of vehicle in G.S. 20-4.01(49) and, because the evidence at trial showed that his breath alcohol concentration following arrest was 0.13, there was sufficient evidence to uphold defendant's conviction for impaired driving under G.S. 20-138.1. *State v. Crow*, — N.C. App. —, 623 S.E.2d 68, 2005 N.C. App. LEXIS 2747 (2005).

## III. DRIVING WITH 0.10 (NOW 0.08) PERCENT OR MORE ALCOHOL IN BLOOD.

**Mandatory Revocation of License. —** Under G.S. 20-17(a)(2), defendant's driver's license was subject to mandatory revocation for one year because she was convicted under G.S. 20-138.1 for driving with an alcohol concentration of 0.16. *State v. Benbow*, 169 N.C. App. 613, 610 S.E.2d 297, 2005 N.C. App. LEXIS 687 (2005).

## IV. PROCEDURE.

**Evidence Held Admissible. —** No plain error existed in a trial court admitting evidence of defendant's empty prescription pill bottle, testimony by an officer identifying the pills from the label, and testimony by a pharmacist about the interaction between the pills and alcohol, as the evidence was relevant to show that defendant, who had been drinking, was driving while impaired. *State v. Edwards*, 170 N.C. App. 381, 612 S.E.2d 394, 2005 N.C. App. LEXIS 992 (2005).

## VI. SENTENCING.

**Failure to Submit Aggravating Factors to Jury. —** Trial court erred in failing to submit aggravating factors to the jury before imposing an aggravated sentence on defendant for his conviction of driving while impaired; as defendant was entitled to a jury trial on the charge, any aggravating factor had to be submitted to the jury before an aggravated sentence could be imposed. *State v. Speight*, 359 N.C. 602, 614 S.E.2d 262, 2005 N.C. LEXIS 645 (2005).

## § 20-138.2. Impaired driving in commercial vehicle.

(a) Offense. — A person commits the offense of impaired driving in a commercial motor vehicle if he drives a commercial motor vehicle upon any highway, any street, or any public vehicular area within the State:

- (1) While under the influence of an impairing substance; or
- (2) After having consumed sufficient alcohol that he has, at any relevant time after the driving, an alcohol concentration of 0.04 or more. The results of a chemical analysis shall be deemed sufficient evidence to prove a person's alcohol concentration; or
- (3) With any amount of a Schedule I controlled substance, as listed in G.S. 90-89, or its metabolites in his blood or urine.

(a1) A person who has submitted to a chemical analysis of a blood sample, pursuant to G.S. 20-139.1(d), may use the result in rebuttal as evidence that the person did not have, at a relevant time after driving, an alcohol concentration of 0.04 or more.

(a2) In order to prove the gross vehicle weight rating of a vehicle as defined in G.S. 20-4.01(12b), the opinion of a person who observed the vehicle as to the weight, the testimony of the gross vehicle weight rating affixed to the vehicle, the registered or declared weight shown on the Division's records pursuant to G.S. 20-26(b1), the gross vehicle weight rating as determined from the vehicle identification number, the listed gross weight publications from the manufacturer of the vehicle, or any other description or evidence shall be admissible.

(b) Defense Precluded. — The fact that a person charged with violating this section is or has been legally entitled to use alcohol or a drug is not a defense to a charge under this section.

(b1) Defense Allowed. — Nothing in this section shall preclude a person from asserting that a chemical analysis result is inadmissible pursuant to G.S. 20-139.1(b2).

(c) Pleading. — To charge a violation of this section, the pleading is sufficient if it states the time and place of the alleged offense in the usual form and charges the defendant drove a commercial motor vehicle on a highway, street, or public vehicular area while subject to an impairing substance.

(d) Implied Consent Offense. — An offense under this section is an implied consent offense subject to the provisions of G.S. 20-16.2.

(e) Punishment. — The offense in this section is a misdemeanor and any defendant convicted under this section shall be sentenced under G.S. 20-179. This offense is not a lesser included offense of impaired driving under G.S. 20-138.1, and if a person is convicted under this section and of an offense involving impaired driving under G.S. 20-138.1 arising out of the same transaction, the aggregate punishment imposed by the Court may not exceed the maximum punishment applicable to the offense involving impaired driving under G.S. 20-138.1.

(f) Repealed by Session Laws 1991, c. 726, s. 19.

(g) Chemical Analysis Provisions. — The provisions of G.S. 20-139.1 shall apply to the offense of impaired driving in a commercial motor vehicle. (1989, c. 771, s. 12; 1991, c. 726, s. 19; 1993, c. 539, s. 363; 1994, Ex. Sess., c. 24, s. 14(c); 1998-182, s. 24; 2006-253, s. 10.)

**Editor's Note. —**

Session Laws 2006-253, s. 1, provides: "This act shall be known as 'The Motor Vehicle Driver Protection Act of 2006.'"

**Effect of Amendments. —** Session Laws

2006-253, s. 10, effective December 1, 2006, and applicable to offenses committed on or after that date, added the last sentence in subdivision (a)(2), added subdivision (a)(3) and subsections (a1), (a2) and (b1).

## § 20-138.3. Driving by person less than 21 years old after consuming alcohol or drugs.

(a) Offense. — It is unlawful for a person less than 21 years old to drive a motor vehicle on a highway or public vehicular area while consuming alcohol or at any time while he has remaining in his body any alcohol or controlled substance previously consumed, but a person less than 21 years old does not



violate this section if he drives with a controlled substance in his body which was lawfully obtained and taken in therapeutically appropriate amounts.

(b) Subject to Implied-Consent Law. — An offense under this section is an alcohol-related offense subject to the implied-consent provisions of G.S. 20-16.2.

(b1) Odor Insufficient. — The odor of an alcoholic beverage on the breath of the driver is insufficient evidence by itself to prove beyond a reasonable doubt that alcohol was remaining in the driver's body in violation of this section unless the driver was offered an alcohol screening test or chemical analysis and refused to provide all required samples of breath or blood for analysis.

(b2) Alcohol Screening Test. — Notwithstanding any other provision of law, an alcohol screening test may be administered to a driver suspected of violation of subsection (a) of this section, and the results of an alcohol screening test or the driver's refusal to submit may be used by a law enforcement officer, a court, or an administrative agency in determining if alcohol was present in the driver's body. No alcohol screening tests are valid under this section unless the device used is one approved by the Department of Health and Human Services, and the screening test is conducted in accordance with the applicable regulations of the Department as to its manner and use.

(c) Punishment; Effect When Impaired Driving Offense Also Charged. — The offense in this section is a Class 2 misdemeanor. It is not, in any circumstances, a lesser included offense of impaired driving under G.S. 20-138.1, but if a person is convicted under this section and of an offense involving impaired driving arising out of the same transaction, the aggregate punishment imposed by the court may not exceed the maximum applicable to the offense involving impaired driving, and any minimum punishment applicable shall be imposed.

(d) Limited Driving Privilege. — A person who is convicted of violating subsection (a) of this section and whose driver's license is revoked solely based on that conviction may apply for a limited driving privilege as provided in G.S. 20-179.3. This subsection shall apply only if the person meets both of the following requirements:

(1) Is 18, 19, or 20 years old on the date of the offense.

(2) Has not previously been convicted of a violation of this section.

The judge may issue the limited driving privilege only if the person meets the eligibility requirements of G.S. 20-179.3, other than the requirement in G.S. 20-179.3(b)(1)c. G.S. 20-179.3(e) shall not apply. All other terms, conditions, and restrictions provided for in G.S. 20-179.3 shall apply. G.S. 20-179.3, rather than this subsection, governs the issuance of a limited driving privilege to a person who is convicted of violating subsection (a) of this section and of driving while impaired as a result of the same transaction. (1983, c. 435, s. 34; 1985 (Reg. Sess., 1986), c. 852, s. 11; 1993, c. 539, s. 364; 1994, Ex. Sess., c. 24, s. 14(c); 1995, c. 506, s. 6; 1997-379, ss. 4, 5.2; 2000-140, s. 7; 2000-155, s. 18; 2006-253, s. 11.)

**Editor's Note.** — Session Laws 2006-253, s. 1, provides: "This act shall be known as 'The Motor Vehicle Driver Protection Act of 2006.'"

**Effect of Amendments.** — Session Laws 2006-253, s. 11, effective December 1, 2006, and

applicable to offenses committed on or after that date, in subsection (b2), substituted "Department of Health and Human Services" for "Commission for Health Services" and "Department" for "Commission."

## **§ 20-138.4. Requirement that prosecutor explain reduction or dismissal of charge involving impaired driving.**

(a) Any prosecutor shall enter detailed facts in the record of any case subject



to the implied-consent law or involving driving while license revoked for impaired driving as defined in G.S. 20-28.2 explaining orally in open court and in writing the reasons for his action if he:

- (1) Enters a voluntary dismissal; or
- (2) Accepts a plea of guilty or no contest to a lesser included offense; or
- (3) Substitutes another charge, by statement of charges or otherwise, if the substitute charge carries a lesser mandatory minimum punishment or is not an offense involving impaired driving; or
- (4) Otherwise takes a discretionary action that effectively dismisses or reduces the original charge in the case involving impaired driving.

General explanations such as “interests of justice” or “insufficient evidence” are not sufficiently detailed to meet the requirements of this section.

(b) The written explanation shall be signed by the prosecutor taking the action on a form approved by the Administrative Office of the Courts and shall contain, at a minimum:

- (1) The alcohol concentration or the fact that the driver refused.
- (2) A list of all prior convictions of implied-consent offenses or driving while license revoked.
- (3) Whether the driver had a valid drivers license or privilege to drive in this State as indicated by the Division’s records.
- (4) A statement that a check of the database of the Administrative Office of the Courts revealed whether any other charges against the defendant were pending.
- (5) The elements that the prosecutor believes in good faith can be proved, and a list of those elements that the prosecutor cannot prove and why.
- (6) The name and agency of the charging officer and whether the officer is available.
- (7) Any reason why the charges are dismissed.

(c) **See Editor’s note on effective date)** A copy of the form required in subsection (b) of this section shall be sent to the head of the law enforcement agency that employed the charging officer, to the district attorney who employs the prosecutor, and filed in the court file. The Administrative Office of the Courts shall electronically record this data in its database and make it available upon request. (1983, c. 435, s. 25; 1987 (Reg. Sess., 1988), c. 1112; 1989, c. 771, s. 18; 2006-253, s. 19.)

**Editor’s Note. —**

Session Laws 2006-253, s. 1, provides: “This act shall be known as ‘The Motor Vehicle Driver Protection Act of 2006.’”

Session Laws 2006-253, s. 33, provides in part: “Sections 20.1, 20.2, and the requirement that the Administrative Office of the Courts electronically record certain data contained in subsection (c) of G.S. 20-138.4, as amended by

Section 19 of this act, become effective after the next rewrite of the superior court clerks system by the Administrative Office of the Courts.” The rewrite of the superior court clerk’s system has not happened.

**Effect of Amendments. —** Session Laws 2006-253, s. 19, effective December 1, 2006, rewrote the section. See Editor’s note for applicability.

## § 20-138.5. Habitual impaired driving.

(a) A person commits the offense of habitual impaired driving if he drives while impaired as defined in G.S. 20-138.1 and has been convicted of three or more offenses involving impaired driving as defined in G.S. 20-4.01(24a) within 10 years of the date of this offense.

(b) A person convicted of violating this section shall be punished as a Class F felon and shall be sentenced to a minimum active term of not less than 12 months of imprisonment, which shall not be suspended. Sentences imposed under this subsection shall run consecutively with and shall commence at the expiration of any sentence being served.

(c) An offense under this section is an implied consent offense subject to the provisions of G.S. 20-16.2. The provisions of G.S. 20-139.1 shall apply to an offense committed under this section.

(d) A person convicted under this section shall have his license permanently revoked.

(e) If a person is convicted under this section, the motor vehicle that was driven by the defendant at the time the defendant committed the offense of impaired driving becomes property subject to forfeiture in accordance with the procedure set out in G.S. 20-28.2. In applying the procedure set out in that statute, an owner or a holder of a security interest is considered an innocent party with respect to a motor vehicle subject to forfeiture under this subsection if any of the following applies:

- (1) The owner or holder of the security interest did not know and had no reason to know that the defendant had been convicted within the previous seven years of three or more offenses involving impaired driving.
- (2) The defendant drove the motor vehicle without the consent of the owner or the holder of the security interest. (1989 (Reg. Sess., 1990), c. 1039, s. 7; 1993, c. 539, s. 1258; 1994, Ex. Sess., c. 14, s. 32; c. 24, s. 14(c); 1993 (Reg. Sess., 1994), c. 761, s. 34.1; c. 767, s. 32; 1997-379, s. 6; 2006-253, ss. 12, 13.)

**Editor's Note.** — Session Laws 2006-253, s. 1, provides: "This act shall be known as 'The Motor Vehicle Driver Protection Act of 2006.'"

**Effect of Amendments.** — Session Laws 2006-253, ss. 12 and 13, effective December 1,

2006, and applicable to offenses committed on or after that date, substituted "10" for "seven" in subsection (a); and added the last sentence in subsection (c).

## CASE NOTES

**Determination of Prior Record Level.** — Trial court did not err in calculating defendant's prior record by including his driving while impaired convictions even though those convictions were also elements of his habitual impaired driving convictions; prior convictions of driving while impaired were the elements of the offense of habitual impaired driving, but G.S. 20-138.5(a) did not impose punishment for these previous crimes, it imposed an enhanced punishment for the latest offense, and the trial

court's calculation of defendant's prior record level did not represent a double-counting of convictions. *State v. Hyden*, — N.C. App. —, 625 S.E.2d 125, 2006 N.C. App. LEXIS 179 (2006).

**Cited in** *State v. Highsmith*, 173 N.C. App. 600, 619 S.E.2d 586, 2005 N.C. App. LEXIS 2123 (2005); *State v. Bowden*, — N.C. App. —, 630 S.E.2d 208, 2006 N.C. App. LEXIS 1218 (2006).

## § 20-138.7. Transporting an open container of alcoholic beverage.

(a) Offense. — No person shall drive a motor vehicle on a highway or the right-of-way of a highway:

- (1) While there is an alcoholic beverage in the passenger area in other than the unopened manufacturer's original container; and
- (2) While the driver is consuming alcohol or while alcohol remains in the driver's body.

(a1) Offense. — No person shall possess an alcoholic beverage other than in the unopened manufacturer's original container, or consume an alcoholic beverage, in the passenger area of a motor vehicle while the motor vehicle is on a highway or the right-of-way of a highway. For purposes of this subsection, only the person who possesses or consumes an alcoholic beverage in violation of this subsection shall be charged with this offense.



(a2) Exception. — It shall not be a violation of subsection (a1) of this section for a passenger to possess an alcoholic beverage other than in the unopened manufacturer's original container, or for a passenger to consume an alcoholic beverage, if the container is:

- (1) In the passenger area of a motor vehicle that is designed, maintained, or used primarily for the transportation of persons for compensation;
- (2) In the living quarters of a motor home or house car as defined in G.S. 20-4.01(27)d2.; or
- (3) In a house trailer as defined in G.S. 20-4.01(14).

(a3) Meaning of Terms. — Under this section, the term “motor vehicle” means only those types of motor vehicles which North Carolina law requires to be registered, whether the motor vehicle is registered in North Carolina or another jurisdiction.

(b) Subject to Implied-Consent Law. — An offense under this section is an alcohol-related offense subject to the implied-consent provisions of G.S. 20-16.2.

(c) Odor Insufficient. — The odor of an alcoholic beverage on the breath of the driver is insufficient evidence to prove beyond a reasonable doubt that alcohol was remaining in the driver's body in violation of this section, unless the driver was offered an alcohol screening test or chemical analysis and refused to provide all required samples of breath or blood for analysis.

(d) Alcohol Screening Test. — Notwithstanding any other provision of law, an alcohol screening test may be administered to a driver suspected of violating subsection (a) of this section, and the results of an alcohol screening test or the driver's refusal to submit may be used by a law enforcement officer, a court, or an administrative agency in determining if alcohol was present in the driver's body. No alcohol screening tests are valid under this section unless the device used is one approved by the Commission for Health Services, and the screening test is conducted in accordance with the applicable regulations of the Commission as to the manner of its use.

(e) Punishment; Effect When Impaired Driving Offense Also Charged. — Violation of subsection (a) of this section shall be a Class 3 misdemeanor for the first offense and shall be a Class 2 misdemeanor for a second or subsequent offense. Violation of subsection (a) of this section is not a lesser included offense of impaired driving under G.S. 20-138.1, but if a person is convicted under subsection (a) of this section and of an offense involving impaired driving arising out of the same transaction, the punishment imposed by the court shall not exceed the maximum applicable to the offense involving impaired driving, and any minimum applicable punishment shall be imposed. Violation of subsection (a1) of this section by the driver of the motor vehicle is a lesser-included offense of subsection (a) of this section. A violation of subsection (a) shall be considered a moving violation for purposes of G.S. 20-16(c).

Violation of subsection (a1) of this section shall be an infraction and shall not be considered a moving violation for purposes of G.S. 20-16(c).

(f) Definitions. — If the seal on a container of alcoholic beverages has been broken, it is opened within the meaning of this section. For purposes of this section, “passenger area of a motor vehicle” means the area designed to seat the driver and passengers and any area within the reach of a seated driver or passenger, including the glove compartment. The area of the trunk or the area behind the last upright back seat of a station wagon, hatchback, or similar vehicle shall not be considered part of the passenger area. The term “alcoholic beverage” is as defined in G.S. 18B-101(4).

(g) Pleading. — In any prosecution for a violation of subsection (a) of this section, the pleading is sufficient if it states the time and place of the alleged offense in the usual form and charges that the defendant drove a motor vehicle on a highway or the right-of-way of a highway with an open container of alcoholic beverage after drinking.



In any prosecution for a violation of subsection (a1) of this section, the pleading is sufficient if it states the time and place of the alleged offense in the usual form and charges that (i) the defendant possessed an open container of alcoholic beverage in the passenger area of a motor vehicle while the motor vehicle was on a highway or the right-of-way of a highway, or (ii) the defendant consumed an alcoholic beverage in the passenger area of a motor vehicle while the motor vehicle was on a highway or the right-of-way of a highway.

(h) Limited Driving Privilege. — A person who is convicted of violating subsection (a) of this section and whose drivers license is revoked solely based on that conviction may apply for a limited driving privilege as provided for in G.S. 20-179.3. The judge may issue the limited driving privilege only if the driver meets the eligibility requirements of G.S. 20-179.3, other than the requirement in G.S. 20-179.3(b)(1)c. G.S. 20-179.3(e) shall not apply. All other terms, conditions, and restrictions provided for in G.S. 20-179.3 shall apply. G.S. 20-179.3, rather than this subsection, governs the issuance of a limited driving privilege to a person who is convicted of violating subsection (a) of this section and of driving while impaired as a result of the same transaction. (1995, c. 506, s. 9; 2000-155, s. 4; 2002-25, s. 1; 2006-66, s. 21.7.)

**Editor's Note.** — Session Laws 2000-155, s. 21, as amended by Session Laws 2002-25, s. 1, and as amended by Session Laws 2006-66, s. 21.7, provides that the amendment to this section by s. 4 of the act is effective September 1, 2000. The sunset provision was deleted by Session Laws 2006-66, s. 21.7.

Session Laws 2006-66, s. 1.2, provides: "This act shall be known as 'The Current Operations and Capital Improvements Appropriations Act of 2006'."

Session Laws 2006-66, s. 28.6 is a severability clause.

**Effect of Amendments.** — Session Laws 2000-155, s. 4, as amended by Session Laws 2002-25, s. 1, and as amended by Session Laws 2006-66, s. 21.7, effective September 1, 2000, deleted "after consuming alcohol" following "beverage" in the catchline; substituted "the

right-of-way of a highway" for "public vehicular area" in subsection (a); in subdivision (a)(1), inserted "in the passenger area," and deleted "in passenger area" following "container"; added subsections (a1) through (a3); in subsection (e), deleted "punished as" preceding "Class 3" and "Class 2," deleted the former second sentence stating, "A fine imposed for a second or subsequent offense may not exceed one thousand dollars (\$1,000)," substituted "subsection (a) of this section" for "this section" three times, added the next-to-last sentence, substituted "subsection (a)" for "this section," and added the last paragraph; and in subsection (g), substituted "subsection (a) of this section" for "this section," substituted "the right-of-way of a highway" for "public vehicular area" and added the last paragraph.

## § 20-139.1. Procedures governing chemical analyses; admissibility; evidentiary provisions; controlled-drinking programs.

(a) Chemical Analysis Admissible. — In any implied-consent offense under G.S. 20-16.2, a person's alcohol concentration or the presence of any other impairing substance in the person's body as shown by a chemical analysis is admissible in evidence. This section does not limit the introduction of other competent evidence as to a person's alcohol concentration or results of other tests showing the presence of an impairing substance, including other chemical tests.

(b) Approval of Valid Test Methods; Licensing Chemical Analysts. — The results of a chemical analysis shall be deemed sufficient evidence to prove a person's alcohol concentration. A chemical analysis of the breath administered pursuant to the implied-consent law is admissible in any court or administrative hearing or proceeding if it meets both of the following requirements:

- (1) It is performed in accordance with the rules of the Department of Health and Human Services.

- (2) The person performing the analysis had, at the time of the analysis, a current permit issued by the Department of Health and Human Services authorizing the person to perform a test of the breath using the type of instrument employed.

For purposes of establishing compliance with subdivision (b)(1) of this section, the court or administrative agency shall take notice of the rules of the Department of Health and Human Services. For purposes of establishing compliance with subdivision (b)(2) of this section, the court or administrative agency shall take judicial notice of the list of permits issued to the person performing the analysis, the type of instrument on which the person is authorized to perform tests of the breath, and the date the permit was issued. The Department of Health and Human Services may ascertain the qualifications and competence of individuals to conduct particular chemical analyses and the methods for conducting chemical analyses. The Department may issue permits to conduct chemical analyses to individuals it finds qualified subject to periodic renewal, termination, and revocation of the permit in the Department's discretion.

(b1) When Officer May Perform Chemical Analysis. — Any person possessing a current permit authorizing the person to perform chemical analysis may perform a chemical analysis.

(b2) Breath Analysis Results Preventive Maintenance. — The Department of Health and Human Services shall perform preventive maintenance on breath-testing instruments used for chemical analysis. A court or administrative agency shall take judicial notice of the preventive maintenance records of the Department. Notwithstanding the provisions of subsection (b), the results of a chemical analysis of a person's breath performed in accordance with this section are not admissible in evidence if:

- (1) The defendant objects to the introduction into evidence of the results of the chemical analysis of the defendant's breath; and
- (2) The defendant demonstrates that, with respect to the instrument used to analyze the defendant's breath, preventive maintenance procedures required by the regulations of the Department of Health and Human Services had not been performed within the time limits prescribed by those regulations.

(b3) Sequential Breath Tests Required. — The methods governing the administration of chemical analyses of the breath shall require the testing of at least duplicate sequential breath samples. The results of the chemical analysis of all breath samples are admissible if the test results from any two consecutively collected breath samples do not differ from each other by an alcohol concentration greater than 0.02. Only the lower of the two test results of the consecutively administered tests can be used to prove a particular alcohol concentration. A person's refusal to give the sequential breath samples necessary to constitute a valid chemical analysis is a refusal under G.S. 20-16.2(c).

A person's refusal to give the second or subsequent breath sample shall make the result of the first breath sample, or the result of the sample providing the lowest alcohol concentration if more than one breath sample is provided, admissible in any judicial or administrative hearing for any relevant purpose, including the establishment that a person had a particular alcohol concentration for conviction of an offense involving impaired driving.

(b4) Repealed by Session Laws 2006-253, s. 16, effective December 1, 2006, and applicable to offenses committed on or after that date

(b5) Subsequent Tests Allowed. — A person may be requested, pursuant to G.S. 20-16.2, to submit to a chemical analysis of the person's blood or other bodily fluid or substance in addition to or in lieu of a chemical analysis of the breath, in the discretion of a law enforcement officer. If a subsequent chemical



analysis is requested pursuant to this subsection, the person shall again be advised of the implied consent rights in accordance with G.S. 20-16.2(a). A person's willful refusal to submit to a chemical analysis of the blood or other bodily fluid or substance is a willful refusal under G.S. 20-16.2.

(b6) The Department of Health and Human Services shall post on a Web page and file with the clerk of superior court in each county a list of all persons who have a permit authorizing them to perform chemical analyses, the types of analyses that they can perform, the instruments that each person is authorized to operate, the effective dates of the permits, and the records of preventive maintenance. A court shall take judicial notice of whether, at the time of the chemical analysis, the chemical analyst possessed a permit authorizing the chemical analyst to perform the chemical analysis administered and whether preventive maintenance had been performed on the breath-testing instrument in accordance with the Department's rules.

(c) Blood and Urine for Chemical Analysis. — Notwithstanding any other provision of law, when a blood or urine test is specified as the type of chemical analysis by a law enforcement officer, a physician, registered nurse, emergency medical technician, or other qualified person shall withdraw the blood sample and obtain the urine sample, and no further authorization or approval is required. If the person withdrawing the blood or collecting the urine requests written confirmation of the law enforcement officer's request for the withdrawal of blood or collecting the urine, the officer shall furnish it before blood is withdrawn or urine collected. When blood is withdrawn or urine collected pursuant to a law enforcement officer's request, neither the person withdrawing the blood nor any hospital, laboratory, or other institution, person, firm, or corporation employing that person, or contracting for the service of withdrawing blood, may be held criminally or civilly liable by reason of withdrawing that blood, except that there is no immunity from liability for negligent acts or omissions.

(c1) Admissibility. — The results of a chemical analysis of blood or urine by the North Carolina State Bureau of Investigation Laboratory, the Charlotte, North Carolina, Police Department Laboratory, or any other laboratory approved for chemical analysis by the Department of Health and Human Services, are admissible as evidence in all administrative hearings, and in any court, without further authentication. The results shall be certified by the person who performed the analysis, and reported on a form approved by the Attorney General. However, if the defendant notifies the State, at least five days before trial in the superior court division or an adjudicatory hearing in juvenile court that the defendant objects to the introduction of the report into evidence, the admissibility of the report shall be determined and governed by the appropriate rules of evidence.

The report containing the results of any blood or urine test may be transmitted electronically or via facsimile. A copy of the affidavit sent electronically or via facsimile shall be admissible in any court or administrative hearing without further authentication. A copy of the report shall be sent to the charging officer, the clerk of superior court in the county in which the criminal charges are pending, the Division of Motor Vehicles, and the Department of Health and Human Services.

Nothing in this subsection precludes the right of any party to call any witness or to introduce any evidence supporting or contradicting the evidence contained in the report.

(c2) A chemical analysis of blood or urine, to be admissible under this section, shall be performed in accordance with rules or procedures adopted by the State Bureau of Investigation, or by another laboratory certified by the American Society of Crime Laboratory Directors (ASCLD), for the submission, identification, analysis, and storage of forensic analyses.



(c3) Procedure for Establishing Chain of Custody Without Calling Unnecessary Witnesses. —

- (1) For the purpose of establishing the chain of physical custody or control of blood or urine tested or analyzed to determine whether it contains alcohol, a controlled substance or its metabolite, or any impairing substance, a statement signed by each successive person in the chain of custody that the person delivered it to the other person indicated on or about the date stated is prima facie evidence that the person had custody and made the delivery as stated, without the necessity of a personal appearance in court by the person signing the statement.
  - (2) The statement shall contain a sufficient description of the material or its container so as to distinguish it as the particular item in question and shall state that the material was delivered in essentially the same condition as received. The statement may be placed on the same document as the report provided for in subsection (c1) of this section.
  - (3) The provisions of this subsection may be utilized in any administrative hearing and by the State in district court, but can only be utilized in a case originally tried in superior court or an adjudicatory hearing in juvenile court if the defendant fails to notify the State at least five days before trial that the defendant objects to the introduction of the statement into evidence.
  - (4) Nothing in this subsection precludes the right of any party to call any witness or to introduce any evidence supporting or contradicting the evidence contained in the statement.
- (c4) The results of a blood or urine test are admissible to prove a person's alcohol concentration or the presence of controlled substances or metabolites or any other impairing substance if:
- (1) A law enforcement officer or chemical analyst requested a blood and/or urine sample from the person charged; and
  - (2) A chemical analysis of the person's blood was performed by a chemical analyst possessing a permit issued by the Department of Health and Human Services authorizing the chemical analyst to analyze blood or urine for alcohol or controlled substances, metabolites of a controlled substance, or any other impairing substance.

For purposes of establishing compliance with subdivision (2) of this subsection, the court or administrative agency shall take judicial notice of the list of persons possessing permits, the type of instrument on which each person is authorized to perform tests of the blood and/or urine, and the date the permit was issued and the date it expires.

(d) Right to Additional Test. — Nothing in this section shall be construed to prohibit a person from obtaining or attempting to obtain an additional chemical analysis. If the person is not released from custody after the initial appearance, the agency having custody of the person shall make reasonable efforts in a timely manner to assist the person in obtaining access to a telephone to arrange for any additional test and allow access to the person in accordance with the agreed procedure in G.S. 20-38.4. The failure or inability of the person who submitted to a chemical analysis to obtain any additional test or to withdraw blood does not preclude the admission of evidence relating to the chemical analysis.

(d1) Right to Require Additional Tests. — If a person refuses to submit to any test or tests pursuant to this section, any law enforcement officer with probable cause may, without a court order, compel the person to provide blood or urine samples for analysis if the officer reasonably believes that the delay necessary to obtain a court order, under the circumstances, would result in the dissipation of the percentage of alcohol in the person's blood or urine.

(d2) Notwithstanding any other provision of law, when a blood or urine sample is requested under subsection (d1) of this section by a law enforcement

officer, a physician, registered nurse, emergency medical technician, or other qualified person shall withdraw the blood and obtain the urine sample, and no further authorization or approval is required. If the person withdrawing the blood or collecting the urine requests written confirmation of the charging officer's request for the withdrawal of blood or obtaining urine, the officer shall furnish it before blood is withdrawn or urine obtained.

(d3) When blood is withdrawn or urine collected pursuant to a law enforcement officer's request, neither the person withdrawing the blood nor any hospital, laboratory, or other institution, person, firm, or corporation employing that person, or contracting for the service of withdrawing blood, may be held criminally or civilly liable by reason of withdrawing that blood, except that there is no immunity from liability for negligent acts or omissions. The results of the analysis of blood or urine under this subsection shall be admissible if performed by the State Bureau of Investigation Laboratory or any other hospital or qualified laboratory.

(e) Recording Results of Chemical Analysis of Breath. — A person charged with an implied-consent offense who has not received, prior to a trial, a copy of the chemical analysis results the State intends to offer into evidence may request in writing a copy of the results. The failure to provide a copy prior to any trial shall be grounds for a continuance of the case but shall not be grounds to suppress the results of the chemical analysis or to dismiss the criminal charges.

(e1) Use of Chemical Analyst's Affidavit in District Court. — An affidavit by a chemical analyst sworn to and properly executed before an official authorized to administer oaths is admissible in evidence without further authentication in any hearing or trial in the District Court Division of the General Court of Justice with respect to the following matters:

- (1) The alcohol concentration or concentrations or the presence or absence of an impairing substance of a person given a chemical analysis and who is involved in the hearing or trial.
- (2) The time of the collection of the blood, breath, or other bodily fluid or substance sample or samples for the chemical analysis.
- (3) The type of chemical analysis administered and the procedures followed.
- (4) The type and status of any permit issued by the Department of Health and Human Services that the analyst held on the date the analyst performed the chemical analysis in question.
- (5) If the chemical analysis is performed on a breath-testing instrument for which regulations adopted pursuant to subsection (b) require preventive maintenance, the date the most recent preventive maintenance procedures were performed on the breath-testing instrument used, as shown on the maintenance records for that instrument.

The Department of Health and Human Services shall develop a form for use by chemical analysts in making this affidavit. If any person who submitted to a chemical analysis desires that a chemical analyst personally testify in the hearing or trial in the District Court Division, the person may subpoena the chemical analyst and examine him as if he were an adverse witness. A subpoena for a chemical analyst shall not be issued unless the person files in writing with the court and serves a copy on the district attorney at least five days prior to trial an affidavit specifying the factual grounds on which the person believes the chemical analysis was not properly administered and the facts that the chemical analyst will testify about and stating that the presence of the analyst is necessary for the proper defense of the case. The district court shall determine if there are grounds to believe that the presence of the analyst requested is necessary for the proper defense. If so, the case shall be continued until the analyst can be present. The criminal case shall not be dismissed due to the failure of the analyst to appear, unless the analyst willfully fails to appear after being ordered to appear by the court.



(f) Evidence of Refusal Admissible. — If any person charged with an implied-consent offense refuses to submit to a chemical analysis or to perform field sobriety tests at the request of an officer, evidence of that refusal is admissible in any criminal, civil, or administrative action against the person.

(g) Controlled-Drinking Programs. — The Department of Health and Human Services may adopt rules concerning the ingestion of controlled amounts of alcohol by individuals submitting to chemical testing as a part of scientific, experimental, educational, or demonstration programs. These regulations shall prescribe procedures consistent with controlling federal law governing the acquisition, transportation, possession, storage, administration, and disposition of alcohol intended for use in the programs. Any person in charge of a controlled-drinking program who acquires alcohol under these regulations must keep records accounting for the disposition of all alcohol acquired, and the records must at all reasonable times be available for inspection upon the request of any federal, State, or local law-enforcement officer with jurisdiction over the laws relating to control of alcohol. A controlled-drinking program exclusively using lawfully purchased alcoholic beverages in places in which they may be lawfully possessed, however, need not comply with the record-keeping requirements of the regulations authorized by this subsection. All acts pursuant to the regulations reasonably done in furtherance of bona fide objectives of a controlled-drinking program authorized by the regulations are lawful notwithstanding the provisions of any other general or local statute, regulation, or ordinance controlling alcohol. (1963, c. 966, s. 2; 1967, c. 123; 1969, c. 1074, s. 2; 1971, c. 619, ss. 12, 13; 1973, c. 476, s. 128; c. 1081, s. 2; c. 1331, s. 3; 1975, c. 405; 1979, 2nd Sess., c. 1089; 1981, c. 412, s. 4; c. 747, s. 66; 1983, c. 435, s. 26; 1983 (Reg. Sess., 1984), c. 1101, s. 20; 1989, c. 727, s. 219(2); 1991, c. 689, s. 233.1(b); 1993, c. 285, s. 7; 1997-379, ss. 5.3-5.5; 1997-443, s. 11A.10; 1997-443, s. 11A.123; 1997-456, s. 34(b); 2000-155, s. 8; 2003-95, s. 1; 2003-104, s. 2; 2006-253, s. 16.)

**Editor's Note.** — Session Laws 2006-253, s. 1, provides: "This act shall be known as 'The Motor Vehicle Driver Protection Act of 2006.'"

**Effect of Amendments.** — Session Laws

2006-253, s. 16, effective December 1, 2006, and applicable to offenses committed on or after that date, rewrote the section.

## § 20-140. Reckless driving.

### CASE NOTES

- I. In General.
- III. Evidence.

#### I. IN GENERAL.

**Cited in** State v. Stokes, — N.C. App. —, 621 S.E.2d 311, 2005 N.C. App. LEXIS 2495 (2005).

#### III. EVIDENCE.

**Evidence of Reckless Driving Held Sufficient to Go to Jury.** —

State presented sufficient evidence of the

aggravating factors necessary to support defendant's conviction for felony fleeing to elude arrest under G.S. 20-141.5(b); during a high-speed chase, defendant was driving more than 15 mph over the speed limit and he was driving recklessly under G.S. 20-140. State v. Smith, — N.C. App. —, 631 S.E.2d 34, 2006 N.C. App. LEXIS 1290 (2006).

## § 20-141.4. Felony and misdemeanor death by vehicle; felony serious injury by vehicle; aggravated offenses; repeat felony death by vehicle.

- (a) Repealed by Session Laws 1983, c. 435, s. 27.



(a1) **Felony Death by Vehicle.** — A person commits the offense of felony death by vehicle if:

- (1) The person unintentionally causes the death of another person,
- (2) The person was engaged in the offense of impaired driving under G.S. 20-138.1 or G.S. 20-138.2, and
- (3) The commission of the offense in subdivision (2) of this subsection is the proximate cause of the death.

(a2) **Misdemeanor Death by Vehicle.** — A person commits the offense of misdemeanor death by vehicle if:

- (1) The person unintentionally causes the death of another person,
- (2) The person was engaged in the violation of any State law or local ordinance applying to the operation or use of a vehicle or to the regulation of traffic, other than impaired driving under G.S. 20-138.1, and
- (3) The commission of the offense in subdivision (2) of this subsection is the proximate cause of the death.

(a3) **Felony Serious Injury by Vehicle.** — A person commits the offense of felony serious injury by vehicle if:

- (1) The person unintentionally causes serious injury to another person,
- (2) The person was engaged in the offense of impaired driving under G.S. 20-138.1 or G.S. 20-138.2, and
- (3) The commission of the offense in subdivision (2) of this subsection is the proximate cause of the serious injury.

(a4) **Aggravated Felony Serious Injury by Vehicle.** — A person commits the offense of aggravated felony serious injury by vehicle if:

- (1) The person unintentionally causes serious injury to another person,
- (2) The person was engaged in the offense of impaired driving under G.S. 20-138.1 or G.S. 20-138.2,
- (3) The commission of the offense in subdivision (2) of this subsection is the proximate cause of the serious injury, and
- (4) The person has a previous conviction involving impaired driving, as defined in G.S. 20-4.01(24a), within seven years of the date of the offense.

(a5) **Aggravated Felony Death by Vehicle.** — A person commits the offense of aggravated felony death by vehicle if:

- (1) The person unintentionally causes the death of another person,
- (2) The person was engaged in the offense of impaired driving under G.S. 20-138.1 or G.S. 20-138.2,
- (3) The commission of the offense in subdivision (2) of this subsection is the proximate cause of the death, and
- (4) The person has a previous conviction involving impaired driving, as defined in G.S. 20-4.01(24a), within seven years of the date of the offense.

(a6) **Repeat Felony Death by Vehicle Offender.** — A person who commits an offense under Subsection (a1) or Subsection (a5) of this section, and who has a previous conviction under

- (1) Subsection (a1) of this section; or
- (2) Subsection (a5) of this section; or
- (3) G.S. 14-17 or G.S. 14-18, where the basis of that former conviction, as determined from the face of the indictment, was the unintentional death of another person while engaged in the offense of impaired driving under GS 20-138.1 or GS 20-138.2,

shall be subject to the same sentence as if the person had been convicted of second degree murder.

(b) **Punishments.** — Unless the conduct is covered under some other provision of law providing greater punishment, the following classifications apply to the offenses set forth in this section:

- (1) Aggravated felony death by vehicle is a Class D felony.
  - (2) Felony death by vehicle is a Class E felony.
  - (3) Aggravated felony serious injury by vehicle is a Class E felony.
  - (4) Felony serious injury by vehicle is a Class F felony.
  - (5) Misdemeanor death by vehicle is a Class 1 misdemeanor.
- (c) No Double Prosecutions. — No person who has been placed in jeopardy upon a charge of death by vehicle may be prosecuted for the offense of manslaughter arising out of the same death; and no person who has been placed in jeopardy upon a charge of manslaughter may be prosecuted for death by vehicle arising out of the same death. (1973, c. 1330, s. 9; 1983, c. 435, s. 27; 1993, c. 285, s. 10; c. 539, ss. 371, 1259; 1994, Ex. Sess., c. 24, s. 14(c); 2006-253, s. 14.)

**Editor’s Note.** — Session Laws 2006-253, s. 1, provides: “This act shall be known as ‘The Motor Vehicle Driver Protection Act of 2006.’”

**Effect of Amendments.** — Session Laws 2006-253, s. 14, effective December 1, 2006, and applicable to offenses committed on or after that date, rewrote the section.

### § 20-141.5. Speeding to elude arrest.

#### CASE NOTES

**Evidence Held Sufficient to Support Conviction.** — Proof that defendant was grossly impaired while driving due the consumption of alcohol and was driving recklessly was sufficient to support a conviction for felonious fleeing to elude arrest; the State was not required to prove that defendant drove in excess of 15 miles per hour over the legal speed limit as well since G.S. 20-141.5 only requires proof of two of the three listed factors. *State v. Stokes*, — N.C. App. —, 621 S.E.2d 311, 2005 N.C. App. LEXIS 2495 (2005).

State presented sufficient evidence of the aggravating factors necessary to support defendant’s conviction for felony fleeing to elude arrest under G.S. 20-141.5(b); during a high-speed chase, defendant was driving more than 15 mph over the speed limit and he was driving recklessly under G.S. 20-140. *State v. Smith*, — N.C. App. —, 631 S.E.2d 34, 2006 N.C. App. LEXIS 1290 (2006).

### § 20-145. When speed limit not applicable.

#### CASE NOTES

**Gross or Wanton Negligence.** — Officer’s speed of 10 to 25 miles per hour in excess of the 35 mile-per-hour speed limit in responding to an emergency call from another officer in peril did not support a finding of gross negligence under G.S. 20-145 in a claim for injuries sustained when the officer struck plaintiff; the officer’s compliance with the authoritative training standard in this emergency situation fully supported the appropriateness of his decision to perform an evasive maneuver upon viewing the injured person in the road and negated the contention of gross negligence. *Jones v. City of Durham*, 360 N.C. 81, 622 S.E.2d 596, 2005 N.C. LEXIS 1315 (2005).

**Cited in** *Clayton v. Branson*, 170 N.C. App. 438, 613 S.E.2d 259, 2005 N.C. App. LEXIS 1070 (2005).

### § 20-146. Drive on right side of highway; exceptions.

#### CASE NOTES

**Probable Cause to Stop Vehicle.** — Where a police investigator saw defendant’s vehicle commit a violation of G.S. 20-146(a), the traffic stop was proper under U.S. Const., Amend. IV, as it was based on a readily observed traffic violation and it was supported by probable cause. *State v. Baublitz*, 172 N.C. App. 801, 616 S.E.2d 615, 2005 N.C. App. LEXIS 1778 (2005).

## § 20-152. Following too closely.

### CASE NOTES

**Cited** in *State v. Hernandez*, 170 N.C. App. 299, 612 S.E.2d 420, 2005 N.C. App. LEXIS 1006 (2005).

## § 20-154. Signals on starting, stopping or turning.

### CASE NOTES

#### I. In General.

##### I. IN GENERAL.

**The duty to give a signal does not arise unless the operation of some other vehicle may be affected, etc.**

Because defendant's right turn, made with-

out a signal, did not affect any other vehicle or pedestrian, defendant did not violate G.S. 20-154(a), and the officer lacked probable cause to stop defendant's vehicle. *State v. Ivey*, 360 N.C. 562, 633 S.E.2d 459, 2006 N.C. LEXIS 844 (2006).

## § 20-157. Approach of law enforcement, fire department or rescue squad vehicles or ambulances; driving over fire hose or blocking fire-fighting equipment; parking, etc., near law enforcement, fire department, or rescue squad vehicle or ambulance.

(a) Upon the approach of any law enforcement or fire department vehicle or public or private ambulance or rescue squad emergency service vehicle giving warning signal by appropriate light and by audible bell, siren or exhaust whistle, audible under normal conditions from a distance not less than 1000 feet, the driver of every other vehicle shall immediately drive the same to a position as near as possible and parallel to the right-hand edge or curb, clear of any intersection of streets or highways, and shall stop and remain in such position unless otherwise directed by a law enforcement or traffic officer until law enforcement or fire department vehicle or public or private ambulance or rescue squad emergency service vehicle shall have passed. Provided, however, this subsection shall not apply to vehicles traveling in the opposite direction of the vehicles herein enumerated when traveling on a four-lane limited access highway with a median divider dividing the highway for vehicles traveling in opposite directions, and provided further that the violation of this subsection shall be negligence per se. Violation of this subsection is a Class 2 misdemeanor.

(b) It shall be unlawful for the driver of any vehicle other than one on official business to follow any fire apparatus traveling in response to a fire alarm closer than one block or to drive into or park such vehicle within one block where fire apparatus has stopped in answer to a fire alarm.

(c) Outside of the corporate limits of any city or town it shall be unlawful for the driver of any vehicle other than one on official business to follow any fire apparatus traveling in response to a fire alarm closer than 400 feet or to drive into or park such vehicle within a space of 400 feet from where fire apparatus has stopped in answer to a fire alarm.

(d) It shall be unlawful to drive a motor vehicle over a fire hose or any other equipment that is being used at a fire at any time, or to block a fire-fighting



apparatus or any other equipment from its source of supply regardless of its distance from the fire.

(e) It shall be unlawful for the driver of a vehicle, other than one on official business, to park and leave standing such vehicle within 100 feet of law enforcement or fire department vehicles, public or private ambulances, or rescue squad emergency vehicles which are engaged in the investigation of an accident or engaged in rendering assistance to victims of such accident.

(f) When an authorized emergency vehicle as described in subsection (a) of this section or any public service vehicle is parked or standing within 12 feet of a roadway and is giving a warning signal by appropriate light, the driver of every other approaching vehicle shall, as soon as it is safe and when not otherwise directed by an individual lawfully directing traffic, do one of the following:

- (1) Move the vehicle into a lane that is not the lane nearest the parked or standing authorized emergency vehicle or public service vehicle and continue traveling in that lane until safely clear of the authorized emergency vehicle. This paragraph applies only if the roadway has at least two lanes for traffic proceeding in the direction of the approaching vehicle and if the approaching vehicle may change lanes safely and without interfering with any vehicular traffic.
- (2) Slow the vehicle, maintaining a safe speed for traffic conditions, and operate the vehicle at a reduced speed and be prepared to stop until completely past the authorized emergency vehicle or public service vehicle. This paragraph applies only if the roadway has only one lane for traffic proceeding in the direction of the approaching vehicle or if the approaching vehicle may not change lanes safely and without interfering with any vehicular traffic.

For purposes of this section, "public service vehicle" means a vehicle that has been called to the scene by a motorist or a law enforcement officer, is being used to assist motorists or law enforcement officers with wrecked or disabled vehicles, and is operating an amber-colored flashing light authorized by G.S. 20-130.2. Violation of this subsection shall be negligence per se.

(g) Except as provided in subsections (a), (h), and (i) of this section, violation of this section shall be an infraction punishable by a fine of two hundred fifty dollars (\$250.00).

(h) A person who violates this section and causes damage to property in the immediate area of the authorized emergency vehicle or public service vehicle in excess of five hundred dollars (\$500.00), or causes injury to a law enforcement officer, a firefighter, an emergency vehicle operator, an Incident Management Assistance Patrol member, a public service vehicle operator, or any other emergency response person in the immediate area of the authorized emergency vehicle or public service vehicle is guilty of a Class 1 misdemeanor.

(i) A person who violates this section and causes serious injury or death to a law enforcement officer, a firefighter, an emergency vehicle operator, an Incident Management Assistance Patrol member, a public service vehicle operator, or any other emergency response person in the immediate area of the authorized emergency vehicle or public service vehicle is guilty of a Class I felony. The Division may suspend, for up to six months, the driver's license of any person convicted under this subsection. If the Division suspends a person's license under this subsection, a judge may allow the licensee a limited driving privilege for a period not to exceed the period of suspension, provided the person's license has not also been revoked or suspended under any other provision of law. The limited driving privilege shall be issued in the same manner and under the terms and conditions prescribed in G.S. 20-16.1(b). (1937, c. 407, s. 119; 1955, cc. 173, 744; 1971, c. 366, ss. 1, 2; 1985, c. 764, s. 31; 1985 (Reg. Sess., 1986), c. 852, s. 17; 1993, c. 539, s. 372; 1994, Ex. Sess., c. 24, s. 14(c); 2001-331, s. 1; 2005-189, s. 1; 2006-259, s. 9.)

**Effect of Amendments. —**

Session Laws 2006-259, s. 9, effective August

23, 2006, added “or public service vehicle” in subdivisions (f)(1) and (f)(2).

**§ 20-158. Vehicle control signs and signals.**

(a) The Department of Transportation, with reference to State highways, and local authorities, with reference to highways under their jurisdiction, are hereby authorized to control vehicles:

- (1) At intersections, by erecting or installing stop signs requiring vehicles to come to a complete stop at the entrance to that portion of the intersection designated as the main traveled or through highway. Stop signs may also be erected at three or more entrances to an intersection.
- (2) At appropriate places other than intersections, by erecting or installing stop signs requiring vehicles to come to a complete stop.
- (3) At intersections and other appropriate places, by erecting or installing steady-beam traffic signals and other traffic control devices, signs, or signals. All steady-beam traffic signals emitting alternate red and green lights shall be arranged so that the red light in vertical-arranged signal faces shall appear above, and in horizontal-arranged signal faces shall appear to the left of all yellow and green lights.
- (4) At intersections and other appropriate places, by erecting or installing flashing red or yellow lights.

**(b) Control of Vehicles at Intersections. —**

- (1) When a stop sign has been erected or installed at an intersection, it shall be unlawful for the driver of any vehicle to fail to stop in obedience thereto and yield the right-of-way to vehicles operating on the designated main-traveled or through highway. When stop signs have been erected at three or more entrances to an intersection, the driver, after stopping in obedience thereto, may proceed with caution.
- (2)a. When a steady-beam traffic signal is emitting a red light controlling traffic approaching an intersection, an approaching vehicle facing the red light shall come to a stop and shall not enter the intersection. After coming to a complete stop and unless prohibited by an appropriate sign, that approaching vehicle may make a right turn.

b. Any vehicle that turns right under this subdivision shall yield the right-of-way to:

1. Other traffic and pedestrians using the intersection; and
2. Pedestrians who are moving towards the intersection, who are in reasonably close proximity to the intersection, and who are preparing to cross in front of the traffic that is required to stop at the red light.

c. Failure to yield to a pedestrian under this subdivision shall be an infraction, and the court may assess a penalty of not more than five hundred dollars (\$500.00) and not less than one hundred dollars (\$100.00).

d. The Department of Transportation shall collect data regarding the number of individuals who are found responsible for violations of sub-subdivision b. of this subdivision and the number of pedestrians who are involved in accidents at intersections because of a driver's failure to yield the right-of-way while turning right at a red light. The data shall include information regarding the number of disabled pedestrians, including individuals with visual or mobility-related disabilities, who are involved in right turn on red accidents. The Department shall report the data annually to the Joint Legislative Transportation Oversight Committee beginning January 1, 2006.



- (2a) When a traffic signal is emitting a steady yellow circular light on a traffic signal controlling traffic approaching an intersection or a steady yellow arrow light on a traffic signal controlling traffic turning at an intersection, vehicles facing the yellow light are warned that the related green light is being terminated or a red light will be immediately forthcoming. When the traffic signal is emitting a steady green light, vehicles may proceed with due care through the intersection subject to the rights of pedestrians and other vehicles as may otherwise be provided by law.
- (3) When a flashing red light has been erected or installed at an intersection, approaching vehicles facing the red light shall stop and yield the right-of-way to vehicles in or approaching the intersection. The right to proceed shall be subject to the rules applicable to making a stop at a stop sign.
- (4) When a flashing yellow light has been erected or installed at an intersection, approaching vehicles facing the yellow flashing light may proceed through the intersection with caution, yielding the right-of-way to vehicles in or approaching the intersection.
- (5) When a stop sign, stoplight, flashing light, or other traffic-control device authorized by subsection (a) of this section requires a vehicle to stop at an intersection, the driver shall stop (i) at an appropriately marked stop line, or if none, (ii) before entering a marked crosswalk, or if none, (iii) before entering the intersection at the point nearest the intersecting street where the driver has a view of approaching traffic on the intersecting street.
- (c) Control of Vehicles at Places other than Intersections. —
  - (1) When a stop sign has been erected or installed at a place other than an intersection, it shall be unlawful for the driver of any vehicle to fail to stop in obedience thereto and yield the right-of-way to pedestrians and other vehicles.
  - (2) When a stoplight has been erected or installed at a place other than an intersection, and is emitting a steady red light, vehicles facing the red light shall come to a complete stop. When the stoplight is emitting a steady yellow light, vehicles facing the light shall be warned that a red light will be immediately forthcoming and that vehicles may not proceed through such a red light. When the stoplight is emitting a steady green light, vehicles may proceed subject to the rights of pedestrians and other vehicles as may otherwise be provided by law.
  - (3) When a flashing red light has been erected or installed at a place other than an intersection, approaching vehicles facing the light shall stop and yield the right-of-way to pedestrians or other vehicles.
  - (4) When a flashing yellow light has been erected or installed at a place other than an intersection, approaching vehicles facing the light may proceed with caution, yielding the right-of-way to pedestrians and other vehicles.
  - (5) When a stoplight, stop sign, or other signaling device authorized by subsection (a) requires a vehicle to stop at a place other than an intersection, the driver shall stop at an appropriately marked stop line, or if none, before entering a marked crosswalk, or if none, before proceeding past the signaling device.
- (d) No failure to stop as required by the provisions of this section shall be considered negligence or contributory negligence per se in any action at law for injury to person or property, but the facts relating to such failure to stop may be considered with the other facts in the case in determining whether a party was guilty of negligence or contributory negligence. (1937, c. 407, s. 120; 1941, c. 83; 1949, c. 583, s. 2; 1955, c. 384, s. 1; c. 913, s. 7; 1957, c. 65, s. 11; 1973,



c. 507, s. 5; c. 1191; c. 1330, s. 22; 1975, c. 1; 1977, c. 464, s. 34; 1979, c. 298, s. 1; 1989, c. 285; 2004-141, ss. 1, 2; 2004-172, s. 2; 2006-264, s. 6.)

**Effect of Amendments. —**

Session Laws 2006-264, s. 6, effective August 27, 2006, rewrote subdivision (b)(2) and (b)(2)a.

**CASE NOTES**

- I. In General.
- III. Negligence and Proximate Cause.

**I. IN GENERAL.**

**City's Red Light Camera Ordinance. —** County board of education was entitled to funds derived from a city's red light camera program, which program was implemented by an ordinance pursuant to G.S. 160A-300.1(c), as N.C. Const. art. IX, § 7 applied to the civil penalties assessed by the city for violations of the ordinance regarding the failure to stop for a red stoplight. Further, pursuant to G.S. 115C-437, the city was to pay 90 percent of the amount collected by its red light camera program to the board. *Shavitz v. City of High Point*, — N.C.

App. —, 630 S.E.2d 4, 2006 N.C. App. LEXIS 1080 (2006).

**III. NEGLIGENCE AND PROXIMATE CAUSE.**

**Peremptory Instruction As to Negligence Was Proper. —** As the evidence was undisputed as to the driver's violation of G.S. 20-158(b)(1), the trial court did not err in giving a peremptory instruction to the jury as to her negligence. *Oakes v. Wooten*, 173 N.C. App. 506, 620 S.E.2d 39, 2005 N.C. App. LEXIS 2100 (2005).

**§ 20-162.1. Prima facie rule of evidence for enforcement of parking regulations.**

**Local Modification. —** Mecklenburg: 1981, c. 239; city of Clinton: 1979, c. 326; city of Goldsboro: 1981, c. 314; city of Greenville: 1985 (Reg. Sess., 1986), c. 813; city of Jacksonville:

1985, c. 152; city of Sandford: 2006-28, s. 2; city of Winston-Salem: 1983, c. 160; town of Fremont: 1981, c. 314; town of Kernersville: 1987, c. 54; town of Pittsboro: 1987, c. 460, s. 27.

**§ 20-166. Duty to stop in event of accident or collision; furnishing information or assistance to injured person, etc.; persons assisting exempt from civil liability.**

**CASE NOTES**

- I. In General.

**I. IN GENERAL.**

**Evidence Held Admissible. —** No plain error existed in a trial court admitting evidence of defendant's empty prescription pill bottle, testimony by an officer identifying the pills from the label, and testimony by a pharmacist about the interaction between the pills and

alcohol, as the evidence was relevant to show that defendant, who had been drinking, was driving while impaired at the time of an auto accident. *State v. Edwards*, 170 N.C. App. 381, 612 S.E.2d 394, 2005 N.C. App. LEXIS 992 (2005).

**Part 10C. Operation of All-Terrain Vehicles.**

**§ 20-171.19. Prohibited acts by owners and operators.**

- (a) No person shall operate an all-terrain vehicle unless the person wears

eye protection and a safety helmet meeting United States Department of Transportation standards for motorcycle helmets.

(a1) Notwithstanding subsection (a) of this section, any person employed by a supplier of retail electric service, while engaged in power line inspection, may operate an all-terrain vehicle while wearing both of the following:

- (1) Head protection equipped with a chin strap that conforms to the standards applicable to suppliers of retail electric service adopted by the Occupational Safety and Health Division of the North Carolina Department of Labor.
- (2) Eye protection that conforms to the standards applicable to suppliers of retail electric service adopted by the Occupational Safety and Health Division of the North Carolina Department of Labor.

(b) No owner shall authorize an all-terrain vehicle to be operated contrary to this Part.

(c) No person shall operate an all-terrain vehicle while under the influence of alcohol, any controlled substance, or a prescription or nonprescription drug that impairs vision or motor coordination.

(d) No person shall operate an all-terrain vehicle in a careless or reckless manner so as to endanger or cause injury or damage to any person or property.

(e) Except as otherwise permitted by law, no person shall operate an all-terrain vehicle on any public street, road, or highway except for purposes of crossing that street, road, or highway.

(f) Except as otherwise permitted by law, no person shall operate an all-terrain vehicle at anytime on an interstate or limited-access highway.

(g) No person shall operate an all-terrain vehicle during the hours of darkness, from one-half hour after sunset to one-half hour before sunrise and at anytime when visibility is reduced due to insufficient light or atmospheric conditions, without displaying a lighted headlamp and taillamp, unless the use of lights is prohibited by other applicable laws. (2005-282, s. 2; 2006-259, s. 10(a).)

**Effect of Amendments.** — Session Laws and applicable to acts committed on or after 2006-259, s. 10(a), effective December 1, 2006, that date, added subsection (a1).

## Part 11. Pedestrians' Rights and Duties.

### § 20-175. Pedestrians soliciting rides, employment, business or funds upon highways or streets.

(a) No person shall stand in any portion of the State highways, except upon the shoulders thereof, for the purpose of soliciting a ride from the driver of any motor vehicle.

(b) No person shall stand or loiter in the main traveled portion, including the shoulders and median, of any State highway or street, excluding sidewalks, or stop any motor vehicle for the purpose of soliciting employment, business or contributions from the driver or occupant of any motor vehicle that impedes the normal movement of traffic on the public highways or streets: Provided that the provisions of this subsection shall not apply to licensees, employees or contractors of the Department of Transportation or of any municipality engaged in construction or maintenance or in making traffic or engineering surveys.

(c) Repealed by Session Laws 1973, c. 1330, s. 39.

(d) Local governments may enact ordinances restricting or prohibiting a person from standing on any street, highway, or right-of-way excluding sidewalks while soliciting, or attempting to solicit, any employment, business, or contributions from the driver or occupants of any vehicle. This subsection

does not permit additional restrictions or prohibitions on the activities of licensees, employees, or contractors of the Department of Transportation or of any municipality engaged in construction or maintenance or in making traffic or engineering surveys except as provided in subsection (e) of this section.

(e) A local government shall have the authority to grant authorization for a person to stand in, on, or near a street or State roadway, within the local government's municipal corporate limits, to solicit a charitable contribution if the requirements of this subsection are met.

A person seeking authorization under this subsection to solicit charitable contributions shall file a written application with the local government. This application shall be filed not later than seven days before the date the solicitation event is to occur. If there are multiple events or one event occurring on more than one day, each event shall be subject to the application and permit requirements of this subsection for each day the event is to be held, to include the application fee.

The application must include:

- (1) The date and time when the solicitation is to occur;
- (2) Each location at which the solicitation is to occur; and
- (3) The number of solicitors to be involved in the solicitation at each location.

This subsection does not prohibit a local government from charging a fee for a permit, but in no case shall the fee be greater than twenty-five dollars (\$25.00) per day per event.

The applicant shall also furnish to the local government advance proof of liability insurance in the amount of at least two million dollars (\$2,000,000) to cover damages that may arise from the solicitation. The insurance coverage must provide coverage for claims against any solicitor and agree to hold the local government harmless.

A local government, by acting under this section, does not waive, or limit, any immunity or create any new liability for the local government. The issuance of an authorization under this section and the conducting of the solicitation authorized are not considered governmental functions of the local government.

In the event the solicitation event or the solicitors shall create a nuisance, delay traffic, create threatening or hostile situations, any law enforcement officer with proper jurisdiction may order the solicitations to cease. Any individual failing to follow a law enforcement officer's lawful order to cease solicitation shall be guilty of a Class 2 misdemeanor. (1937, c. 407, s. 136; 1965, c. 673; 1973, c. 507, s. 5; c. 1330, s. 39; 1977, c. 464, s. 34; 2005-310, s. 1; 2006-250, ss. 7(a), 7(b).)

**Effect of Amendments. —**

Session Laws 2006-250, s. 7(a) and (b), effective December 1, 2006, and applicable to offenses committed on or after that date, inserted

"except as provide in subsection (e) of this section" at the end of subsection (d) and added subsection (e).

## Part 12. Sentencing; Penalties.

### § 20-176. Penalty for misdemeanor or infraction.

#### CASE NOTES

**Allocation of Funds From a City's Red Light Camera Ordinance. —** County board of education was entitled to funds derived from a city's red light camera program, which pro-

gram was implemented by an ordinance pursuant to G.S. 160A-300.1(c), as N.C. Const. art. IX, § 7 applied to the civil penalties assessed by the city for violations of the ordinance re-



garding the failure to stop for a red stoplight. Further, pursuant to G.S. 115C-437, the city was to pay 90 percent of the amount collected by its red light camera program to the board.

*Shavitz v. City of High Point*, — N.C. App. —, 630 S.E.2d 4, 2006 N.C. App. LEXIS 1080 (2006).

**§ 20-179. Sentencing hearing after conviction for impaired driving; determination of grossly aggravating and aggravating and mitigating factors; punishments.**

(a) Sentencing Hearing Required. — After a conviction under G.S. 20-138.1, G.S. 20-138.2, a second or subsequent conviction under G.S. 20-138.2A, or a second or subsequent conviction under G.S. 20-138.2B, G.S. 20-138.3, or when any of those offenses are remanded back to district court after an appeal to superior court, the judge shall hold a sentencing hearing to determine whether there are aggravating or mitigating factors that affect the sentence to be imposed.

- (1) The court shall consider evidence of aggravating or mitigating factors present in the offense that make an aggravated or mitigated sentence appropriate. The State bears the burden of proving beyond a reasonable doubt that an aggravating factor exists, and the offender bears the burden of proving by a preponderance of the evidence that a mitigating factor exists.
  - (2) Before the hearing the prosecutor shall make all feasible efforts to secure the defendant's full record of traffic convictions, and shall present to the judge that record for consideration in the hearing. Upon request of the defendant, the prosecutor shall furnish the defendant or his attorney a copy of the defendant's record of traffic convictions at a reasonable time prior to the introduction of the record into evidence. In addition, the prosecutor shall present all other appropriate grossly aggravating and aggravating factors of which he is aware, and the defendant or his attorney may present all appropriate mitigating factors. In every instance in which a valid chemical analysis is made of the defendant, the prosecutor shall present evidence of the resulting alcohol concentration.
- (a1) Jury Trial in Superior Court; Jury Procedure if Trial Bifurcated. —
- (1) Notice. — If the defendant appeals to superior court, and the State intends to use one or more aggravating factors under subsections (c) or (d) of this section, the State must provide the defendant with notice of its intent. The notice shall be provided no later than 10 days prior to trial and shall contain a plain and concise factual statement indicating the factor or factors it intends to use under the authority of subsections (c) and (d) of this section. The notice must list all the aggravating factors that the State seeks to establish.
  - (2) Aggravating factors. — The defendant may admit to the existence of an aggravating factor, and the factor so admitted shall be treated as though it were found by a jury pursuant to the procedures in this section. If the defendant does not so admit, only a jury may determine if an aggravating factor is present. The jury impaneled for the trial may, in the same trial, also determine if one or more aggravating factors is present, unless the court determines that the interests of justice require that a separate sentencing proceeding be used to make that determination. If the court determines that a separate proceeding is required, the proceeding shall be conducted by the trial judge before the trial jury as soon as practicable after the guilty verdict is returned. The State bears the burden of proving beyond a reasonable

doubt that an aggravating factor exists, and the offender bears the burden of proving by a preponderance of the evidence that a mitigating factor exists.

- (3) Convening the jury. — If prior to the time that the trial jury begins its deliberations on the issue of whether one or more aggravating factors exist, any juror dies, becomes incapacitated or disqualified, or is discharged for any reason, an alternate juror shall become a part of the jury and serve in all respects as those selected on the regular trial panel. An alternate juror shall become a part of the jury in the order in which the juror was selected. If the trial jury is unable to reconvene for a hearing on the issue of whether one or more aggravating factors exist after having determined the guilt of the accused, the trial judge shall impanel a new jury to determine the issue.
- (4) Jury selection. — A jury selected to determine whether one or more aggravating factors exist shall be selected in the same manner as juries are selected for the trial of criminal cases.
- (a2) Jury Trial on Aggravating Factors in Superior Court.
  - (1) Defendant admits aggravating factor only. — If the defendant admits that an aggravating factor exists, but pleads not guilty to the underlying charge, a jury shall be impaneled to dispose of the charge only. In that case, evidence that relates solely to the establishment of an aggravating factor shall not be admitted in the trial.
  - (2) Defendant pleads guilty to the charge only. — If the defendant pleads guilty to the charge, but contests the existence of one or more aggravating factors, a jury shall be impaneled to determine if the aggravating factor or factors exist.
- (b) Repealed by Session Laws 1983, c. 435, s. 29.
- (c) Determining Existence of Grossly Aggravating Factors. — At the sentencing hearing, based upon the evidence presented at trial and in the hearing, the judge, or the jury in superior court, must first determine whether there are any grossly aggravating factors in the case. Whether a prior conviction exists under subdivision (1) of this subsection shall be a matter to be determined by the judge, and not the jury, in district or superior court. If the sentencing hearing is for a case remanded back to district court from superior court, the judge shall determine whether the defendant has been convicted of any offense that was not considered at the initial sentencing hearing and impose the appropriate sentence under this section. The judge must impose the Level One punishment under subsection (g) of this section if it is determined that two or more grossly aggravating factors apply. The judge must impose the Level Two punishment under subsection (h) of this section if it is determined that only one of the grossly aggravating factors applies. The grossly aggravating factors are:
  - (1) A prior conviction for an offense involving impaired driving if:
    - a. The conviction occurred within seven years before the date of the offense for which the defendant is being sentenced; or
    - b. The conviction occurs after the date of the offense for which the defendant is presently being sentenced, but prior to or contemporaneously with the present sentencing.
 Each prior conviction is a separate grossly aggravating factor.
  - (2) Driving by the defendant at the time of the offense while his driver's license was revoked under G.S. 20-28, and the revocation was an impaired driving revocation under G.S. 20-28.2(a).
  - (3) Serious injury to another person caused by the defendant's impaired driving at the time of the offense.
  - (4) Driving by the defendant while a child under the age of 16 years was in the vehicle at the time of the offense.



In imposing a Level One or Two punishment, the judge may consider the aggravating and mitigating factors in subsections (d) and (e) in determining the appropriate sentence. If there are no grossly aggravating factors in the case, the judge must weigh all aggravating and mitigating factors and impose punishment as required by subsection (f).

(c1) Written Findings. — The court shall make findings of the aggravating and mitigating factors present in the offense. If the jury finds factors in aggravation, the court shall ensure that those findings are entered in the court's determination of sentencing factors form or any comparable document used to record the findings of sentencing factors. Findings shall be in writing.

(d) Aggravating Factors to Be Weighed. — The judge, or the jury in superior court, shall determine before sentencing under subsection (f) whether any of the aggravating factors listed below apply to the defendant. The judge shall weigh the seriousness of each aggravating factor in the light of the particular circumstances of the case. The factors are:

- (1) Gross impairment of the defendant's faculties while driving or an alcohol concentration of 0.16 or more within a relevant time after the driving.
- (2) Especially reckless or dangerous driving.
- (3) Negligent driving that led to a reportable accident.
- (4) Driving by the defendant while his driver's license was revoked.
- (5) Two or more prior convictions of a motor vehicle offense not involving impaired driving for which at least three points are assigned under G.S. 20-16 or for which the convicted person's license is subject to revocation, if the convictions occurred within five years of the date of the offense for which the defendant is being sentenced, or one or more prior convictions of an offense involving impaired driving that occurred more than seven years before the date of the offense for which the defendant is being sentenced.
- (6) Conviction under G.S. 20-141.5 of speeding by the defendant while fleeing or attempting to elude apprehension.
- (7) Conviction under G.S. 20-141 of speeding by the defendant by at least 30 miles per hour over the legal limit.
- (8) Passing a stopped school bus in violation of G.S. 20-217.
- (9) Any other factor that aggravates the seriousness of the offense.

Except for the factor in subdivision (5) the conduct constituting the aggravating factor shall occur during the same transaction or occurrence as the impaired driving offense.

(e) Mitigating Factors to Be Weighed. — The judge shall also determine before sentencing under subsection (f) whether any of the mitigating factors listed below apply to the defendant. The judge shall weigh the degree of mitigation of each factor in light of the particular circumstances of the case. The factors are:

- (1) Slight impairment of the defendant's faculties resulting solely from alcohol, and an alcohol concentration that did not exceed 0.09 at any relevant time after the driving.
- (2) Slight impairment of the defendant's faculties, resulting solely from alcohol, with no chemical analysis having been available to the defendant.
- (3) Driving at the time of the offense that was safe and lawful except for the impairment of the defendant's faculties.
- (4) A safe driving record, with the defendant's having no conviction for any motor vehicle offense for which at least four points are assigned under G.S. 20-16 or for which the person's license is subject to revocation within five years of the date of the offense for which the defendant is being sentenced.



- (5) Impairment of the defendant's faculties caused primarily by a lawfully prescribed drug for an existing medical condition, and the amount of the drug taken was within the prescribed dosage.
  - (6) The defendant's voluntary submission to a mental health facility for assessment after he was charged with the impaired driving offense for which he is being sentenced, and, if recommended by the facility, his voluntary participation in the recommended treatment.
  - (7) Any other factor that mitigates the seriousness of the offense.
- Except for the factors in subdivisions (4), (6) and (7), the conduct constituting the mitigating factor shall occur during the same transaction or occurrence as the impaired driving offense.

(f) Weighing the Aggravating and Mitigating Factors. — If the judge or the jury in the sentencing hearing determines that there are no grossly aggravating factors, the judge shall weigh all aggravating and mitigating factors listed in subsections (d) and (e). If the judge determines that:

- (1) The aggravating factors substantially outweigh any mitigating factors, the judge shall note in the judgment the factors found and his finding that the defendant is subject to the Level Three punishment and impose a punishment within the limits defined in subsection (i).
- (2) There are no aggravating and mitigating factors, or that aggravating factors are substantially counterbalanced by mitigating factors, the judge shall note in the judgment any factors found and the finding that the defendant is subject to the Level Four punishment and impose a punishment within the limits defined in subsection (j).
- (3) The mitigating factors substantially outweigh any aggravating factors, the judge shall note in the judgment the factors found and his finding that the defendant is subject to the Level Five punishment and impose a punishment within the limits defined in subsection (k).

It is not a mitigating factor that the driver of the vehicle was suffering from alcoholism, drug addiction, diminished capacity, or mental disease or defect. Evidence of these matters may be received in the sentencing hearing, however, for use by the judge in formulating terms and conditions of sentence after determining which punishment level shall be imposed.

(f1) Aider and Abettor Punishment. — Notwithstanding any other provisions of this section, a person convicted of impaired driving under G.S. 20-138.1 under the common law concept of aiding and abetting is subject to Level Five punishment. The judge need not make any findings of grossly aggravating, aggravating, or mitigating factors in such cases.

(f2) Limit on Consolidation of Judgments. — Except as provided in subsection (f1), in each charge of impaired driving for which there is a conviction the judge shall determine if the sentencing factors described in subsections (c), (d) and (e) are applicable unless the impaired driving charge is consolidated with a charge carrying a greater punishment. Two or more impaired driving charges may not be consolidated for judgment.

(g) Level One Punishment. — A defendant subject to Level One punishment may be fined up to four thousand dollars (\$4,000) and shall be sentenced to a term of imprisonment that includes a minimum term of not less than 30 days and a maximum term of not more than 24 months. The term of imprisonment may be suspended only if a condition of special probation is imposed to require the defendant to serve a term of imprisonment of at least 30 days. If the defendant is placed on probation, the judge shall impose a requirement that the defendant obtain a substance abuse assessment and the education or treatment required by G.S. 20-17.6 for the restoration of a drivers license and as a condition of probation. The judge may impose any other lawful condition of probation.

(h) Level Two Punishment. — A defendant subject to Level Two punishment may be fined up to two thousand dollars (\$2,000) and shall be sentenced to a

term of imprisonment that includes a minimum term of not less than seven days and a maximum term of not more than 12 months. The term of imprisonment may be suspended only if a condition of special probation is imposed to require the defendant to serve a term of imprisonment of at least seven days. If the defendant is placed on probation, the judge shall impose a requirement that the defendant obtain a substance abuse assessment and the education or treatment required by G.S. 20-17.6 for the restoration of a drivers license and as a condition of probation. The judge may impose any other lawful condition of probation.

(i) Level Three Punishment. — A defendant subject to Level Three punishment may be fined up to one thousand dollars (\$1,000) and shall be sentenced to a term of imprisonment that includes a minimum term of not less than 72 hours and a maximum term of not more than six months. The term of imprisonment may be suspended. However, the suspended sentence shall include the condition that the defendant:

- (1) Be imprisoned for a term of at least 72 hours as a condition of special probation; or
- (2) Perform community service for a term of at least 72 hours; or
- (3) Repealed by Session Laws 2006-253, s. 23, effective December 1, 2006, and applicable to offenses committed on or after that date.
- (4) Any combination of these conditions.

If the defendant is placed on probation, the judge shall impose a requirement that the defendant obtain a substance abuse assessment and the education or treatment required by G.S. 20-17.6 for the restoration of a drivers license and as a condition of probation. The judge may impose any other lawful condition of probation.

(j) Level Four Punishment. — A defendant subject to Level Four punishment may be fined up to five hundred dollars (\$500.00) and shall be sentenced to a term of imprisonment that includes a minimum term of not less than 48 hours and a maximum term of not more than 120 days. The term of imprisonment may be suspended. However, the suspended sentence shall include the condition that the defendant:

- (1) Be imprisoned for a term of 48 hours as a condition of special probation; or
- (2) Perform community service for a term of 48 hours; or
- (3) Repealed by Session Laws 2006-253, s. 23, effective December 1, 2006, and applicable to offenses committed on or after that date.
- (4) Any combination of these conditions.

If the defendant is placed on probation, the judge shall impose a requirement that the defendant obtain a substance abuse assessment and the education or treatment required by G.S. 20-17.6 for the restoration of a drivers license and as a condition of probation. The judge may impose any other lawful condition of probation.

(k) Level Five Punishment. — A defendant subject to Level Five punishment may be fined up to two hundred dollars (\$200.00) and shall be sentenced to a term of imprisonment that includes a minimum term of not less than 24 hours and a maximum term of not more than 60 days. The term of imprisonment may be suspended. However, the suspended sentence shall include the condition that the defendant:

- (1) Be imprisoned for a term of 24 hours as a condition of special probation; or
- (2) Perform community service for a term of 24 hours; or
- (3) Repealed by Session Laws 2006-253, s. 23, effective December 1, 2006, and applicable to offenses committed on or after that date.
- (4) Any combination of these conditions.

If the defendant is placed on probation, the judge shall impose a requirement that the defendant obtain a substance abuse assessment and the education or



treatment required by G.S. 20-17.6 for the restoration of a drivers license and as a condition of probation. The judge may impose any other lawful condition of probation.

(k1) Credit for Inpatient Treatment. — Pursuant to G.S. 15A-1351(a), the judge may order that a term of imprisonment imposed as a condition of special probation under any level of punishment be served as an inpatient in a facility operated or licensed by the State for the treatment of alcoholism or substance abuse where the defendant has been accepted for admission or commitment as an inpatient. The defendant shall bear the expense of any treatment unless the trial judge orders that the costs be absorbed by the State. The judge may impose restrictions on the defendant's ability to leave the premises of the treatment facility and require that the defendant follow the rules of the treatment facility. The judge may credit against the active sentence imposed on a defendant the time the defendant was an inpatient at the treatment facility, provided such treatment occurred after the commission of the offense for which the defendant is being sentenced. This section shall not be construed to limit the authority of the judge in sentencing under any other provisions of law.

(l) Repealed by Session Laws 1989, c. 691.

(m) Repealed by Session Laws 1995, c. 496, s. 2.

(n) Time Limits for Performance of Community Service. — If the judgment requires the defendant to perform a specified number of hours of community service as provided in subsections (i), (j), or (k), the community service shall be completed:

- (1) Within 90 days, if the amount of community service required is 72 hours or more; or
- (2) Within 60 days, if the amount of community service required is 48 hours; or
- (3) Within 30 days, if the amount of community service required is 24 hours.

The court may extend these time limits upon motion of the defendant if it finds that the defendant has made a good faith effort to comply with the time limits specified in this subsection.

(o) Evidentiary Standards; Proof of Prior Convictions. — In the sentencing hearing, the State shall prove any grossly aggravating or aggravating factor beyond a reasonable doubt, and the defendant shall prove any mitigating factor by the greater weight of the evidence. Evidence adduced by either party at trial may be utilized in the sentencing hearing. Except as modified by this section, the procedure in G.S. 15A-1334(b) governs. The judge may accept any evidence as to the presence or absence of previous convictions that he finds reliable but he shall give prima facie effect to convictions recorded by the Division or any other agency of the State of North Carolina. A copy of such conviction records transmitted by the police information network in general accordance with the procedure authorized by G.S. 20-26(b) is admissible in evidence without further authentication. If the judge decides to impose an active sentence of imprisonment that would not have been imposed but for a prior conviction of an offense, the judge shall afford the defendant an opportunity to introduce evidence that the prior conviction had been obtained in a case in which he was indigent, had no counsel, and had not waived his right to counsel. If the defendant proves by the preponderance of the evidence all three above facts concerning the prior case, the conviction may not be used as a grossly aggravating or aggravating factor.

(p) Limit on Amelioration of Punishment. — For active terms of imprisonment imposed under this section:

- (1) The judge may not give credit to the defendant for the first 24 hours of time spent in incarceration pending trial.



- (2) The defendant shall serve the mandatory minimum period of imprisonment and good or gain time credit may not be used to reduce that mandatory minimum period.
- (3) The defendant may not be released on parole unless he is otherwise eligible, has served the mandatory minimum period of imprisonment, and has obtained a substance abuse assessment and completed any recommended treatment or training program or is paroled into a residential treatment program.

With respect to the minimum or specific term of imprisonment imposed as a condition of special probation under this section, the judge may not give credit to the defendant for the first 24 hours of time spent in incarceration pending trial.

(q) Repealed by Session Laws 1991, c. 726, s. 20.

(r) Supervised Probation Terminated. — Unless a judge in his discretion determines that supervised probation is necessary, and includes in the record that he has received evidence and finds as a fact that supervised probation is necessary, and states in his judgment that supervised probation is necessary, a defendant convicted of an offense of impaired driving shall be placed on unsupervised probation if he meets three conditions. These conditions are that he has not been convicted of an offense of impaired driving within the seven years preceding the date of this offense for which he is sentenced, that the defendant is sentenced under subsections (i), (j), and (k) of this section, and has obtained any necessary substance abuse assessment and completed any recommended treatment or training program.

When a judge determines in accordance with the above procedures that a defendant should be placed on supervised probation, the judge shall authorize the probation officer to modify the defendant's probation by placing the defendant on unsupervised probation upon the completion by the defendant of the following conditions of his suspended sentence:

- (1) Community service; or
- (2) Repealed by Session Laws 1995 c. 496, s. 2.
- (3) Payment of any fines, court costs, and fees; or
- (4) Any combination of these conditions.

(s) Method of Serving Sentence. — The judge in his discretion may order a term of imprisonment to be served on weekends, even if the sentence cannot be served in consecutive sequence. However, if the defendant is ordered to a term of 48 hours or more, or has 48 hours or more remaining on a term of imprisonment, the defendant shall be required to serve 48 continuous hours of imprisonment to be given credit for time served.

- (1) Credit for any jail time shall only be given hour for hour for time actually served. The jail shall maintain a log showing number of hours served.
- (2) The defendant shall be refused entrance and shall be reported back to court if the defendant appears at the jail and has remaining in his body any alcohol as shown by an alcohol screening device or controlled substance previously consumed, unless lawfully obtained and taken in therapeutically appropriate amounts.
- (3) If a defendant has been reported back to court under subdivision (2) of this subsection, the court shall hold a hearing. The defendant shall be ordered to serve his jail time immediately and shall not be eligible to serve jail time on weekends if the court determines that, at the time of his entrance to the jail, if
  - a. The defendant had previously consumed alcohol in his body as shown by an alcohol screening device, or
  - b. The defendant had a previously consumed controlled substance in his body.

It shall be a defense to an immediate service of sentence of jail time and ineligibility for weekend service of jail time if the court deter-

mines that alcohol or controlled substance was lawfully obtained and was taken in therapeutically appropriate amounts.

(t) Repealed by Session Laws 1995, c. 496, s. 2. (1937, c. 407, s. 140; 1947, c. 1067, s. 18; 1967, c. 510; 1969, c. 50; c. 1283, ss. 1-5; 1971, c. 619, s. 16; c. 1133, s. 1; 1975, c. 716, s. 5; 1977, c. 125; 1977, 2nd Sess., c. 1222, s. 1; 1979, c. 453, ss. 1, 2; c. 903, ss. 1, 2; 1981, c. 466, ss. 4-6; 1983, c. 435, s. 29; 1983 (Reg. Sess., 1984), c. 1101, ss. 21-29, 36; 1985, c. 706, s. 1; 1985 (Reg. Sess., 1986), c. 1014, s. 201(d); 1987, c. 139; c. 352, s. 1; c. 797, ss. 1, 2; 1989, c. 548, ss. 1, 2; c. 691, ss. 1-3, 4.1; 1989 (Reg. Sess., 1990), c. 1031, ss. 1, 2; c. 1039, s. 6; 1991, c. 636, s. 19(b), (c); c. 726, ss. 20, 21; 1993, c. 285, s. 9; 1995, c. 191, s. 3; c. 496, ss. 2-7; c. 506, ss. 11-13; 1997-379, ss. 2.1-2.8; 1997-443, s. 19.26(c); 1998-182, ss. 25, 31-35; 2006-253, s. 23.)

**Editor's Note.** — Session Laws 2006-253, s. 1, provides: "This act shall be known as 'The Motor Vehicle Driver Protection Act of 2006.'"

Session Laws 2006-253, s. 29, provides: "The North Carolina General Assembly requests that the Chief Justice of the North Carolina Supreme Court encourage the judges of this State to obtain continuing legal education on the laws of this State relating to driving while

impaired offenses and related issues, and to promulgate any rules necessary to ensure that the judiciary receives necessary training and education on these laws."

**Effect of Amendments.** — Session Laws 2006-253, s. 23, effective December 1, 2006, and applicable to offenses committed on or after that date, rewrote the section.

#### CASE NOTES

**Grossly Aggravating Factor.** — Trial court erred in sentencing defendant on his conviction for driving while impaired by finding that a grossly aggravating factor applied and permitted enhancement of his sentence for that offense; the law required that a grossly aggravating factor that was used to increase defendant's sentence beyond the presumptive range had to

be submitted to a jury and found by the jury to exist beyond a reasonable doubt. *State v. Cruz*, 173 N.C. App. 689, 620 S.E.2d 251, 2005 N.C. App. LEXIS 2288 (2005).

**Cited in** *State v. Speight*, 359 N.C. 602, 614 S.E.2d 262, 2005 N.C. LEXIS 645 (2005); *State v. Alexander*, 359 N.C. 824, 616 S.E.2d 914, 2005 N.C. LEXIS 843 (2005).

### § 20-179.3. Limited driving privilege.

#### CASE NOTES

**Modification of Limited Driving Privilege Due to Inability Caused by Medical Condition.** — Trial court did not have jurisdiction to exempt under G.S. 20-179.3(i) a driver who was seeking reinstatement of her driver's license after having it revoked for driving while impaired from complying with the ignition interlock device upon a showing that the driver

could not use the ignition interlock device due to medical conditions substantiated by a doctor's note; the ignition interlock device provisions of G.S. 20-17.8 are mandatory and not subject to review. *State v. Benbow*, 169 N.C. App. 613, 610 S.E.2d 297, 2005 N.C. App. LEXIS 687 (2005).

#### ARTICLE 3A.

### *Safety and Emissions Inspection Program.*

#### Part 2. Safety and Emissions Inspections of Certain Vehicles.

### § 20-183.2. Description of vehicles subject to safety or emissions inspection; definitions.

(a) Safety. — A motor vehicle is subject to a safety inspection in accordance with this Part if it meets all of the following requirements:



- (1) It is subject to registration with the Division under Article 3 of this Chapter.
  - (2) It is not subject to inspection under 49 C.F.R. Part 396, the federal Motor Carrier Safety Regulations.
  - (3) It is not a trailer whose gross weight is less than 4,000 pounds or a house trailer.
- (a1) Safety Inspection Exception. — Historic vehicles, as defined in G.S. 20-79.4(b)(17), shall not be subject to a safety inspection pursuant to this Article.

(b) Emissions. — A motor vehicle is subject to an emissions inspection in accordance with this Part if it meets all of the following requirements:

- (1) It is subject to registration with the Division under Article 3 of this Chapter, except for motor vehicles operated on a federal installation as provided in sub-subdivision e. of subdivision (5) of this subsection.
  - (2) It is not a trailer whose gross weight is less than 4,000 pounds, a house trailer, or a motorcycle.
  - (3) It is a 1996 or later model.
  - (4) Repealed by Session Laws 1999-328, s. 3.11, effective July 21, 1999.
  - (5) It meets any of the following descriptions:
    - a. It is required to be registered in an emissions county.
    - b. It is part of a fleet that is operated primarily in an emissions county.
    - c. It is offered for rent in an emissions county.
    - d. It is a used vehicle offered for sale by a dealer in an emissions county.
    - e. It is operated on a federal installation located in an emissions county and it is not a tactical military vehicle. Vehicles operated on a federal installation include those that are owned or leased by employees of the installation and are used to commute to the installation and those owned or operated by the federal agency that conducts business at the installation.
    - f. It is otherwise required by 40 C.F.R. Part 51 to be subject to an emissions inspection.
  - (6) It is not licensed at the farmer rate under G.S. 20-88(b).
  - (7) It is not a new motor vehicle, as defined in G.S. 20-286(10)a. and has been a used motor vehicle, as defined in G.S. 20-286(10)b., for 12 months or more. However, a motor vehicle that has been leased or rented, or offered for lease or rent, is subject to an emissions inspection when it either:
    - a. Has been leased or rented, or offered for lease or rent, for 12 months or more.
    - b. Is sold to a consumer-purchaser.
  - (8) It is not a privately owned, nonfleet motor home or house car, as defined in G.S. 20-4.01(27)d2., that is built on a single chassis, has a gross vehicle weight of more than 10,000 pounds, and is designed primarily for recreational use.
- (c) Definitions. — The following definitions apply in this Part:
- (1) Emissions county. — A county listed in G.S. 143-215.107A(c) or designated by the Environmental Management Commission pursuant to G.S. 143-215.107A(d) and certified to the Commissioner of Motor Vehicles as a county in which the implementation of a motor vehicle emissions inspection program will improve ambient air quality.
  - (2) Federal installation. — An installation that is owned by, leased to, or otherwise regularly used as the place of business of a federal agency. (1965, c. 734, s. 1; 1967, c. 692, s. 1; 1969, c. 179, s. 2; cc. 219, 386; 1973, c. 679, s. 2; 1975, c. 683; c. 716, s. 5; 1979, c. 77; 1989, c. 467;



1991, c. 394, s. 1; c. 761, s. 7; 1993 (Reg. Sess., 1994), c. 754, s. 1; 1995, c. 163, s. 10; 1997-29, s. 12; 1999-328, s. 3.11; 2000-134, ss. 7, 7.1, 9, 11; 2001-504, ss. 4, 5, 6, 10; 2004-167, s. 10; 2004-199, s. 59; 2006-255, s. 1.)

**Effect of Amendments.** — 23, 2006, added the exception in subdivision  
Session Laws 2006-255, s. 1, effective August (b)(1).

§ 20-183.7. Fees for performing an inspection and putting an inspection sticker on a vehicle; use of civil penalties.

(a) **(Effective until July 1, 2007)** Fee Amount. — When a fee applies to an inspection of a vehicle or the issuance of an inspection sticker, the fee must be collected. The following fees apply to an inspection of a vehicle and the issuance of an inspection sticker:

Type	Inspection	Sticker
Safety Only	\$ 8.25	\$ .85
Emissions and Safety	23.50	6.50.

The fee for performing an inspection of a vehicle applies when an inspection is performed, regardless of whether the vehicle passes the inspection. The fee for an inspection sticker applies when an inspection sticker is put on a vehicle. The fee for inspecting after-factory tinted windows shall be ten dollars (\$10.00), and the fee applies only to an inspection performed with a light meter after a safety inspection mechanic determined that the window had after-factory tint. A safety inspection mechanic shall not inspect an after-factory tinted window of a vehicle for which the Division has issued a medical exception permit pursuant to G.S. 20-127(f).

A vehicle that is inspected at an inspection station and fails the inspection is entitled to be reinspected at the same station at any time within 30 days of the failed inspection without paying another inspection fee.

The inspection fee for an emissions and safety inspection set out in this subsection is the maximum amount that an inspection station or an inspection mechanic may charge for an emissions and safety inspection of a vehicle. An inspection station or an inspection mechanic may charge the maximum amount or any lesser amount for an emissions and safety inspection of a vehicle. The inspection fee for a safety only inspection set out in this subsection may not be increased or decreased. The sticker fees set out in this subsection may not be increased or decreased.

(a) **(Effective July 1, 2007)** Fee Amount. — When a fee applies to an inspection of a vehicle or the issuance of an inspection sticker, the fee must be collected. The following fees apply to an inspection of a vehicle and the issuance of an inspection sticker:

Type	Inspection	Sticker
Safety Only	\$ 8.25	\$ .85
Emissions and Safety	23.75	6.25.

The fee for performing an inspection of a vehicle applies when an inspection is performed, regardless of whether the vehicle passes the inspection. The fee for an inspection sticker applies when an inspection sticker is put on a vehicle. The fee for an inspection sticker does not apply to a replacement inspection sticker for use on a windshield replaced by a business registered with the Division pursuant to G.S. 20-183.6. The fee for inspecting after-factory tinted windows shall be ten dollars (\$10.00), and the fee applies only to an inspection performed with a light meter after a safety inspection mechanic determined

G.S. 20-183.7(a) and (c) are set out twice. See notes.

that the window had after-factory tint. A safety inspection mechanic shall not inspect an after-factory tinted window of a vehicle for which the Division has issued a medical exception permit pursuant to G.S. 20-127(f).

A vehicle that is inspected at an inspection station and fails the inspection is entitled to be reinspected at the same station at any time within 30 days of the failed inspection without paying another inspection fee.

The inspection fee for an emissions and safety inspection set out in this subsection is the maximum amount that an inspection station or an inspection mechanic may charge for an emissions and safety inspection of a vehicle. An inspection station or an inspection mechanic may charge the maximum amount or any lesser amount for an emissions and safety inspection of a vehicle. The inspection fee for a safety only inspection set out in this subsection may not be increased or decreased. The sticker fees set out in this subsection may not be increased or decreased.

(b) Self-Inspector. — The fee for an inspection does not apply to an inspection performed by a self-inspector. The fee for putting an inspection sticker on a vehicle applies to an inspection performed by a self-inspector.

(c) **(Effective until July 1, 2007)** Fee Distribution. — Fees collected for inspection stickers are payable to the Division of Motor Vehicles. The amount of each fee listed in the table below shall be credited to the Highway Fund, the Emissions Program Account established in subsection (d) of this section, the Telecommunications Account established in subsection (d1) of this section, the Highway Trust Fund Repayment Fee established in subsection (d2) of this section, the Volunteer Rescue/EMS Fund established in G.S. 58-87-5, the Rescue Squad Workers’ Relief Fund established in G.S. 58-88-5, and the Division of Air Quality of the Department of Environment and Natural Resources:

Recipient	Safety Only Sticker	Emissions and Safety Sticker
Highway Fund	.55	.55
Emissions Program Account	.00	3.00
Telecommunications Account	.00	1.75
Volunteer Rescue/EMS Fund	.18	.18
Rescue Squad Workers’ Relief Fund	.12	.12
Division of Air Quality	.00	.65
Highway Trust Fund Repayment Fee	.00	.25.

(c) **(Effective July 1, 2007)** Fee Distribution. — Fees collected for inspection stickers are payable to the Division of Motor Vehicles. The amount of each fee listed in the table below shall be credited to the Highway Fund, the Emissions Program Account established in subsection (d) of this section, the Telecommunications Account established in subsection (d1) of this section, the Volunteer Rescue/EMS Fund established in G.S. 58-87-5, the Rescue Squad Workers’ Relief Fund established in G.S. 58-88-5, and the Division of Air Quality of the Department of Environment and Natural Resources:

Recipient	Safety Only Sticker	Emissions and Safety Sticker
Highway Fund	.55	.55
Emissions Program Account	.00	3.00
Telecommunications Account	.00	1.75
Volunteer Rescue/EMS Fund	.18	.18
Rescue Squad Workers’ Relief Fund	.12	.12



G.S. 20-183.7(a) and (c) are set out twice. See notes.

<u>Recipient</u>	<u>Safety Only Sticker</u>	<u>Emissions and Safety Sticker</u>
Division of Air Quality	.00	.65.
(d) Emissions Program Account. — The Emissions Program Account is created as a nonreverting account within the Highway Fund. The Division shall administer the Account. Revenue in the Account may be used only to fund the vehicle emissions inspection and maintenance program.		
(d1) Telecommunications Account. — The Telecommunications Account is created as a nonreverting account within the Highway Fund. The Division shall administer the Account. Revenue in the Account may be used only to provide equipment and telecommunications services associated with the vehicle emissions inspection and maintenance program.		
(d2) <b>(Effective until July 1, 2007)</b> Highway Trust Fund Repayment Fee. — The Highway Trust Fund Repayment Fee shall be credited to the Highway Trust Fund on a quarterly basis in order to repay certain funds allocated from the Highway Trust Fund to the Division for the implementation of the vehicle emissions and maintenance program.		
(e) Civil Penalties. — Civil penalties collected under this Part shall be credited to the Highway Fund as nontax revenue.		
(f) Inspection Stations Required to Post Fee Information. — The Division shall approve the form and style of one or more standard signs to be used to display the information required by this subsection. The Division shall require that one or more of the standard signs be conspicuously posted at each inspection station in a manner reasonably calculated to make the information on the sign readily available to each person who presents a motor vehicle to the station for inspection. The sign shall include the following information:		
(1) The maximum and minimum amounts of the inspection fee authorized by this section.		
(2) The amount of the inspection fee charged by the inspection station and a statement that clearly indicates that the amount of the inspection fee is determined by the inspection station, that the inspection fee is retained by the inspection station to compensate the station for performing the inspection, and that the inspection fee is not paid to the State.		
(3) The amount of the sticker fee, if the motor vehicle passes the inspection, a statement that the sticker fee is paid to the State, and a brief summary of the purposes for which the sticker fee is collected.		
(4) The total fee to be charged if the motor vehicle passes the inspection.		
(5) A statement that a vehicle that fails an inspection may be reinspected at the same station within 30 days of the inspection without payment of another inspection fee.		
(g) Information on Receipt. — The information set out in subdivisions (1) through (5) of subsection (f) of this section shall be set out in not smaller than 12 point type and shall be shown graphically in the form of a pie chart on the inspection receipt.		
(h) Subsections (f) and (g) of this section apply only to inspection stations that perform both emissions and safety inspections. (1965, c. 734, s. 1; 1969, c. 1242; 1973, c. 1480; 1975, c. 547; c. 716, s. 5; c. 875, s. 4; 1979, c. 688; 1979, 2nd Sess., c. 1180, ss. 5, 6; 1981, c. 690, s. 17; 1981 (Reg. Sess., 1982), c. 1261, s. 2; 1985, c. 415, ss. 1-6; 1985 (Reg. Sess., 1986), c. 1018, s. 8; 1987, c. 584, ss. 1-3; 1987 (Reg. Sess., 1988), c. 1062, ss. 3-5; 1989, c. 391, s. 3; c. 534, s. 3; 1989 (Reg. Sess., 1990), c. 1066, s. 33(b); 1991 (Reg. Sess., 1992), c. 943, s. 1; 1993, c. 385, s. 1; 1993 (Reg. Sess., 1994), c. 754, s. 1; 1995, c. 473, s. 3; 1995 (Reg. Sess., 1996), c. 743, s. 1; 1997-29, s. 4; 1997-443, s. 11A.123; 2000-75, s. 3; 2001-504, ss. 1, 2; 2006-230, s. 2.)		



**Subsections (a) and (c) are set out twice.**

— The first versions of subsection (a) and (c) set out above are effective until July 1, 2007. The second versions of subsection (a) and (c) set out above are effective July 1, 2007.

**Effect of Amendments. —**

Session Laws 2006-230, s. 2, effective July 1, 2007, added the third sentence in the second paragraph of subsection (a).

## ARTICLE 3B.

*Permanent Weigh Stations and Portable Scales.***§ 20-183.9. Establishment and maintenance of permanent weigh stations.**

The Department of Crime Control and Public Safety is hereby authorized, empowered and directed to equip and operate permanent weigh stations equipped to weigh vehicles using the streets and highways of this State to determine whether such vehicles are being operated in accordance with legislative enactments relating to weights of vehicles and their loads. The permanent weigh stations shall be established at such locations on the streets and highways in this State as will enable them to be used most advantageously in determining the weight of vehicles and their loads. The Department of Transportation shall be responsible for the maintenance and upkeep of all permanent weigh stations established pursuant to this section. (1951, c. 988, s. 1; 1957, c. 65, s. 11; 1973, c. 507, s. 5; 1977, c. 464, ss. 34, 37; 1979, c. 76; 2002-159, s. 31.5(b); 2002-190, s. 7; 2004-124, s. 18.3(b); 2006-66, s. 21.8.)

**Editor's Note. —**

Session Laws 2006-66, s. 1.2, provides: "This act shall be known as 'The Current Operations and Capital Improvements Appropriations Act of 2006'."

Session Laws 2006-66, s. 28.6 is a severability clause.

**Effect of Amendments. —**

Session Laws 2006-66, s. 21.8, effective July 1, 2006, substituted "equip and operate" for "equip, operate, and maintain" in the first sentence and added the last sentence of the paragraph.

## ARTICLE 4.

*State Highway Patrol.***§ 20-184. Patrol under supervision of Department of Crime Control and Public Safety.**

## CASE NOTES

**Power to Prescribe Regulations. —** Trial court did not err in granting summary judgment to the governor, state public safety agency, state highway patrol, and certain unidentified persons, and denying the wrecker service owner's motion for summary judgment on the wrecker service owner's declaratory judgment action seeking a determination that regulations used to remove his wrecker service business from the state's Wrecker Rotation Ser-

vices List were illegal and that the regulations were preempted by federal law; the trial court had the authority to declare that the regulations were not illegal because the General Assembly granted to the state public safety agency the power to direct the state highway patrol to establish regulations for private wrecker services. *Ramey v. Easley*, — N.C. App. —, 632 S.E.2d 178, 2006 N.C. App. LEXIS 1308 (2006).

## § 20-188. Duties of Highway Patrol.

### CASE NOTES

#### **Right to Employ Reasonable Means in Fulfilling Duties. —**

Trial court did not err in granting summary judgment to the governor, state public safety agency, state highway patrol, and certain unidentified persons, and denying the wrecker service owner's motion for summary judgment on the wrecker service owner's declaratory judgment action seeking a determination that regulations used to remove his wrecker service business from the state's Wrecker Rotation Ser-

vices List were illegal and that the regulations were preempted by federal law; the trial court had the authority to declare that the regulations were not illegal because the General Assembly granted to the state public safety agency the power to direct the state highway patrol to establish regulations for private wrecker services. *Ramey v. Easley*, — N.C. App. —, 632 S.E.2d 178, 2006 N.C. App. LEXIS 1308 (2006).

## § 20-189. (Effective July 1, 2007) Patrolmen assigned to Governor's office.

The Secretary of Crime Control and Public Safety, at the request of the Governor, shall assign and attach two members of the State Highway Patrol to the office of the Governor, there to be assigned such duties and perform such services as the Governor may direct. The salary of the State highway patrolmen so assigned to the office of the Governor shall be paid from appropriations made to the office of the Governor and shall be fixed in an amount to be determined by the Governor. (1941, cc. 23, 36; 1965, c. 1159; 1977, c. 70, s. 13; 1983, c. 717, s. 6; 1985 (Reg. Sess., 1986), c. 955, ss. 2, 3; 2006-203, s. 15.)

**Section Set Out Twice.** — The section above is effective July 1, 2007. For the section as in effect until July 1, 2007, see the main volume.

**Effect of Amendments.** — Session Laws

2006-203, s. 15, effective July 1, 2007, deleted the former last sentence which read: "Prior to taking any action under the previous sentence, the Governor may consult with the Advisory Budget Commission."

### ARTICLE 7.

#### *Miscellaneous Provisions Relating to Motor Vehicles.*

## § 20-217. Motor vehicles to stop for properly marked and designated school buses in certain instances; evidence of identity of driver.

(a) When a school bus is displaying its mechanical stop signal or flashing red lights and the bus is stopped for the purpose of receiving or discharging passengers, the driver of any other vehicle that approaches the school bus from any direction on the same street, highway, or public vehicular area shall bring that other vehicle to a full stop and shall remain stopped. The driver of the other vehicle shall not proceed to move, pass, or attempt to pass the school bus until after the mechanical stop signal has been withdrawn, the flashing red stoplights have been turned off, and the bus has started to move.

(b) For the purpose of this section, a school bus includes a public school bus transporting children or school personnel, a public school bus transporting senior citizens under G.S. 115C-243, or a privately owned bus transporting children. This section applies only in the event the school bus bears upon the front and rear a plainly visible sign containing the words "school bus."

(c) Notwithstanding subsection (a) of this section, the driver of a vehicle traveling in the opposite direction from the school bus, upon any road, highway or city street that has been divided into two roadways, so constructed as to separate vehicular traffic between the two roadways by an intervening space (including a center lane for left turns if the roadway consists of at least four more lanes) or by a physical barrier, need not stop upon meeting and passing any school bus that has stopped in the roadway across the dividing space or physical barrier.

(d) It shall be unlawful for any school bus driver to stop and receive or discharge passengers or for any principal or superintendent of any school, routing a school bus, to authorize the driver of any school bus to stop and receive or discharge passengers upon any roadway described by subsection (c) of this section where passengers would be required to cross the roadway to reach their destination or to board the bus; provided, that passengers may be discharged or received at points where pedestrians and vehicular traffic are controlled by adequate stop-and-go traffic signals.

(e) Except as provided in subsection (g) of this section, any person violating this section shall be guilty of a Class 1 misdemeanor. A person who violates subsection (a) of this section shall not receive a prayer for judgment continued under any circumstances.

(f) Expired.

(g) Any person who willfully violates subsection (a) of this section and strikes any person causing serious bodily injury to that person shall be guilty of a Class I felony. (1925, c. 265; 1943, c. 767; 1947, c. 527; 1955, c. 1365; 1959, c. 909; 1965, c. 370; 1969, c. 952; 1971, c. 245, s. 1; 1973, c. 1330, s. 35; 1977, 2nd Sess., c. 1280, s. 4; 1979, 2nd Sess., c. 1323; 1983, c. 779, s. 1; 1985, c. 700, s. 1; 1991, c. 290, s. 1; 1993, c. 539, s. 382; 1994, Ex. Sess., c. 24, s. 14(c); 1998-149, s. 10; 2005-204, s. 1; 2006-160, s. 1; 2006-259, s. 11(a).)

#### Effect of Amendments. —

Session Laws 2006-160, s. 1, effective September 1, 2006, and applicable to offenses committed on or after that date, added the second sentence in subsection (e).

Session Laws 2006-259, s. 11(a), effective

December 1, 2006, and applicable to acts committed on or after that date, in subsection (g), added “willfully” following “Any person who” and deleted “willfully” preceding “strikes any person.”

## ARTICLE 9A.

### *Motor Vehicle Safety and Financial Responsibility Act of 1953.*

## § 20-279.21. “Motor vehicle liability policy” defined.

### CASE NOTES

- I. General Consideration.
- III. Uninsured Motorist Coverage.
- IV. Underinsured Motorist Coverage.

#### I. GENERAL CONSIDERATION.

**Nonowned Vehicle.** — Since actual title had not passed, an insurer had to provide coverage to its insured while driving a non-owned vehicle, even though the insured was in the process of buying the vehicle, as North Carolina required actual title to pass for own-

ership under G.S. 20-4.01(26); the insurer was responsible to a passenger who was injured in a collision with a non-owned vehicle being driven by the insured. *Hernandez v. Nationwide Mut. Ins. Co.*, 171 N.C. App. 510, 615 S.E.2d 425, 2005 N.C. App. LEXIS 1360 (2005), cert. denied, 360 N.C. 63, 621 S.E.2d 624 (2005).



### III. UNINSURED MOTORIST COVERAGE.

#### Construction of Uninsured Motorists Coverage. —

Employees injured in an accident caused by an uninsured motorist (UM) did not qualify as “persons insured” who were required to be offered UM coverage by the insurer under G.S. 20-279.21(b)(3) because their employer was the named insured under the commercial automobile policy and they were not using an insured vehicle at the time of the collision. *Reel v. Selective Ins. Co.*, 407 F. Supp. 2d 737, 2005 U.S. Dist. LEXIS 38289 (E.D.N.C. 2005).

**Insurer Bound by Judgment of Florida Court.** — Insurer who was served by registered or certified mail, return receipt requested, or another manner provided by law, with a copy of the summons, complaint, or other process in an underlying Florida action against an uninsured motorist, was, under G.S. 20-279.51(b)(3), bound by the final judgment the injured party took against the uninsured motorist. *Sawyers v. Farm Bureau Ins. Co. of N.C., Inc.*, 170 N.C. App. 17, 612 S.E.2d 184, 2005 N.C. App. LEXIS 893 (2005).

### IV. UNDERINSURED MOTORIST COVERAGE.

#### Insurer's Failure to Provide Opportunity to Reject Uninsured Motorist Limits.

— G.S. 20-279.21 established that an insured must be given the initial opportunity to reject or select different underinsured motorist (UIM) limits; insurer's total failure to provide an opportunity to reject UIM coverage or select different limits violated this requirement, and thus entitled the insured to the highest available limit of UIM coverage of \$1,000,000. *Williams v. Nationwide Mut. Ins. Co.*, — N.C. App. —, 621 S.E.2d 644, 2005 N.C. App. LEXIS 2486 (2005).

#### But Certain Additional Language Is Allowed. —

Accident victim's insurer was properly granted summary judgment on its claim that it did not have to provide the victim with underinsured motorist coverage (UIM) because the victim rejected UIM when she completed her insurance application, and the insurer's UIM selection/rejection form complied with a form promulgated by the North Carolina Rate Bureau and approved by the Commissioner of the North Carolina Department of Insurance pursuant to G.S. 20-279.21(b)(4); the only deviations from the promulgated form were the insurer's inclusion of additional language which explained uninsured and underinsured motorist coverage, and the insurer's use of 10-point type rather than 12-point type. *Stegenga v. Burney*, 174 N.C. App. 196, 620 S.E.2d 302, 2005 N.C. App. LEXIS 2300 (2005).

## § 20-279.33A. Religious organizations; self-insurance.

(a) Notwithstanding any other provision of this Article or Article 13 of this Chapter, any recognized religious organization having established tenets or teachings and that has been in existence at all times since December 31, 1950, may qualify as a self-insurer by obtaining a certificate of self-insurance from the Commissioner as provided in subsection (c) of this section if the Commissioner determines that all of the following conditions are met:

- (1) Members of the religious organization operate five or more vehicles that are registered in this State and are either owned or leased by them.
- (2) Members of the religious organization hold a common belief in mutual financial assistance in time of need to the extent that they share in financial obligations of other members who would otherwise be unable to meet their obligations.
- (3) The religious organization has met all of its insurance obligations for the five years preceding its application.
- (4) The religious organization is financially solvent and not subject to any actions in bankruptcy, trusteeship, receivership, or any other court proceeding in which the financial solvency of the religious organization is in question.
- (5) Neither the religious organization nor any of its participating members has any judgments arising out of the operation, maintenance, or use of a motor vehicle taken against them that have remained unsatisfied for more than 30 days after becoming final.

- (6) There are no other factors that cause the Commissioner to believe that the religious organization and its participating members are not of sufficient financial ability to pay judgments against them.
- (7) The religious organization and its participating members meet other requirements that the Commissioner by administrative rule prescribes.

(b) The Commissioner may, in the Commissioner's discretion, upon the application of a religious organization, issue a certificate of self-insurance when the Commissioner is satisfied that the religious organization is possessed and will continue to be possessed of an ability to pay any judgments that might be rendered against the religious organization. The certificate shall serve as evidence of insurance for the purposes of G.S. 20-7(c1), 20-13.2(e), 20-16.1, 20-19(k), and 20-179.3(1).

(c) A group issued a certificate of self-insurance under this section shall notify the Commissioner in writing if any person ceases to be a member of the group. The group shall notify the Commissioner within 10 days of the person's removal or departure from the group.

(d) The Commissioner may, at any time after the issuance of a certificate of self-insurance under this subsection, cancel the certificate by giving 30 days' written notice of cancellation to the religious organization whenever there is reason to believe that the religious organization to whom the certificate was issued is no longer qualified as a self-insurer under this section. (2006-145, s. 5.)

**Editor's Note.** — Session Laws 2006-145, s. 7, makes this section effective January 1, 2007. Session Laws 2006-145, s. 6 is a severability clause.

## ARTICLE 12.

### *Motor Vehicle Dealers and Manufacturers Licensing Law.*

#### **§ 20-288. Application for license; license requirements; expiration of license; bond.**

(a) A new motor vehicle dealer, motor vehicle sales representative, manufacturer, factory branch, factory representative, distributor, distributor branch, distributor representative, or wholesaler may obtain a license by filing an application with the Division. An application must be on a form provided by the Division and contain the information required by the Division. An application for a license must be accompanied by the required fee and by an application for a dealer license plate.

(a1) A used motor vehicle dealer may obtain a license by filing an application, as prescribed in subsection (a) of this section, and providing the following:

- (1) The required fee.
- (2) Proof that the applicant, within the last 12 months, has completed a 12-hour licensing course approved by the Division if the applicant is seeking an initial license and a six-hour course approved by the Division if the applicant is seeking a renewal license. The requirements of this subdivision do not apply to a used motor vehicle dealer the primary business of which is the sale of salvage vehicles on behalf of insurers or to a manufactured home dealer licensed under G.S. 143-143.11 who complies with the continuing education requirements of G.S. 143-143.11B. The requirement of this subdivision does not apply to persons age 62 or older as of July 1, 2002, who are seeking a renewal license. This subdivision also does not apply to an applicant



who holds a license as a new motor vehicle dealer as defined in G.S. 20-286(13) and operates from an established showroom one mile or less from the established showroom for which the applicant seeks a used motor vehicle dealer license. An applicant who also holds a license as a new motor vehicle dealer may designate a representative to complete the licensing course required by this subdivision.

- (3) If the applicant is an individual, proof that the applicant is at least 18 years of age and proof that all salespersons employed by the dealer are at least 18 years of age.

- (4) The application for a dealer license plate.

(b) The Division shall require in such application, or otherwise, information relating to matters set forth in G.S. 20-294 as grounds for the refusing of licenses, and to other pertinent matters commensurate with the safeguarding of the public interest, all of which shall be considered by the Division in determining the fitness of the applicant to engage in the business for which he seeks a license.

(c) All licenses that are granted shall be for a period of one year unless sooner revoked or suspended. The Division shall vary the expiration dates of all licenses that are granted so that an equal number of licenses expire at the end of each month, quarter, or other period consisting of one or more months to coincide with G.S. 20-79(c).

(d) To obtain a license as a wholesaler, an applicant who intends to sell or distribute self-propelled vehicles must have an established office in this State, and an applicant who intends to sell or distribute only trailers or semitrailers of more than 2,500 pounds unloaded weight must have a place of business in this State where the records required under this Article are kept.

To obtain a license as a motor vehicle dealer, an applicant who intends to deal in self-propelled vehicles must have an established salesroom in this State, and an applicant who intends to deal in only trailers or semitrailers of more than 2,500 pounds unloaded weight must have a place of business in this State where the records required under this Article are kept.

An applicant for a license as a manufacturer, a factory branch, a distributor, a distributor branch, a wholesaler, or a motor vehicle dealer must have a separate license for each established office, established salesroom, or other place of business in this State. An application for any of these licenses shall include a list of the applicant's places of business in this State.

(e) Each applicant approved by the Division for license as a motor vehicle dealer, manufacturer, factory branch, distributor, distributor branch, or wholesaler shall furnish a corporate surety bond or cash bond or fixed value equivalent of the bond. The amount of the bond for an applicant for a motor vehicle dealer's license is fifty thousand dollars (\$50,000) for one established salesroom of the applicant and twenty-five thousand dollars (\$25,000) for each of the applicant's additional established salesrooms. The amount of the bond for other applicants required to furnish a bond is fifty thousand dollars (\$50,000) for one place of business of the applicant and twenty-five thousand dollars (\$25,000) for each of the applicant's additional places of business.

A corporate surety bond shall be approved by the Commissioner as to form and shall be conditioned that the obligor will faithfully conform to and abide by the provisions of this Article and Article 15. A cash bond or fixed value equivalent thereof shall be approved by the Commissioner as to form and terms of deposits as will secure the ultimate beneficiaries of the bond; and such bond shall not be available for delivery to any person contrary to the rules of the Commissioner. Any purchaser of a motor vehicle, including a motor vehicle dealer, who shall have suffered any loss or damage by the failure of any license holder subject to this subsection to deliver free and clear title to any vehicle purchased from a license holder or any other act of a license holder subject to



this subsection that constitutes a violation of this Article or Article 15 of this Chapter shall have the right to institute an action to recover against the license holder and the surety. Every license holder against whom an action is instituted shall notify the Commissioner of the action within 10 days after served with process. Except as provided by G.S. 20-288(f) and (g), a corporate surety bond shall remain in force and effect and may not be canceled by the surety unless the bonded person stops engaging in business or the person's license is denied, suspended, or revoked under G.S. 20-294. That cancellation may be had only upon 30 days' written notice to the Commissioner and shall not affect any liability incurred or accrued prior to the termination of such 30-day period. This subsection does not apply to a license holder who deals only in trailers having an empty weight of 4,000 pounds or less. This subsection does not apply to manufacturers of, or dealers in, mobile or manufactured homes who furnish a corporate surety bond, cash bond, or fixed value equivalent thereof, pursuant to G.S. 143-143.12.

(f) A corporate surety bond furnished pursuant to this section or renewal thereof may also be canceled by the surety prior to the next premium anniversary date without the prior written consent of the license holder for the following reasons:

- (1) Nonpayment of premium in accordance with the terms for issuance of the surety bond; or
- (2) An act or omission by the license holder or his representative that constitutes substantial and material misrepresentation or nondisclosure of a material fact in obtaining the surety bond or renewing the bond.

Any cancellation permitted by this subsection is not effective unless written notice of cancellation has been delivered or mailed to the license holder and to the Commissioner not less than 30 days before the proposed effective date of cancellation. The notice must be given or mailed by certified mail to the license holder at its last known address. The notice must state the reason for cancellation. Cancellation for nonpayment of premium is not effective if the amount due is paid before the effective date set forth in the notice of cancellation. Cancellation of the surety shall not affect any liability incurred or accrued prior to the termination of the 30-day notice period.

(g) A corporate surety may refuse to renew a surety bond furnished pursuant to this section by giving or mailing written notice of nonrenewal to the license holder and to the Commissioner not less than 30 days prior to the premium anniversary date of the surety bond. The notice must be given or mailed by certified mail to the license holder at its last known address. Nonrenewal of the surety bond shall not affect any liability incurred or accrued prior to the premium anniversary date of the surety bond. (1955, c. 1243, s. 4; 1975, c. 716, s. 5; 1977, c. 560, s. 2; 1979, c. 254; 1981, c. 952, s. 3; 1985, c. 262; 1991, c. 495, s. 1; c. 662, s. 3; 1993, c. 440, s. 3; 1997-429, s. 1; 2001-345, s. 2; 2001-492, s. 4; 2003-254, s. 2; 2004-167, s. 9; 2004-199, s. 59; 2005-99, s. 2; 2006-105, s. 2.3; 2006-191, s. 1; 2006-259, s. 12.)

**Editor's Note. —**

Session Laws 2006-105, s. 4, is a severability clause.

**Effect of Amendments. —**

Session Laws 2006-105, s. 2.3, effective October 1, 2006, substituted "Except as provided by G.S. 20-288(f) and (g), a" for "A" at the beginning of the fifth sentence in the second paragraph of subsection (e); and added subsections (f) and (g).

Session Laws 2006-191, s. 1, effective January 1, 2007, and applicable to applications for used motor vehicle dealer license filed on or after that date, added the fourth and fifth sentences to subdivision (a1)(2).

Session Laws 2006-259, s. 12, effective August 23, 2006, substituted "Nonrenewal" for "cancellation" in subsection (g).

## ARTICLE 13.

*The Vehicle Financial Responsibility Act of 1957.***§ 20-309. Financial responsibility prerequisite to registration; must be maintained throughout registration period.**

(a) No motor vehicle shall be registered in this State unless the owner at the time of registration has financial responsibility for the operation of such motor vehicle, as provided in this Article. The owner of each motor vehicle registered in this State shall maintain financial responsibility continuously throughout the period of registration.

(a1) An owner of a commercial motor vehicle, as defined in G.S. 20-4.01(3d), shall have financial responsibility for the operation of the motor vehicle in an amount equal to that required for for-hire carriers transporting nonhazardous property in interstate or foreign commerce in 49 C.F.R. § 387.9.

(b) Financial responsibility shall be a liability insurance policy or a financial security bond or a financial security deposit or by qualification as a self-insurer, as these terms are defined and described in Article 9A, Chapter 20 of the General Statutes of North Carolina, as amended.

(c) When it is certified that financial responsibility is a liability insurance policy, the Commissioner of Motor Vehicles may require that the owner produce records to prove the fact of such insurance, and failure to produce such records shall be prima facie evidence that no financial responsibility exists with regard to the vehicle concerned. It shall be the duty of insurance companies, upon request of the Division, to verify the accuracy of any owner's certification.

(d) When liability insurance with regard to any motor vehicle is terminated by cancellation or failure to renew, or the owner's financial responsibility for the operation of any motor vehicle is otherwise terminated, the owner shall forthwith surrender the registration certificate and plates of the vehicle to the Division of Motor Vehicles unless financial responsibility is maintained in some other manner in compliance with this Article.

(e) **(Repealed effective July 1, 2008)** Upon termination by cancellation or otherwise of an insurance policy provided in subsection (b) of this section, the insurer shall notify the Division of the termination within 20 business days; provided, no cancellation notice is required if the same insurer issues a replacement insurance policy complying with this Article at the same time the insurer cancels or otherwise terminates the old policy, no lapse in coverage results, and the insurer sends the certificate of insurance form for the new policy to the Division. The insurer shall notify the Division of any new policy for insurance within 20 working days of its issuance unless the new coverage is a replacement insurance policy for a policy terminated by the same insurer. Any insurance company with twenty-five million dollars (\$25,000,000) or more in annual vehicle insurance premium volume must submit the notices required under this section by electronic means. All other insurance companies may submit the notices required under this section by either paper or electronic means. The names of insureds and the beginning date and termination date of insurance coverage provided to the Division by the insurer pursuant to this paragraph shall constitute a designated trade secret under G.S. 132-1.2.

The Division, upon receiving notice of a lapse in insurance coverage, shall notify the owner of the lapse in coverage, and the owner shall, to retain the registration plate for the vehicle registered or required to be registered, within 10 days from date of notice given by the Division either:



- (1) Certify to the Division that he had financial responsibility effective on or prior to the date of such termination; or
- (2) In the case of a lapse in financial responsibility, pay a fifty dollar (\$50.00) civil penalty; and certify to the Division that he now has financial responsibility effective on the date of certification, that he did not operate the vehicle in question during the period of no financial responsibility with the knowledge that there was no financial responsibility, and that the vehicle in question was not involved in a motor vehicle crash during the period of no financial responsibility.

Failure of the owner to certify that he has financial responsibility as herein required shall be prima facie evidence that no financial responsibility exists with regard to the vehicle concerned and unless the owner's registration plate has on or prior to the date of termination of insurance been surrendered to the Division by surrender to an agent or representative of the Division designated by the Commissioner, or depositing the same in the United States mail, addressed to the Division of Motor Vehicles, Raleigh, North Carolina, the Division shall revoke the vehicle's registration for 30 days.

In no case shall any vehicle, the registration of which has been revoked for failure to have financial responsibility, be reregistered in the name of the registered owner, spouse, or any child of the spouse, or any child of such owner within less than 30 days after the date of receipt of the registration plate by the Division of Motor Vehicles, except that a spouse living separate and apart from the registered owner may register such vehicle immediately in such spouse's name. Additionally, as a condition precedent to the reregistration of the vehicle by the registered owner, spouse, or any child of the spouse, or any child of such owner, except a spouse living separate and apart from the registered owner, the payment of a restoration fee of fifty dollars (\$50.00) and the appropriate fee for a new registration plate is required. Any person, firm or corporation failing to give notice of termination shall be subject to a civil penalty of two hundred dollars (\$200.00) to be assessed by the Commissioner of Insurance upon a finding by the Commissioner of Insurance that good cause is not shown for such failure to give notice of termination to the Division.

(f) The Commissioner shall administer and enforce the provisions of this Article and may make rules and regulations necessary for its administration and shall provide for hearings upon request of persons aggrieved by orders or acts of the Commissioner under the provisions of this Article.

(g) Penalties. — The clear proceeds of all civil penalties, civil forfeitures, and civil fines that are collected by the Department of Transportation pursuant to this section shall be remitted to the Civil Penalty and Forfeiture Fund in accordance with G.S. 115C-457.2.

(h) Notwithstanding the penalty and restoration fee provisions of this section, any monetary penalty or restoration fee shall be waived for any person who, at the time of notification of a lapse in coverage, was deployed as a member of the United States Armed Forces outside of the continental United States for a total of 45 or more days. In addition, no insurance points under the Safe Driver Incentive Plan shall be assessed for any violation for which a monetary penalty or restoration fee is waived pursuant to this subsection. Any person qualifying under this subsection shall:

- (1) Have an affirmative defense to any criminal charge based upon the failure to return any registration card or registration plate to the Division;
- (2) Upon reregistration, receive without cost from the Division all necessary registration cards or plates; and
- (3) Upon notice of revocation, be permitted to transfer the vehicle's registration immediately to his or her spouse, child, or spouse's child, notwithstanding the provisions of subsection (e) of this section. (1957,



c. 1393, s. 1; 1959, c. 1277, s. 1; 1963, c. 964, s. 1; 1965, c. 272; c. 1136, ss. 1, 2; 1967, c. 822, ss. 1, 2; c. 857, ss. 1, 2; 1971, c. 477, ss. 1, 2; c. 924; 1975, c. 302; c. 348, ss. 1-3; c. 716, s. 5; 1979, 2nd Sess., c. 1279, s. 1; 1981, c. 690, s. 25; 1983, c. 761, s. 146; 1983 (Reg. Sess., 1984), c. 1069, ss. 1, 2; 1985, c. 666, s. 84; 1991, c. 402, s. 1; 1999-330, s. 4; 1999-452, s. 20; 2000-140, s. 100(a); 2000-155, s. 20; 2005-276, s. 6.37(p); 2006-213, s. 5; 2006-264, s. 38.)

**Effect of Amendments. —**

Session Laws 2006-213, s. 5, effective July 1, 2008, and applicable to lapses occurring on or after that date, repealed subsection (e).

Session Laws 2006-264, s. 38, effective August 27, 2006, added subsection (h).

**§ 20-309.2. (Effective July 1, 2008) Insurer shall notify Division of actions on insurance policies.**

(a) Notice Required. — An insurer shall notify the Division upon any of the following with regard to a motor vehicle liability policy:

- (1) Issues a new or replacement policy.
- (2) Terminates a policy, either by cancellation or failure to renew, unless the same insurer issues a replacement policy complying with this Article at the same time the insurer terminates the old policy and no lapse in coverage results.
- (3) Reinstates a policy after the insurer has notified the Division of a cancellation or termination.

(b) Time Period. — An insurer shall notify the Division as required by subsection (a) of this section within 20 business days.

(c) Form of Notice. — Any insurer with twenty-five million dollars (\$25,000,000) or more in annual vehicle insurance premium volume shall submit the notices required under this section by electronic means. All other insurers may submit the notices required under this section by either paper or electronic means.

(d) Trade Secret Protection. — The names of insureds and the beginning date and termination date of insurance coverage provided to the Division by an insurer under this section constitutes a designated trade secret under G.S. 132-1.2.

(e) Civil Penalty. — The Commissioner of Insurance may assess a civil penalty of two hundred dollars (\$200.00) against an insurer that fails to notify the Division as required by this section. The Commissioner may waive the penalty if the insurer establishes good cause for the failure. (2006-213, s. 1.)

**Editor's Note. —** Session Laws 2006-213, s. 6, makes this section effective July 1, 2008, and

applicable to lapses occurring on or after that date.

**§ 20-311. (Effective July 1, 2008) Action by the Division when notified of a lapse in financial responsibility.**

(a) Action. — When the Division receives evidence, by a notice of termination of a motor vehicle liability policy or otherwise, that the owner of a motor vehicle registered or required to be registered in this State does not have financial responsibility for the operation of the vehicle, the Division shall send the owner a letter. The letter shall notify the owner of the evidence and inform the owner that the owner shall respond to the letter within 10 days of the date on the letter and explain how the owner has met the duty to have continuous

G.S. 20-311 is set out twice. See notes.

financial responsibility for the vehicle. Based on the owner's response, the Division shall take the appropriate action listed:

- (1) Division correction. — If the owner responds within the required time and the response establishes that the owner has not had a lapse in financial responsibility, the Division shall correct its records.
  - (2) Penalty only. — If the owner responds within the required time and the response establishes all of the following, the Division shall assess the owner a penalty in the amount set in subsection (b) of this section:
    - a. The owner had a lapse in financial responsibility, but the owner now has financial responsibility.
    - b. The vehicle was not involved in an accident during the lapse in financial responsibility.
    - c. The owner did not operate the vehicle during the lapse with knowledge that the owner had no financial responsibility for the vehicle.
  - (3) Penalty and revocation. — If the owner responds within the required time and the response establishes any of the following, the Division shall assess the owner a penalty in the amount set in subsection (b) of this section and revoke the registration of the owner's vehicle for the period set in subsection (c) of this section:
    - a. The owner had a lapse in financial responsibility and still does not have financial responsibility.
    - b. The owner now has financial responsibility even though the owner had a lapse, but the vehicle was involved in an accident during the lapse, the owner operated the vehicle during the lapse with knowledge that the owner had no financial responsibility for the vehicle, or both.
  - (4) Revocation pending response. — If the owner does not respond within the required time, the Division shall revoke the registration of the owner's vehicle for the period set in subsection (c) of this section. When the owner responds, the Division shall take the appropriate action listed in subdivisions (1) through (3) of this subsection as if the response had been timely.
- (b) Penalty Amount. — The following table determines the amount of a penalty payable under this section by an owner who has had a lapse in financial responsibility; the amount is based on the number of times the owner has been assessed a penalty under this section during the three-year period before the date the owner's current lapse began:
- | Number of Lapses in Previous Three Years | Penalty Amount |
|--|----------------|
| None                                     | \$50.00        |
| One                                      | \$100.00       |
| Two or More                              | \$150.00       |
- (c) Revocation Period. — The revocation period for a revocation based on a response that establishes that a vehicle owner does not have financial responsibility is indefinite and ends when the owner obtains financial responsibility or transfers the vehicle to an owner who has financial responsibility. The revocation period for a revocation based on a response that establishes the occurrence of an accident during a lapse in financial responsibility or the knowing operation of a vehicle without financial responsibility is 30 days. The revocation period for a revocation based on failure of a vehicle owner to respond is indefinite and ends when the owner responds.
- (d) Revocation Notice. — When the Division revokes the registration of an owner's vehicle, it shall notify the owner of the revocation. The notice shall inform the owner of the following:



**G.S. 20-311 is set out twice. See notes.**

- (1) That the owner shall return the vehicle's registration plate and registration card to the Division, if the owner has not done so already, and that failure to do so is a Class 2 misdemeanor under G.S. 20-45.
  - (2) That the vehicle's registration plate and registration card are subject to seizure by a law enforcement officer.
  - (3) That the registration of the vehicle cannot be renewed while the registration is revoked.
  - (4) That the owner shall pay any penalties assessed, a restoration fee, and the fee for a registration plate when the owner applies to the Division to register a vehicle whose registration was revoked.
- (e) **Registration After Revocation.** — A vehicle whose registration has been revoked may not be registered during the revocation period in the name of the owner, a child of the owner, the owner's spouse, or a child of the owner's spouse. This restriction does not apply to a spouse who is living separate and apart from the owner. At the end of a revocation period, a vehicle owner who has financial responsibility may apply to register a vehicle whose registration was revoked. The owner shall pay any penalty assessed, a restoration fee of fifty dollars (\$50.00), and the fee for a registration plate. (1957, c. 1393, s. 3; 1959, c. 1277, s. 2; 1963, c. 964, s. 4; 1965, c. 205; c. 1136, s. 3; 1967, c. 822, s. 3; c. 857, s. 4; 1971, c. 477, s. 3; 1975, c. 348, s. 4; c. 716, s. 5; 1979, 2nd Sess., c. 1279, s. 2; 1983, c. 761, s. 147; 1983 (Reg. Sess., 1984), c. 1069, s. 2; 2006-213, s. 2.)

**Section Set Out Twice.** — The section above is effective July 1, 2008. For the section as in effect until July 1, 2008, see the main volume.

**Effect of Amendments.** — Session Laws 2006-213, s. 2, effective July 1, 2008, and applicable to lapses occurring on or after that date, rewrote the section.

**§ 20-312. (Repealed effective July 1, 2008) Failure of owner to deliver certificate of registration and plates after revocation; notice of revocation.**

**Section Repealed Effective July 1, 2008.** — This section is repealed effective July 1, 2008, and applicable to lapses occurring on or after that date, by Session Laws 2006-213, s. 5.

**§ 20-316. (Effective July 1, 2008) Divisional hearings upon lapse of liability insurance coverage.**

Any person whose registration plate has been revoked under G.S. 20-311 may request a hearing. Upon receipt of such request, the Division shall, as early as practical, afford an opportunity for hearing. At the hearing the duly authorized agents of the Division may administer oaths and issue subpoenas for the attendance of witnesses and the production of relevant books and documents. If it appears that continuous financial responsibility existed for the vehicle involved, or if it appears the lapse of financial responsibility is not reasonably attributable to the neglect or fault of the person whose registration plate was revoked, the Division shall withdraw its order of revocation and such person may retain the registration plate. Otherwise, the order of revocation shall be affirmed and the registration plate surrendered. (1971, c. 1218, s. 1; 1973, c. 1144, ss. 1, 2; 1975, c. 716, s. 5; 2006-213, s. 3.)

**Section Set Out Twice.** — The section above is effective July 1, 2008. For the section as in effect until July 1, 2008, see the main volume.



**Effect of Amendments.** — Session Laws 2006-213, s. 3, effective July 1, 2008, and applicable to lapses occurring on or after that date, in the first sentence, deleted “20-309(e) or”

following “under G.S.”; in the second sentence, deleted “him” preceding “an opportunity”; and in the third sentence, substituted “At the” for “Upon such.”

## § 20-316.1. (Repealed effective July 1, 2008) Notification of Division of renewal or reinstatement of policy.

**Section Repealed Effective July 1, 2008.** — This section is repealed effective July 1,

2008, and applicable to lapses occurring on or after that date, by Session Laws 2006-213, s. 5.

### ARTICLE 15.

#### *Vehicle Mileage Act.*

## § 20-348. Private civil action.

### CASE NOTES

**Plaintiff Must Elect Remedies.** — Pursuant to the doctrine of election of remedies, a party may not recover twice based on the same conduct; trial court erred in awarding the buyers in a used car purchase transaction treble

damages under both G.S. 20-348(a) and G.S. ch. 75. *Blankenship v. Town & Country Ford, Inc.*, — N.C. App. —, 622 S.E.2d 638, 2005 N.C. App. LEXIS 2616 (2005).

### ARTICLE 15A.

#### *New Motor Vehicles Warranties Act.*

## § 20-351.3. Replacement or refund; disclosure requirement.

### CASE NOTES

**Damage Caused by Non-Manufacturer Parts Were Excluded from the Manufacturer’s Express Warranty Coverage.** — Under the express warranty related to a vehicle lease, damage caused by non-manufacturer parts were excluded from the manufacturer’s express warranty coverage and thus could not have been the basis of relief under the New Motor Vehicles Warranties Act, G.S. 20-351.3; an affidavit submitted by the lessee did not

create a fact issue as to whether the maker of the device at issue was authorized by the manufacturer, as it did not indicate how affiant had personal knowledge, but, in contrast, affidavits submitted by the manufacturer stated that their information was based on the affiants’ personal knowledge. *Eugene Tucker Builders, Inc. v. Ford Motor Co.*, — N.C. App. —, 622 S.E.2d 698, 2005 N.C. App. LEXIS 2727 (2005).

## Chapter 22.

### Contracts Requiring Writing.

#### § 22-1. Contracts charging representative personally; promise to answer for debt of another.

##### CASE NOTES

- III. Promise to Answer for Debt of Another.  
A. In General.

##### III. PROMISE TO ANSWER FOR DEBT OF ANOTHER.

###### A. In General.

**Promise to Guarantee a Promissory Note.** — Creditor's complaint stated a claim

upon which relief could be granted because, pursuant to the main purpose rule, the personal representative had promised to guarantee a promissory note and thus it was not within the statute of frauds. *Terrell v. Kaplan*, 170 N.C. App. 667, 613 S.E.2d 526, 2005 N.C. App. LEXIS 1084 (2005).

#### § 22-2. Contract for sale of land; leases.

##### CASE NOTES

- III. Sufficiency of Compliance with Section.  
A. In General.

##### III. SUFFICIENCY OF COMPLIANCE WITH SECTION.

###### A. In General.

**The agreement must adequately express the intent and obligation of the parties.** —

Estoppel letter did not satisfy North Carolina's statute of frauds because the estoppel letter was signed only by plaintiff landlord, not defendant corporation, and nowhere in the letter did the corporation agree to be an assignee or ask to take over the lease by being billed or otherwise; the letter made clear that the tenant, which had been purchased by the corpora-

tion, remained as the tenant. *C & H P'ship v. Shaw Indus. Group, Inc.*, — F. Supp. 2d —, 2006 U.S. Dist. LEXIS 27231 (M.D.N.C. May 4, 2006).

###### **Latent Ambiguity in Description.** —

Summary judgment was improperly granted in an action seeking specific performance because a genuine issue of fact existed as to the statute of frauds, G.S. 22-2; there was a latent ambiguity due to the extrinsic means of identification, but a survey problem precluded judgment as a matter of law. *Wolfe v. Villines*, 169 N.C. App. 483, 610 S.E.2d 754, 2005 N.C. App. LEXIS 690 (2005).

## Chapter 22B.

### Contracts Against Public Policy.

#### ARTICLE 1.

#### *Invalid Agreements.*

### § 22B-3. Contracts with forum selection provisions.

#### CASE NOTES

##### **Contracts “Entered Into.” —**

General contractor’s claim that letters evidencing alleged debt that the general contractor owed to the judgment creditor should have been excluded from the trial court’s consideration as unenforceable under G.S. 22B-3 could not be considered on appeal; the state of the record, without any findings of fact or conclusions of law by the trial court, was such that the argument was not supported by evidence in the record. *Quantum Corporate Funding, Ltd. v. B.H. Bryan Bldg. Co.*, — N.C. App. —, 623 S.E.2d 793, 2006 N.C. App. LEXIS 187 (2006).

**Forum Selection Clause Held Unreasonable and Unjust.** — Defendants’ motion to transfer venue to Texas was denied because

application of the forum-selection clause would have been unreasonable and unjust; the case involved a contract between North Carolina corporations for the sale of an ongoing business in North Carolina, the contract was entered into in North Carolina and had been performed in North Carolina, almost all of the witnesses were located in North Carolina, and the state of North Carolina had expressed a strong interest in having local controversies settled at home. *Curtis B. Pearson Music Co. v. McFadyen Music, Inc.*, — F. Supp. 2d —, 2005 U.S. Dist. LEXIS 11196 (M.D.N.C. June 3, 2005).

**Cited in** *Simpson v. Snyder’s of Hanover, Inc.*, — F. Supp. 2d —, 2006 U.S. Dist. LEXIS 42091 (W.D.N.C. June 12, 2006).

#### ARTICLE 2.

#### *Jury Trial Waivers Unenforceable.*

### § 22B-10. Contract provisions waiving jury trial unenforceable.

#### CASE NOTES

**Bylaw Requirement Requiring Vote Before Bringing Suit.** — Trial court properly dismissed a property owners association’s suit against its developer, which asserted claims of constructive fraud and unfair and deceptive trade practices, for lack of standing on the part of the association, because the association failed to obtain a two-thirds vote of its member-

ship authorizing the suit, as was required by its bylaws; as a result, the trial court lacked subject matter jurisdiction and properly granted the developer’s motion to dismiss and motion for summary judgment. *Peninsula Prop. Owners Ass’n v. Crescent Res., LLC*, 171 N.C. App. 89, 614 S.E.2d 351, 2005 N.C. App. LEXIS 1165 (2005).



## Chapter 24.

### Interest.

#### ARTICLE 1.

#### *General Provisions.*

### § 24-1. Legal rate is eight percent.

#### CASE NOTES

**Statute of limitations for usury claim was two years;** where all details of borrowers' loan, including the interest rate, fees, and expenses, were disclosed before the closing in loan documents to the borrowers, who had the capacity and the opportunity to discover their claim but failed to do so, the statute of limitations for the borrowers' usury claim began to

run on the date of the closing of their loan. *Shepard v. Ocwen Fed. Bank, FSB*, 172 N.C. App. 475, 617 S.E.2d 61, 2005 N.C. App. LEXIS 1810 (2005).

**Cited in** *Arndt v. First Union Nat'l Bank*, 170 N.C. App. 518, 613 S.E.2d 274, 2005 N.C. App. LEXIS 1080 (2005).

#### § 24-1.1. Contract rates and fees.

#### CASE NOTES

##### **Interest Rate Held Usurious. —**

Where evidence against a check cashing business established that it executed contracts for usurious loans, it used its alternative business purpose of providing Internet access to consumers as a guise to cover this illegal activity, and no evidentiary basis existed upon which a reasonable fact-finder could reach a contrary conclusion, the State's claims of usury and violations of the Consumer Finance Act were established as a matter of law; moreover, the contracts which customers had with the business were cancelled pursuant to G.S. 75-15.1, requiring all funds collected by the business pursuant to such contracts to be refunded to the customers. *State ex rel. Cooper v. NCCS Loans, Inc.*, — N.C. App. —, 624 S.E.2d 371, 2005 N.C.

App. LEXIS 2588 (2005).

**Payment Plan In Excess of Value of Services Held Usurious. —** Reorganized check cashing companies' policy of extending an immediate cash rebate and Internet usage to its customers in exchange for a one-year commitment to make bi-weekly payments in an amount equal to five times the amount of the rebate, violated G.S. § 24-2.1, was usurious, and constituted an unfair and deceptive trade practice in violation of G.S. 75-1.1. The fact that the reorganized companies characterized the transactions as rebates or Internet service agreements was subterfuge to conceal the usurious rate of interest. *State ex rel. Cooper v. NCCS Loans, Inc.*, — N.C. App. —, 620 S.E.2d 697, 2005 N.C. App. LEXIS 2392 (2005).

### § 24-2. Penalty for usury; corporate bonds may be sold below par.

#### CASE NOTES

#### I. General Consideration.

##### **I. GENERAL CONSIDERATION.**

**Applicability To Check Cashing Business That Charged Usurious Interest Rates. —** Where evidence against a check cashing business established that it executed contracts for usurious loans, it used its alterna-

tive business purpose of providing Internet access to consumers as a guise to cover this illegal activity, and no evidentiary basis existed upon which a reasonable fact-finder could reach a contrary conclusion, the State's claims of usury and violations of the Consumer Finance Act were established as a matter of law; more-

over, the contracts which customers had with the business were cancelled pursuant to G.S. 75-15.1, requiring all funds collected by the business pursuant to such contracts to be re-

funded to the customers. *State ex rel. Cooper v. NCCS Loans, Inc.*, — N.C. App. —, 624 S.E.2d 371, 2005 N.C. App. LEXIS 2588 (2005).

## § 24-2.1. Transactions governed by Chapter.

### CASE NOTES

**Cited** in *State ex rel. Cooper v. NCCS Loans, Inc.*, — N.C. App. —, 624 S.E.2d 371, 2005 N.C. App. LEXIS 2588 (2005).

## § 24-5. Interest on judgments.

### CASE NOTES

- I. In General.
- IV. Prejudgment Interest.

#### I. IN GENERAL.

##### **Application of Section.** —

Superior court erred by ordering a city to pay postjudgment interest under G.S. 24-5(b) because the statute was not applicable as the functions in which the city engaged, the enforcement of state and municipal traffic laws and the management of the proceeds collected for violations of the laws, were governmental functions. *Shavitz v. City of High Point*, — N.C. App. —, 630 S.E.2d 4, 2006 N.C. App. LEXIS 1080 (2006).

**Interest Could Not be Awarded in Action Against County.** — When a county was required to refund “school impact fees” improperly imposed upon new residential construction, it was improper to require it to pay interest on the fees. Postjudgment interest could not be awarded against the state or its subdivisions unless authorized by statute or contract. *Durham Land Owners Ass’n v. County of Durham*, — N.C. App. —, 630 S.E.2d 200, 2006 N.C. App. LEXIS 1187 (2006).

#### IV. PREJUDGMENT INTEREST.

##### **Recovery of Interest Under Subsection (b).** —

In a wrongful death action based on the medical specialist’s malpractice, the trial court did not err in requiring the specialist to pay all pre-judgment interest and costs; even if the

claim of error had been preserved for appeal, there was no error because the trial court properly determined costs and interest before entitling the specialist to set-off for the settlement amount involving the other treating doctor, as G.S. 24-5(b) required that the pre-judgment interest be awarded before the set-off was given for the settlement amount. *Boykin v. Kim*, 174 N.C. App. 278, 620 S.E.2d 707, 2005 N.C. App. LEXIS 2396 (2005).

##### **Treble Damages.** —

In a case arising from the termination of an employee, pre-judgment interest should not have been awarded based on treble damages arising from a violation of G.S. 75-1.1 due to a breach of contract; rather, the pre-judgment interest should have been awarded on the actual damages for breach of contract. *Johnson v. Colonial Life & Accident Ins. Co.*, 173 N.C. App. 365, 618 S.E.2d 867, 2005 N.C. App. LEXIS 2015 (2005).

##### **Arbitration Proceedings.** —

Trial court did not impermissibly modify arbitration award under G.S. 1-569.24 when it calculated prejudgment interest under G.S. 24-5(b) but merely enforced the award as written, since both the arbitration agreement as understood between the parties and the arbitration award as drafted by the arbitrator contemplated an award of prejudgment interest. *Lovin v. Byrd*, — N.C. App. —, 631 S.E.2d 58, 2006 N.C. App. LEXIS 1395 (2006).

## § 24-10. Maximum fees on loans secured by real property.

### CASE NOTES

##### **Statute of Limitations.** —

Statute of limitations for usury claim was

two years; where all details of borrowers’ loan, including the interest rate, fees, and expenses,

were disclosed before the closing in loan documents to the borrowers, who had the capacity and the opportunity to discover their claim but failed to do so, the statute of limitations for the borrowers' usury claim began to run on the date of the closing of their loan. *Shepard v. Ocwen Fed. Bank, FSB*, 172 N.C. App. 475, 617 S.E.2d 61, 2005 N.C. App. LEXIS 1810 (2005).

Plaintiffs' claims against a trust company

and its trustee under G.S. 24-10 failed where the statute of limitations for the action began to accrue when plaintiffs closed on their property and as that was more than four years prior to the filing of the action, the statute of limitations in G.S. 1-52(2)-(3) had expired. *Skinner v. Preferred Credit*, 172 N.C. App. 407, 616 S.E.2d 676, 2005 N.C. App. LEXIS 1806 (2005).



## Chapter 25.

### Uniform Commercial Code.

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##### General Provisions.

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- 25-1-201. General definitions.
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- 25-2A-207. [Repealed.]

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- 25-7-503. Document of title to goods defeated in certain cases.
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- 25-9-310. When filing required to perfect security interest or agricultural lien; security interests and agricultural liens to which filing provisions do not apply.
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- 25-9-601. Rights after default; judicial enforcement; consignor or buyer of accounts, chattel paper, payment intangibles, or promissory notes.

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## ARTICLE 1.

*General Provisions.*

(Revised)

## PART 1.

## GENERAL PROVISIONS.

## § 25-1-101. Short titles.

(a) This Chapter may be cited as the Uniform Commercial Code.

(b) This Article may be cited as Uniform Commercial Code — General Provisions. (1965, c. 700, s. 1; 2006-112, s. 1.)

**Editor's Note.** — Session Laws 2006-112, s. 1, effective October 1, 2006, rewrote Article 1 of Chapter 25 of the General Statutes. At the end of Article 1 are tables showing comparable sections and their disposition in new Article 1. Where appropriate, historical citations to sections of former Article 1 have been placed under corresponding sections of revised Article 1.

Session Laws 2006-112, s. 59, provides: "Subparts A and B of Part II of this act apply to a document of title that is issued or a bailment that arises on or after the effective date of this act. Subparts A and B of Part II of this act do not apply to a document of title that is issued or a bailment that arises before the effective date of this act even if the document of title or bailment would be subject to this act if the document of title had been issued or bailment had arisen on or after the effective date of this act. Subparts A and B of Part II of this act do not apply to a right of action that has accrued before the effective date of this act."

Session Laws 2006-112, s. 60, provides: "A document of title issued or a bailment that arises before the effective date of this act and the rights, obligations, and interests flowing from that document or bailment are governed by any statute amended or repealed by this act

as if amendment or repeal had not occurred and may be terminated, completed, consummated, or enforced under that statute."

Session Laws 2006-112, s. 61, provides: "The Revisor of Statutes shall cause to be printed along with this act all relevant portions of the official comments to Uniform Commercial Code Revised Article 1 and Uniform Commercial Code Revised Article 7 and all explanatory comments of the drafters of this act as the Revisor deems appropriate."

**Legal Periodicals.** — For symposium on the Uniform Commercial Code in North Carolina, see 44 N.C.L. Rev. 525 (1966).

For note on choice of law rules in North Carolina, see 48 N.C.L. Rev. 243 (1970).

For survey of 1980 commercial law, see 59 N.C.L. Rev. 1076 (1981).

For symposium on the North Carolina Commercial Code, see 18 Wake Forest L. Rev. 161 (1982).

For note, "Real Estate Finance—Subordination Causes: North Carolina Subordinates Substance to Form—MCB Ltd. v. McGowan," see 23 Wake Forest L. Rev. 575 (1988).

For comment, "Is it a Sale or a Lease?: The Implications of Article 2A and Revised U.C.C. Section 1-201(37) in North Carolina," see 18 N.C. Cent. L.J. 187 (1989).

## CASE NOTES

**Cited** in Szabo Food Serv., Inc. v. Balentine's, Inc., 285 N.C. 452, 206 S.E.2d 242 (1974); Little v. County of Orange, 31 N.C. App. 495, 229 S.E.2d 823 (1976); American Clipper Corp. v. Howerton, 51 N.C. App. 539, 277 S.E.2d 136 (1981); Gillespie v. DeWitt, 53 N.C. App. 252,

280 S.E.2d 736 (1981); Parker Marking Sys. v. Diagraph-Bradley Indus., Inc., 80 N.C. App. 177, 341 S.E.2d 92 (1986); Wohlfahrt v. Schneider, 82 N.C. App. 69, 345 S.E.2d 448 (1986).

## § 25-1-102. Scope of Article.

Except as provided in G.S. 25-1-301, this Article applies to a transaction to the extent that it is governed by another Article of this Chapter. (2006-112, s. 1.)

### NORTH CAROLINA COMMENT

The General Statutes Commission added the reference to G.S. 25-1-301 to make applicable that section's choice of law rules to a transaction that is not subject to the Uniform Commercial Code as enacted in this State but is gov-

erned by the Uniform Commercial Code as enacted in one or more other states with contacts to the transaction, as to which North Carolina law would not apply under G.S. 25-1-301.

## § 25-1-103. Construction of this Chapter to promote its purposes and policies; applicability of supplemental principles of law.

(a) This Chapter shall be liberally construed and applied to promote its underlying purposes and policies, which are:

- (1) To simplify, clarify, and modernize the law governing commercial transactions;
- (2) To permit the continued expansion of commercial practices through custom, usage, and agreement of the parties; and
- (3) To make uniform the law among the various jurisdictions.

(b) Unless displaced by the particular provisions of this Chapter, the principles of law and equity, including the law merchant and the law relative to capacity to contract, principal and agent, estoppel, fraud, misrepresentation, duress, coercion, mistake, bankruptcy, and other validating or invalidating cause supplement its provisions. (1917, c. 37, s. 56; C.S., s. 4039; 1941, c. 353, s. 18; G.S., s. 55-98; 1955, c. 1371, s. 2; 1965, c. 700, s. 1; 2006-112, s. 1.)

**Legal Periodicals.** — For note on choice of law rules in North Carolina, see 48 N.C.L. Rev. 243 (1970).

For article on contract modification under Article 2, see 59 N.C.L. Rev. 335 (1981).

For note on promissory estoppel as regards subcontractors' liability in construction bidding

cases, in light of *Allen M. Campbell Co. v. Virginia Metal Indus., Inc.*, 708 F.2d 930 (4th Cir. 1983), see 63 N.C.L. Rev. 387 (1985).

For comment, "Return to the Conservative View of Security Agreements in Commercial Transactions," see 8 *Campbell L. Rev.* 505 (1986).

### CASE NOTES

**Editor's Note.** — *Some of the cases cited below were decided under former G.S. 25-1-102 and G.S. 25-1-103.*

**The provisions of the UCC are not exclusive** and do not preclude an action for unfair and deceptive trade practices. *United Va. Bank v. Air-Lift Assocs.*, 79 N.C. App. 315, 339 S.E.2d 90 (1986).

**Chapter 75 is applicable to commercial transactions** which are also regulated by the UCC. *United Va. Bank v. Air-Lift Assocs.*, 79 N.C. App. 315, 339 S.E.2d 90 (1986).

**Termination of Petroleum Franchise.** — The Petroleum Marketing Practices Act, 15 U.S.C. § 2806(a), did not preempt G.S. 75-1.1 or subsection (3) of this section or the common law duty of good faith dealing as they arose in

litigation involving wrongful termination of a franchise. *L.C. Williams Oil Co. v. Exxon Corp.*, 627 F. Supp. 864 (M.D.N.C. 1985).

**Use of Cases from Other Jurisdictions.** — Cases from other jurisdictions, including some opinions by referees in bankruptcy and by the federal district courts, were not necessarily authoritative in this jurisdiction, but the Court of Appeals would look to them for guidance and explanation, remembering that one of the purposes of the Uniform Commercial Code is "to make uniform the law among various jurisdictions." *Evans v. Everett*, 10 N.C. App. 435, 179 S.E.2d 120, rev'd on other grounds, 279 N.C. 352, 183 S.E.2d 109 (1971).

**A contractual provision expanding seller's damages** upon breach of the buyer will be

upheld where the contractual provision is reasonable and in good faith. *Martin v. Sheffer*, 102 N.C. App. 802, 403 S.E.2d 555 (1991).

Parties were free to shape their remedies according to their particular needs, and an expansion of the seller's remedies beyond those specified in the Uniform Commercial Code to include specific performance was neither unreasonable nor unconscionable. *Martin v. Sheffer*, 102 N.C. App. 802, 403 S.E.2d 555 (1991).

**Trust Doctrine.** — One principle made applicable by this section is the doctrine of trust pursuit, under which a cestui que trust is enabled to follow the trust funds through changes in their state and form in the hands of the trustee. *Michigan Nat'l Bank v. Flowers Mobile Homes Sales*, 26 N.C. App. 690, 217 S.E.2d 108 (1975).

**Rescission.** — Assuming without deciding that rescission remains available to a buyer as a remedy by virtue of this section, the Supreme Court gave effect to a buyer's allegation of "rescission" as an allegation of "revocation of acceptance" since that Code concept more nearly reflected the claims asserted by the buyer. *Performance Motors, Inc. v. Allen*, 280 N.C. 385, 186 S.E.2d 161 (1972).

**Supplier's failure to modify express terms of contract with distributor** could not be considered violative of the UCC's concept of good faith, as the purpose of the good faith obligation is to determine the terms to be implied in the contract when the terms are not expressly provided. *L.C. Williams Oil Co. v. Exxon Corp.*, 625 F. Supp. 477 (M.D.N.C. 1985).

## § 25-1-104. Construction against implied repeal.

This Chapter being a general act intended as a unified coverage of its subject matter, no part of it shall be deemed to be impliedly repealed by subsequent legislation if such construction can reasonably be avoided. (1965, c. 700, s. 1; 2006-112, s. 1.)

## § 25-1-105. Severability.

If any provision or clause of this Chapter or its application to any person or circumstance is held invalid, the invalidity does not affect other provisions or applications of this Chapter that can be given effect without the invalid provision or application, and to this end the provisions of this Chapter are severable. (1965, c. 700, s. 1; 2006-112, s. 1.)

## § 25-1-106. Use of singular and plural; gender.

In this Chapter, unless the statutory context otherwise requires:

- (1) Words in the singular number include the plural, and those in the plural include the singular; and
- (2) Words of any gender also refer to any other gender. (1965, c. 700, s. 1; 2006-112, s. 1.)

## § 25-1-107. Section captions.

Section captions are part of this Chapter. The subsection headings in Article 9 of this Chapter are not parts of this Chapter. (1965, c. 700, s. 1; 2000-169, s. 4; 2006-112, s. 1.)

### NORTH CAROLINA COMMENT

The General Statutes Commission added the second sentence of this section to bring forward the second sentence of former G.S. 25-1-109.

## § 25-1-108. Relation to Electronic Signatures in Global and National Commerce Act.

This Article modifies, limits, and supersedes the federal Electronic Signa-



tures in Global and National Commerce Act, 15 U.S.C. § 7001, et seq., except that nothing in this Article modifies, limits, or supersedes Section 7001(c) of that Act or authorizes electronic delivery of any of the notices described in Section 7003(b) of that Act. (2006-112, s. 1.)

## PART 2.

### GENERAL DEFINITIONS AND PRINCIPLES OF INTERPRETATION.

#### § 25-1-201. General definitions.

(a) Unless the context otherwise requires, words or phrases defined in this section, or in the additional definitions contained in other Articles of this Chapter that apply to particular Articles or Parts thereof, have the meanings stated.

(b) Subject to definitions contained in other articles of this Chapter that apply to particular articles or parts thereof:

- (1) “Action,” in the sense of a judicial proceeding, includes recoupment, counterclaim, setoff, suit in equity, and any other proceeding in which rights are determined.
- (2) “Aggrieved party” means a party entitled to pursue a remedy.
- (3) “Agreement,” as distinguished from “contract,” means the bargain of the parties in fact, as found in their language or inferred from other circumstances, including course of performance, course of dealing, or usage of trade as provided in G.S. 25-1-303.
- (4) “Bank” means a person engaged in the business of banking and includes a savings bank, savings and loan association, credit union, and trust company.
- (5) “Bearer” means a person in control of a negotiable electronic document of title or a person in possession of a negotiable instrument, negotiable tangible document of title, or certificated security that is payable to bearer or indorsed in blank.
- (6) “Bill of lading” means a document of title evidencing the receipt of goods for shipment issued by a person engaged in the business of directly or indirectly transporting or forwarding goods. The term does not include a warehouse receipt.
- (7) “Branch” includes a separately incorporated foreign branch of a bank.
- (8) “Burden of establishing” a fact means the burden of persuading the trier of fact that the existence of the fact is more probable than its nonexistence.
- (9) “Buyer in ordinary course of business” means a person that buys goods in good faith, without knowledge that the sale violates the rights of another person in the goods, and in the ordinary course from a person, other than a pawnbroker, in the business of selling goods of that kind. A person buys goods in the ordinary course if the sale to the person comports with the usual or customary practices in the kind of business in which the seller is engaged or with the seller’s own usual or customary practices. A person that sells oil, gas, or other minerals at the wellhead or minehead is a person in the business of selling goods of that kind. A buyer in ordinary course of business may buy for cash, by exchange of other property, or on secured or unsecured credit, and may acquire goods or documents of title under a preexisting contract for sale. Only a buyer that takes possession of the goods or has a right to recover the goods from the seller under Article 2 of this Chapter may be a buyer in ordinary course of business. “Buyer in

ordinary course of business” does not include a person that acquires goods in a transfer in bulk or as security for or in total or partial satisfaction of a money debt.

- (10) “Conspicuous,” with reference to a term, means so written, displayed, or presented that a reasonable person against which it is to operate ought to have noticed it. Whether a term is “conspicuous” or not is a decision for the court. Conspicuous terms include the following:
  - a. A heading in capitals equal to or greater in size than the surrounding text, or in contrasting type, font, or color to the surrounding text of the same or lesser size; and
  - b. Language in the body of a record or display in larger type than the surrounding text, or in contrasting type, font, or color to the surrounding text of the same size, or set off from surrounding text of the same size by symbols or other marks that call attention to the language.
- (11) “Consumer” means an individual who enters into a transaction primarily for personal, family, or household purposes.
- (12) “Contract,” as distinguished from “agreement,” means the total legal obligation that results from the parties’ agreement as determined by this Chapter as supplemented by any other applicable laws.
- (13) “Creditor” includes a general creditor, a secured creditor, a lien creditor, and any representative of creditors, including an assignee for the benefit of creditors, a trustee in bankruptcy, a receiver in equity, and an executor or administrator of an insolvent debtor’s or assignor’s estate.
- (14) “Defendant” includes a person in the position of defendant in a counterclaim, cross-claim, or third-party claim.
- (15) “Delivery”, with respect to an electronic document of title means voluntary transfer of control and with respect to an instrument, a tangible document of title, or chattel paper, means voluntary transfer of possession.
- (16) “Document of title” means a record (i) that in the regular course of business or financing is treated as adequately evidencing that the person in possession or control of the record is entitled to receive, control, hold, and dispose of the record and the goods the record covers and (ii) that purports to be issued by or addressed to a bailee and to cover goods in the bailee’s possession which are either identified or are fungible portions of an identified mass. The term includes a bill of lading, transport document, dock warrant, dock receipt, warehouse receipt, and order for delivery of goods. An electronic document of title means a document of title evidenced by a record consisting of information stored in an electronic medium. A tangible document of title means a document of title evidenced by a record consisting of information that is inscribed on a tangible medium.
- (17) “Fault” means a default, breach, or wrongful act or omission.
- (18) “Fungible goods” means:
  - a. Goods of which any unit, by nature or usage of trade, are the equivalent of any other like unit; or
  - b. Goods that by agreement are treated as equivalent.
- (19) “Genuine” means free of forgery or counterfeiting.
- (20) “Good faith,” except as otherwise provided in Article 5 of this Chapter, means honesty in fact and the observance of reasonable commercial standards of fair dealing.
- (21) “Holder” means:
  - a. The person in possession of a negotiable instrument that is payable either to bearer or to an identified person that is the person in possession;



- b. The person in possession of a negotiable tangible document of title if the goods are deliverable either to bearer or to the order of the person in possession; or
  - c. The person in control of a negotiable electronic document of title.
- (22) "Insolvency proceeding" includes an assignment for the benefit of creditors or other proceeding intended to liquidate or rehabilitate the estate of the person involved.
- (23) "Insolvent" means:
- a. Having generally ceased to pay debts in the ordinary course of business other than as a result of bona fide dispute;
  - b. Being unable to pay debts as they become due; or
  - c. Being insolvent within the meaning of federal bankruptcy law.
- (24) "Money" means a medium of exchange currently authorized or adopted by a domestic or foreign government. The term includes a monetary unit of account established by an intergovernmental organization or by agreement between two or more countries.
- (25) "Organization" means a person other than an individual.
- (26) "Party," as distinguished from "third party," means a person that has engaged in a transaction or made an agreement subject to this Chapter.
- (27) "Person" means an individual, corporation, business trust, estate, trust, partnership, limited liability company, association, joint venture, government, governmental subdivision, agency, or instrumentality, public corporation, or any other legal or commercial entity.
- (28) "Present value" means the amount as of a date certain of one or more sums payable in the future, discounted to the date certain by use of either an interest rate specified by the parties if that rate is not manifestly unreasonable at the time the transaction is entered into or, if an interest rate is not so specified, a commercially reasonable rate that takes into account the facts and circumstances at the time the transaction is entered into.
- (29) "Purchase" means taking by sale, lease, discount, negotiation, mortgage, pledge, lien, security interest, issue or reissue, gift, or any other voluntary transaction creating an interest in property.
- (30) "Purchaser" means a person that takes by purchase.
- (31) "Record" means information that is inscribed on a tangible medium or that is stored in an electronic or other medium and is retrievable in perceivable form.
- (32) "Remedy" means any remedial right to which an aggrieved party is entitled with or without resort to a tribunal.
- (33) "Representative" means a person empowered to act for another, including an agent, an officer of a corporation or association, and a trustee, executor, or administrator of an estate.
- (34) "Right" includes remedy.
- (35) "Security interest" means an interest in personal property or fixtures which secures payment or performance of an obligation. "Security interest" includes any interest of a consignor and a buyer of accounts, chattel paper, a payment intangible, or a promissory note in a transaction that is subject to Article 9 of this Chapter. "Security interest" does not include the special property interest of a buyer of goods on identification of those goods to a contract for sale under G.S. 25-2-401, but a buyer may also acquire a "security interest" by complying with Article 9 of this Chapter. Except as otherwise provided in G.S. 25-2-505, the right of a seller or lessor of goods under Article 2 or 2A of this Chapter to retain or acquire possession of the goods is not a "security interest," but a seller or lessor may also acquire a



“security interest” by complying with Article 9 of this Chapter. The retention or reservation of title by a seller of goods notwithstanding shipment or delivery to the buyer under G.S. 25-2-401 is limited in effect to a reservation of a “security interest.” Whether a transaction in the form of a lease creates a “security interest” is determined pursuant to G.S. 25-1-203.

- (36) “Send” in connection with a writing, record, or notice means:
  - a. To deposit in the mail or deliver for transmission by any other usual means of communication with postage or cost of transmission provided for and properly addressed and, in the case of an instrument, to an address specified thereon or otherwise agreed, or if there be none to any address reasonable under the circumstances; or
  - b. In any other way to cause to be received any record or notice within the time it would have arrived if properly sent.
- (37) “Signed” includes using any symbol executed or adopted with present intention to adopt or accept a writing.
- (38) “State” means a State of the United States, the District of Columbia, Puerto Rico, the United States Virgin Islands, or any territory or insular possession subject to the jurisdiction of the United States.
- (39) “Surety” includes a guarantor or other secondary obligor.
- (40) “Term” means a portion of an agreement that relates to a particular matter.
- (41) “Unauthorized signature” means a signature made without actual, implied, or apparent authority. The term includes a forgery.
- (42) “Warehouse receipt” means a document of title issued by a person engaged in the business of storing goods for hire.
- (43) “Writing” includes printing, typewriting, or any other intentional reduction to tangible form. “Written” has a corresponding meaning. (1899, c. 733, ss. 25, 56, 191; Rev., ss. 2173, 2205, 2340, 3032; 1917, c. 37, ss. 4, 5, 58; 1919, c. 65, ss. 1, 10, 32, 42; c. 290; C.S., ss. 280, 283, 292, 314, 2976, 3005, 3037, 4037, 4044, 4046; 1941, c. 353, s. 22; G.S., s. 55-102; 1955, c. 1371, s. 2; 1961, c. 574; 1965, c. 700, s. 1; 1967, c. 562, s. 1; 1975, c. 862, ss. 2, 3; 1989 (Reg. Sess., 1990), c. 1024, s. 8(a)-(c); 1993, c. 463, s. 2; 1995, c. 232, s. 3; 2000-169, ss. 5-7; 2006-112, ss. 1, 26.)

**Editor’s Note.** — Session Laws 2006-112, s. 59, provides: “Subparts A and B of Part II of this act apply to a document of title that is issued or a bailment that arises on or after the effective date of this act. Subparts A and B of Part II of this act do not apply to a document of title that is issued or a bailment that arises before the effective date of this act even if the document of title or bailment would be subject to this act if the document of title had been issued or bailment had arisen on or after the effective date of this act. Subparts A and B of Part II of this act do not apply to a right of action that has accrued before the effective date of this act.”

**Effect of Amendments.** — Session Laws 2006-112, s. 26, effective October 1, 2006, in subsection (b), inserted “a person in control of a negotiable electronic document of title or” and “negotiable tangible” in subdivision (5), inserted “of title” and “directly or indirectly” in the first sentence and added the second sen-

tence of subdivision (6), inserted “to an electronic document of title means voluntary transfer of control and with respect” and “a tangible” in subdivision (15), rewrote subdivision (16), inserted “negotiable tangible” in subdivision (21)b., added subdivision (21)c., and made minor stylistic changes, and substituted “document of title” for “receipt” in subdivision (42).

**Legal Periodicals.** — For article concerning liens on personal property not governed by the Uniform Commercial Code, see 44 N.C.L. Rev. 322 (1966).

For article on waiver of defense clauses in consumer contracts, see 48 N.C.L. Rev. 545 (1970).

For note on consignments and the consignor’s duty to satisfy public notice requirements, see 13 Wake Forest L. Rev. 507 (1977).

For note on commercial reasonableness and the public sale in North Carolina, see 17 Wake Forest L. Rev. 153 (1981).

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View of Security Agreements in Commercial Transactions," see 8 Campbell L. Rev. 505 (1986).

For article, "Court Adjustment of Long-Term Contracts: An Analysis Under Modern Contract Law," see 1987 Duke L.J. 1.

For article, "Public Filing and Personal Prop-

erty Leases: Questions of Definition and Doctrine," see 22 Wake Forest L. Rev. 425 (1987).

For comment, "Is it a Sale or a Lease?: The Implications of Article 2A and Revised U.C.C. Section 1-201(37) in North Carolina," see 18 N.C. Cent. L.J. 187 (1989).

## CASE NOTES

**Editor's Note.** — *Most of the cases cited below were decided under former G.S. 25-1-201.*

**The UCC protects buyers in the ordinary course of business** from the claims of predecessors in interest who place items into the stream of commerce without warning that they subsequently will claim ownership. *North Carolina Nat'l Bank v. Robinson*, 78 N.C. App. 1, 336 S.E.2d 666 (1985).

**"Conspicuousness".** — Determination on conspicuousness is a question of law for the court. *Billings v. Joseph Harris Co.*, 27 N.C. App. 689, 220 S.E.2d 361 (1975), *aff'd*, 290 N.C. 502, 226 S.E.2d 321 (1976); *Angola Farm Supply & Equip. Co. v. FMC Corp.*, 59 N.C. App. 272, 296 S.E.2d 503 (1982).

Language on herbicide to the effect that seller made "no other express or implied warranty of fitness or merchantability or any other express or implied warranty," which was in darker and larger type than the other language on the label, was "conspicuous," as defined by subdivision (10) of this section, and served to effectively disclaim any implied warranties of merchantability or fitness. *Tyson v. Ciba-Geigy Corp.*, 82 N.C. App. 626, 347 S.E.2d 473 (1986).

Forum selection clause was conspicuous where, although the font used in the forum selection clause could have been made larger, the forum selection language was found in two places on the front page of an agreement, both times in bold print and underlined. *Price v. Leasecomm Corp.*, — F. Supp. 2d —, 2004 U.S. Dist. LEXIS 5467 (M.D.N.C. Mar. 31, 2004).

**"Delivery".** — Delivery of a deed or instrument to the named payee, subject to the control of the person delivering it or subject to an agreed condition, does not constitute delivery in the eyes of the law. *State v. First Resort Properties*, 81 N.C. App. 499, 344 S.E.2d 354 (1986).

**"Send."** — Creditor's effort to notify debtors of private sale by sending a first class letter to debtors' last known address was reasonable where there was no evidence that the letter was returned, or that the debtors did not receive such notice, or that the debtors had provided creditor with a new address. *In re Marshall*, 219 Bankr. 687 (Bankr. M.D.N.C. 1997).

**Good faith ("honesty in fact") and "notice,"** although not synonymous, are inherently intertwined. Therefore, the relation between

the two cannot be ignored. *Branch Banking & Trust Co. v. Gill*, 293 N.C. 164, 237 S.E.2d 21 (1977).

The same facts which call a party's "good faith" into question may also give him "notice of a defense." *Branch Banking & Trust Co. v. Gill*, 293 N.C. 164, 237 S.E.2d 21 (1977).

Albeit "good faith" is literally defined as "honesty in fact in the conduct or transaction concerned," the Uniform Commercial Code does not permit parties to intentionally keep themselves in ignorance of facts which, if known, would defeat their rights in a negotiable document of title. *Branch Banking & Trust Co. v. Gill*, 293 N.C. 164, 237 S.E.2d 21 (1977).

**Honesty in Fact Required of Supplier.** — A good faith duty requiring a supplier of products to disclose its internal strategies to distributors was inappropriate, as the breadth of good faith required was limited to the "honesty in fact" definition of this section, which governed distributor's claim under G.S. 25-1-203, rather than the more expansive "reasonable commercial standards of fair dealing in the trade" definition of G.S. 25-2-103. *L.C. Williams Oil Co. v. Exxon Corp.*, 625 F. Supp. 477 (M.D.N.C. 1985).

**"Holder".** — The definition of "holder" in subdivision (20) of this section is applicable to G.S. 45-21.16. *In re Cooke*, 37 N.C. App. 575, 246 S.E.2d 801 (1978).

Ownership is not indispensable to holdership. *In re Cooke*, 37 N.C. App. 575, 246 S.E.2d 801 (1978).

Where a negotiable instrument is made payable to order, one becomes a holder of the instrument when it is properly endorsed and delivered to him, and mere possession of a note payable to order does not suffice to prove ownership or holder status. *Econo-Travel Motor Hotel Corp. v. Taylor*, 301 N.C. 200, 271 S.E.2d 54 (1980).

There was ample evidence that the beneficiaries of a deed of trust were holders of a valid debt where the notes secured by the deed of trust were payable to the beneficiaries or order, the notes were not endorsed, and the notes were in the possession of the original beneficiary-payees. *In re Cooke*, 37 N.C. App. 575, 246 S.E.2d 801 (1978).

As evidence that a plaintiff is holder of a note is an essential element of a cause of action upon



such note, the defendant was entitled to demand strict proof of this element. The incorporation by reference into the complaint of a copy of the note was not in itself sufficient evidence to establish for purposes of summary judgment that the plaintiff was the holder of the note. *Liles v. Myers*, 38 N.C. App. 525, 248 S.E.2d 385 (1978).

It is the fact of possession which is significant in determining whether a person is a holder, and the absence of possession defeats that status. *Connolly v. Potts*, 63 N.C. App. 547, 306 S.E.2d 123 (1983).

Bank which had cancelled and released a promissory note because of a clerical error, and therefore was not a "holder" in the traditional sense, could still meet the burden required by this section by showing that debtor never satisfied the underlying obligation. *G.E. Capital Mtg. Servs. v. Neely*, 135 N.C. App. 187, 519 S.E.2d 553 (1999).

**"Money".** — Debtors' interest in unearned portion of a retainer paid to a law firm was a general intangible and as such, a creditor with a properly perfected security interest had a lien on the balance of the retainer fund; in reaching its determination that the retainer was a general intangible, the bankruptcy court reasoned that the debtors' interest in the retainer was neither a deposit account (because the law firm was not a bank or financial institution) or "money" (because the debtors had only the right to receive a refund on the unearned portion of the retainer fund). *In re E-Z Serve Convenience Stores, Inc.*, 299 B.R. 126, 2003 Bankr. LEXIS 1358 (Bankr. M.D.N.C. 2003), *aff'd*, 318 Bankr. 637 (M.D.N.C. 2004).

**"Rights".** — The term "all rights" in an assignment included the contractual right of assignor to receive C.O.D. payment from defendant. *Gunby v. Pilot Freight Carriers, Inc.*, 82 N.C. App. 427, 346 S.E.2d 188 (1986).

**"Security Interest".** — This section defines "security interest" without reference to whether title is in the vendor or the vendee under the security agreement. *Szabo Food Serv., Inc. v. Balentine's, Inc.*, 285 N.C. 452, 206 S.E.2d 242 (1974).

Clause (b) of subsection (37) is not consistent with the fundamental proposition that to create a security interest the parties must have intended to create one. *Szabo Food Serv., Inc. v. Balentine's, Inc.*, 285 N.C. 452, 206 S.E.2d 242 (1974).

The language of a promissory note considered together with the terms and language of a financing statement may be sufficient to create a security interest in collateral owned by the debtor on the note. *Mitchell v. Rock Hill Nat'l Bank (In re Mid-Atlantic Piping Prods., Inc.)*, 24 Bankr. 314 (Bankr. W.D.N.C. 1982).

A financing statement can serve as a written security agreement to satisfy G.S. 25-9-203(1)(b). *Mitchell v. Rock Hill Nat'l Bank (In re Mid-Atlantic Piping Prods., Inc.)*, 24 Bankr. 314 (Bankr. W.D.N.C. 1982).

Article 9 of this Chapter applies to a transaction intended to create a security interest, regardless of whom the certificate lists as the owner. *Carter v. Holland (In re Carraway)*, 65 Bankr. 51 (Bankr. E.D.N.C. 1986).

**Security Interest v. Lease.** — Where a debtor could terminate her rental agreement for a VCR and a washing machine at any time with no further obligation to continue paying rent, the agreement was a "true" lease, not a security interest, under subdivision (37) of this section. *In re Frady*, 141 Bankr. 600 (Bankr. W.D.N.C. 1991).

An agreement purporting to lease equipment actually was a secured loan, where the lessee could purchase the equipment for \$1 upon termination of the lease, the total monthly lease payments approximated the purchase price, the lessor was a financing company, the lessee was not responsible for maintenance, insurance, taxes, and expenses, and the transaction was referred to as a loan in the parties' agreement. *L.C. Williams Oil Co. v. NAFCO Capital Corp.*, 130 N.C. App. 286, 502 S.E.2d 415 (1998).

**"Signed".** — Because of the importance placed upon financing statements, in cases dealing with the debtor's signature on financing statements the courts should apply the liberal definition of "signed" in subsection (39) of this section with caution. *Provident Fin. Co. v. Beneficial Fin. Co.*, 36 N.C. App. 401, 245 S.E.2d 510, cert. denied, 295 N.C. 549, 248 S.E.2d 728 (1978).

**"Warehouse Receipt".** — "Household Goods Descriptive Inventory" was sufficient to constitute a warehouse receipt for purposes of holding defendant moving company responsible under Art. 7 for its actions as a warehouseman where the document listed each item picked up, its condition, the owner's name, the origin loading address, and was signed and dated by defendant's authorized agent and driver. *Tate v. Action Moving & Storage, Inc.*, 95 N.C. App. 541, 383 S.E.2d 229 (1989), cert. denied, 326 N.C. 54, 389 S.E.2d 104 (1990).

**Arbitration Is Neither an "Action" nor a "Judicial Proceeding."** — By its terms the limitations period stated in G.S. 25-2-725 applies only to an "action," which, under subsection (1) is a "judicial proceeding," and an arbitration is neither an "action" nor a "judicial proceeding," but a nonjudicial, out-of-court proceeding which makes an action or judicial proceeding unnecessary. *In re Cameron*, 91 N.C. App. 164, 370 S.E.2d 704 (1988).



**§ 25-1-202. Notice; knowledge.**

(a) Subject to subsection (f) of this section, a person has “notice” of a fact if the person:

- (1) Has actual knowledge of it;
- (2) Has received a notice or notification of it; or
- (3) From all the facts and circumstances known to the person at the time in question, has reason to know that it exists.

(b) “Knowledge” means actual knowledge. “Knows” has a corresponding meaning.

(c) “Discover,” “learn,” or words of similar import refer to knowledge rather than to reason to know.

(d) A person “notifies” or “gives” a notice or notification to another person by taking such steps as may be reasonably required to inform the other person in ordinary course, whether or not the other person actually comes to know of it.

(e) Subject to subsection (f) of this section, a person “receives” a notice or notification when:

- (1) It comes to that person’s attention; or
- (2) It is duly delivered in a form reasonable under the circumstances at the place of business through which the contract was made or at another location held out by that person as the place for receipt of such communications.

(f) Notice, knowledge, or a notice or notification received by an organization is effective for a particular transaction from the time it is brought to the attention of the individual conducting that transaction and, in any event, from the time it would have been brought to the individual’s attention if the organization had exercised due diligence. An organization exercises due diligence if it maintains reasonable routines for communicating significant information to the person conducting the transaction and there is reasonable compliance with the routines. Due diligence does not require an individual acting for the organization to communicate information unless the communication is part of the individual’s regular duties or the individual has reason to know of the transaction and that the transaction would be materially affected by the information. (1899, c. 733, ss. 25, 56, 191; Rev., ss. 2173, 2205, 2340, 3032; 1917, c. 37, ss. 4, 5, 58; 1919, c. 65, ss. 1, 10, 32, 42; c. 290; C.S., ss. 280, 283, 292, 314, 2976, 3005, 3037, 4037, 4044, 4046; 1941, c. 353, s. 22; G.S., s. 55-102; 1955, c. 1371, s. 2; 1961, c. 574; 1965, c. 700, s. 1; 1967, c. 562, s. 1; 1975, c. 862, ss. 2, 3; 1989 (Reg. Sess., 1990), c. 1024, s. 8(a)-(c); 1993, c. 463, s. 2; 1995, c. 232, s. 3; 2000-169, ss. 5-7; 2006-112, s. 1.)

**§ 25-1-203. Lease distinguished from security interest.**

(a) Whether a transaction in the form of a lease creates a lease or security interest is determined by the facts of each case.

(b) A transaction in the form of a lease creates a security interest if the consideration that the lessee is to pay the lessor for the right to possession and use of the goods is an obligation for the term of the lease and is not subject to termination by the lessee, and:

- (1) The original term of the lease is equal to or greater than the remaining economic life of the goods;
- (2) The lessee is bound to renew the lease for the remaining economic life of the goods or is bound to become the owner of the goods;
- (3) The lessee has an option to renew the lease for the remaining economic life of the goods for no additional consideration or for nominal additional consideration upon compliance with the lease agreement; or

- (4) The lessee has an option to become the owner of the goods for no additional consideration or for nominal additional consideration upon compliance with the lease agreement.
- (c) A transaction in the form of a lease does not create a security interest merely because:
  - (1) The present value of the consideration the lessee is obligated to pay the lessor for the right to possession and use of the goods is substantially equal to or is greater than the fair market value of the goods at the time the lease is entered into;
  - (2) The lessee assumes risk of loss of the goods;
  - (3) The lessee agrees to pay, with respect to the goods, taxes, insurance, filing, recording, or registration fees, or service or maintenance costs;
  - (4) The lessee has an option to renew the lease or to become the owner of the goods;
  - (5) The lessee has an option to renew the lease for a fixed rent that is equal to or greater than the reasonably predictable fair market rent for the use of the goods for the term of the renewal at the time the option is to be performed; or
  - (6) The lessee has an option to become the owner of the goods for a fixed price that is equal to or greater than the reasonably predictable fair market value of the goods at the time the option is to be performed.
- (d) Additional consideration is nominal if it is less than the lessee's reasonably predictable cost of performing under the lease agreement if the option is not exercised. Additional consideration is not nominal if:
  - (1) When the option to renew the lease is granted to the lessee, the rent is stated to be the fair market rent for the use of the goods for the term of the renewal determined at the time the option is to be performed; or
  - (2) When the option to become the owner of the goods is granted to the lessee, the price is stated to be the fair market value of the goods determined at the time the option is to be performed.
- (e) The "remaining economic life of the goods" and "reasonably predictable" fair market rent, fair market value, or cost of performing under the lease agreement must be determined with reference to the facts and circumstances at the time the transaction is entered into. (1899, c. 733, ss. 25, 56, 191; Rev., ss. 2173, 2205, 2340, 3032; 1917, c. 37, ss. 4, 5, 58; 1919, c. 65, ss. 1, 10, 32, 42; c. 290; C.S., ss. 280, 283, 292, 314, 2976, 3005, 3037, 4037, 4044, 4046; 1941, c. 353, s. 22; G.S., s. 55-102; 1955, c. 1371, s. 2; 1961, c. 574; 1965, c. 700, s. 1; 1967, c. 562, s. 1; 1975, c. 862, ss. 2, 3; 1989 (Reg. Sess., 1990), c. 1024, s. 8(a)-(c); 1993, c. 463, s. 2; 1995, c. 232, s. 3; 2000-169, ss. 5-7; 2006-112, s. 1.)

**Legal Periodicals.** — For article concerning liens on personal property not governed by the Uniform Commercial Code, see 44 N.C.L. Rev. 322 (1966).

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## CASE NOTES

**Editor's Note.** — *The cases cited below were decided under former G.S. 25-1-201.*

**"Security Interest".** — This section defines "security interest" without reference to whether title is in the vendor or the vendee under the security agreement. *Szabo Food Serv., Inc. v. Balentine's, Inc.*, 285 N.C. 452, 206 S.E.2d 242 (1974).

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A financing statement can serve as a written security agreement to satisfy G.S. 25-9-203(1)(b). *Mitchell v. Rock Hill Nat'l Bank* (In re Mid-Atlantic Piping Prods., Inc.), 24 Bankr. 314 (Bankr. W.D.N.C. 1982).

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An agreement purporting to lease equipment actually was a secured loan, where the lessee could purchase the equipment for \$1 upon termination of the lease, the total monthly lease payments approximated the purchase price, the lessor was a financing company, the lessee was not responsible for maintenance, insurance, taxes, and expenses, and the transaction was referred to as a loan in the parties' agreement. *L.C. Williams Oil Co. v. NAFCO Capital Corp.*, 130 N.C. App. 286, 502 S.E.2d 415 (1998).

## § 25-1-204. Value.

Except as otherwise provided in Articles 3, 4, and 5 of this Chapter, a person gives value for rights if the person acquires them:

- (1) In return for a binding commitment to extend credit or for the extension of immediately available credit, whether or not drawn upon and whether or not a charge-back is provided for in the event of difficulties in collection;
- (2) As security for, or in total or partial satisfaction of, a preexisting claim;
- (3) By accepting delivery under a preexisting contract for purchase; or
- (4) In return for any consideration sufficient to support a simple contract. (1899, c. 733, ss. 25, 56, 191; Rev., ss. 2173, 2205, 2340, 3032; 1917, c. 37, ss. 4, 5, 58; 1919, c. 65, ss. 1, 10, 32, 42; c. 290; C.S., ss. 280, 283, 292, 314, 2976, 3005, 3037, 4037, 4044, 4046; 1941, c. 353, s. 22; G.S., s. 55-102; 1955, c. 1371, s. 2; 1961, c. 574; 1965, c. 700, s. 1; 1967, c. 562, s. 1; 1975, c. 862, ss. 2, 3; 1989 (Reg. Sess., 1990), c. 1024, s. 8(a)-(c); 1993, c. 463, s. 2; 1995, c. 232, s. 3; 2000-169, ss. 5-7; 2006-112, s. 1.)

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For note on consignments and the consignor's duty to satisfy public notice requirements, see 13 Wake Forest L. Rev. 507 (1977).

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the public sale in North Carolina, see 17 Wake Forest L. Rev. 153 (1981).

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For comment, “Is it a Sale or a Lease?: The Implications of Article 2A and Revised U.C.C.

Section 1-201(37) in North Carolina,” see 18 N.C. Cent. L.J. 187 (1989).

### CASE NOTES

**Editor’s Note.** — *The cases cited below were decided under former G.S. 25-1-201.*

**“Value.”** — Where a finance company refused to finance a vehicle because debtors failed to qualify, the finance company had no lien to assign to the creditor that ultimately extended financing and recorded its lien post-petition; the creditor’s reliance on former G.S. 25-1-

201(44) (see now G.S. 25-1-204) was misplaced because there were numerous conditions that had to be satisfied before the finance company became bound to extend credit, none of which were ever satisfied. In re Josephs, — Bankr. —, 2005 Bankr. LEXIS 1421 (Bankr. M.D.N.C. July 15, 2005).

## § 25-1-205. Reasonable time; seasonableness.

(a) Whether a time for taking an action required by this Chapter is reasonable depends on the nature, purpose, and circumstances of the action.

(b) An action is taken seasonably if it is taken at or within the time agreed or, if no time is agreed, at or within a reasonable time. (1899, c. 733, s. 193; Rev., s. 2343; C.S., s. 2978; 1965, c. 700, s. 1; 2006-112, s. 1.)

**Legal Periodicals.** — For discussion of the “reasonable notice” aspect of warranty law, in light of *Maybank v. S.S. Kresge*, 302 N.C. 129,

273 S.E.2d 681 (1981), see 61 N.C.L. Rev. 177 (1982).

## § 25-1-206. Presumptions.

Whenever this Chapter creates a “presumption” with respect to a fact, or provides that a fact is “presumed,” the trier of fact must find the existence of the fact unless and until evidence is introduced that supports a finding of its nonexistence. (1899, c. 733, ss. 25, 56, 191; Rev., ss. 2173, 2205, 2340, 3032; 1917, c. 37, ss. 4, 5, 58; 1919, c. 65, ss. 1, 10, 32, 42; c. 290; C.S., ss. 280, 283, 292, 314, 2976, 3005, 3037, 4037, 4044, 4046; 1941, c. 353, s. 22; G.S., s. 55-102; 1955, c. 1371, s. 2; 1961, c. 574; 1965, c. 700, s. 1; 1967, c. 562, s. 1; 1975, c. 862, ss. 2, 3; 1989 (Reg. Sess., 1990), c. 1024, s. 8(a)-(c); 1993, c. 463, s. 2; 1995, c. 232, s. 3; 2000-169, ss. 5-7; 2006-112, s. 1.)

## PART 3.

### TERRITORIAL APPLICABILITY AND GENERAL RULES.

## § 25-1-301. Territorial applicability; parties’ power to choose applicable law.

(a) Except as otherwise provided in this section, when a transaction bears a reasonable relation to this State and also to another state or nation the parties may agree that the law either of this State or of such other state or nation shall govern their rights and duties.

(b) In the absence of an agreement effective under subsection (a) of this section, and except as provided in subsection (c) of this section, this Chapter applies to transactions bearing an appropriate relation to this State.

(c) If one of the following provisions of this Chapter specifies the applicable law, that provision governs and a contrary agreement is effective only to the extent permitted by the law so specified:

- (c)(1) G.S. 25-2-402;
- (2) G.S. 25-2A-105 and G.S. 25-2A-106;
- (3) G.S. 25-4-102;
- (4) G.S. 25-4A-507;
- (5) G.S. 25-5-116;
- (6) G.S. 25-8-110;
- (7) G.S. 25-9-301 through G.S. 25-9-307. (1965, c. 700, s. 1; 1975, c. 862, s. 1; 1993, c. 157, s. 2; 1997-181, s. 17; 1999-73, s. 2; 2000-169, s. 3; 2004-190, s. 2; 2006-112, s. 1.)

#### NORTH CAROLINA COMMENT

The Official Comment to this section is omitted.

This section brings forward former G.S. 25-1-105, with some stylistic changes, in lieu of Section 1-301 of Revised Article 1. As of the time this Article was enacted in this State, no state that had enacted Revised Article 1 had adopted revised Section 1-301; states that have enacted Revised Article 1 have instead chosen to continue the former provision.

#### Appendix to North Carolina Comment

The following is the text of the 1999 edition of the Official Comment to former Section 1-105:

1. Subsection (1) [subsection (a)] states affirmatively the right of the parties to a multi-state transaction or a transaction involving foreign trade to choose their own law. That right is subject to the firm rules stated in the five sections [and two groups of sections] listed in subsection (2) [subsection (c)], and is limited to jurisdictions to which the transaction bears a "reasonable relation." In general, the test of "reasonable relation" is similar to that laid down by the Supreme Court in *Seeman v. Philadelphia Warehouse Co.*, 274 U.S. 403, 47 S.Ct. 626, 71 L.Ed. 1123 (1927). Ordinarily the law chosen must be that of a jurisdiction where a significant enough portion of the making or performance of the contract is to occur or occurs. But an agreement as to choice of law may sometimes take effect as a shorthand expression of the intent of the parties as to matters governed by their agreement, even though the transaction has no significant contact with the jurisdiction chosen.

2. Where there is no agreement as to the governing law, the Act is applicable to any transaction having an "appropriate" relation to any state which enacts it. Of course, the Act applies to any transaction which takes place in its entirety in a state which has enacted the Act. But the mere fact that suit is brought in a state does not make it appropriate to apply the substantive law of that state. Cases where a relation to the enacting state is not "appropriate" include, for example, those where the parties have clearly contracted on the basis of some other law, as where the law of the place of contracting and the law of the place of con-

templated performance are the same and are contrary to the law under the Code.

3. Where a transaction has significant contacts with a state which has enacted the Act and also with other jurisdictions, the question what relation is "appropriate" is left to judicial decision. In deciding that question, the court is not strictly bound by precedents established in other contexts. Thus a conflict-of-laws decision refusing to apply a purely local statute or rule of law to a particular multi-state transaction may not be valid precedent for refusal to apply the Code in an analogous situation. Application of the Code in such circumstances may be justified by its comprehensiveness, by the policy of uniformity, and by the fact that it is in large part a reformulation and restatement of the law merchant and of the understanding of a business community which transcends state and even national boundaries. Compare *Global Commerce Corp. v. Clark-Babbitt Industries, Inc.*, 239 F.2d 716, 719 (2d Cir. 1956). In particular, where a transaction is governed in large part by the Code, application of another law to some detail of performance because of an accident or geography may violate the commercial understanding of the parties.

4. The Act does not attempt to prescribe choice-of-law rules for states which do not enact it, but this section does not prevent application of the Act in a court of such a state. Common-law choice of law often rests on policies of giving effect to agreements and of uniformity of result regardless of where suit is brought. To the extent that such policies prevail, the relevant considerations are similar in such a court to those outlined above.

5. Subsection (2) [subsection (c)] spells out essential limitations on the parties' right to choose the applicable law. Especially in Article 9 parties taking a security interest or asked to extend credit which may be subject to a security interest must have sure ways to find out whether and where to file and where to look for possible existing filings.

6. Sections 9-301 through 9-307 should be consulted as to the rules for perfection of security interests and agricultural liens, the effect of perfection and non-perfection, and priority.



**Legal Periodicals.** — For note on choice of law rules in North Carolina, see 48 N.C.L. Rev. 243 (1970).

## CASE NOTES

**Editor's Note.** — *The cases cited below were decided under former G.S. 25-1-105.*

**Purpose.** — Purpose for adopting subsection (1) (now subsections (a) and (b)), was to change North Carolina's adherence to *lex loci contractus* approach, which focuses on place of entering contract and on place of performance to determine which law governs contract disputes. *Terry v. Pullman Trailmobile*, 92 N.C. App. 687, 376 S.E.2d 47 (1989).

**UCC provides its own choice of law rule,** modifying the traditional place-of-contractor-performance rule previously applied in this state. *Boudreau v. Baughman*, 322 N.C. 331, 368 S.E.2d 849 (1988).

**Section Changes Rigid Conflict of Laws Rules.** — The provisions of this section were intended to change the rigid conflict of laws rules. The old rules must give way to the requirements of the Code. *Bernick v. Jurden*, 306 N.C. 435, 293 S.E.2d 405 (1982).

This section modifies traditional conflict of law rules. *Wohlfahrt v. Schneider*, 82 N.C. App. 69, 345 S.E.2d 448 (1986).

The enactment of this section was intended to change this State's rigid choice of law rules with respect to transactions under the UCC. *Boudreau v. Baughman*, 322 N.C. 331, 368 S.E.2d 849 (1988).

**Importance of Section.** — As the North Carolina Comment which follows this section points out, this section is one of the most important preliminary sections of the UCC and it modifies this State's conflict of laws rules. *Bernick v. Jurden*, 306 N.C. 435, 293 S.E.2d 405 (1982).

**Transaction causing personal injury to a plaintiff in this State** has "an appropriate relation" to this State within the meaning of this section. *Bernick v. Jurden*, 306 N.C. 435, 293 S.E.2d 405 (1982).

**Actions Based on Breach of Warranty.** — In determining which jurisdiction's law is applicable to actions based on breach of warranty, a court no longer looks only to where the contract was made or where it was intended to be performed. Rather, it looks to whether the transaction bears an appropriate relation to the State. *Bernick v. Jurden*, 306 N.C. 435, 293 S.E.2d 405 (1982).

A state's interest in enforcing warranties involves protection of its citizens from commercial movement of defective goods into that state. *Boudreau v. Baughman*, 322 N.C. 331, 368 S.E.2d 849 (1988).

Where defendant, a North Carolina brake

manufacturer, initially distributed his product from North Carolina into Kentucky, and plaintiff's injury as a result of a malfunction of brakes supplied by defendant took place in North Carolina, North Carolina law applied to plaintiff's breach of warranty claim. *Mahoney v. Ronnie's Road Serv.*, 122 N.C. App. 150, 468 S.E.2d 279 (1996), *aff'd per curiam*, 345 N.C. 631, 481 S.E.2d 85 (1997).

**UCC is silent on the meaning of the term "appropriate relation,"** leaving its interpretation to judicial decision. *Boudreau v. Baughman*, 322 N.C. 331, 368 S.E.2d 849 (1988).

**"Appropriate Relation" Defined.** — The North Carolina Supreme Court has interpreted "appropriate relation" to mean "most significant relationship." *Boudreau v. Baughman*, 322 N.C. 331, 368 S.E.2d 849 (1988).

**Stipulation as to Law Governing Contract.** — North Carolina permits the parties to a contract to stipulate the state whose law is to govern the contract if that state has a reasonable relationship to the transaction. *Kaplan v. RCA Corp.*, 783 F.2d 463 (4th Cir. 1986).

Where defendant maintained its principal offices in New Jersey, the contract documents were prepared (and finally accepted) in New Jersey, and the antenna which was the subject of the suit was designed, engineered and tested there, New Jersey had a reasonable relationship to the transaction so as to permit the parties to stipulate that its law would govern. *Kaplan v. RCA Corp.*, 783 F.2d 463 (4th Cir. 1986).

Where the transaction bears a reasonable relation to more than one state, the UCC permits the parties to agree with respect to which state's law shall govern their rights and duties. *Wohlfahrt v. Schneider*, 82 N.C. App. 69, 345 S.E.2d 448 (1986).

Where the goods in question were located in Texas and performance was due in this State, the transaction bore a reasonable relationship to both states, and pursuant to the agreement of the parties, the substantive issues involved would be resolved by application of Texas law. Procedural issues, however, would be determined by application of the law of North Carolina. *Wohlfahrt v. Schneider*, 82 N.C. App. 69, 345 S.E.2d 448 (1986).

**State with the Most Significant Relationship to Warranty Claims.** — Where Florida was the place of sale, distribution, delivery, and use of the product, as well as the place of injury, in a products liability action, Florida



was the state with the most significant relationship to the warranty claims. *Boudreau v. Baughman*, 322 N.C. 331, 368 S.E.2d 849 (1988).

Where plaintiff was severely injured while operating tractor-trailer and where plaintiff alleged that accident was caused by defective

design, manufacture, and assembly of trailer, because sale and distribution occurred in North Carolina, trial court properly applied North Carolina law to plaintiff's breach of warranty claims. *Terry v. Pullman Trailmobile*, 92 N.C. App. 687, 376 S.E.2d 47 (1989).

## § 25-1-302. Variation by agreement.

(a) Except as otherwise provided in subsection (b) of this section or elsewhere in this Chapter, the effect of provisions of this Chapter may be varied by agreement.

(b) The obligations of good faith, diligence, reasonableness, and care prescribed by this Chapter may not be disclaimed by agreement. The parties, by agreement, may determine the standards by which the performance of those obligations is to be measured if those standards are not manifestly unreasonable. Whenever this Chapter requires an action to be taken within a reasonable time, a time that is not manifestly unreasonable may be fixed by agreement.

(c) The presence in certain provisions of this Chapter of the phrase "unless otherwise agreed," or words of similar import, does not imply that the effect of other provisions may not be varied by agreement under this section. (1899, c. 733, s. 193; Rev., s. 2343; C.S., s. 2978; 1965, c. 700, s. 1; 2006-112, s. 1.)

**Legal Periodicals.** — For discussion of the "reasonable notice" aspect of warranty law, in light of *Maybank v. S.S. Kresge*, 302 N.C. 129, 273 S.E.2d 681 (1981), see 61 N.C.L. Rev. 177 (1982).

For comment, "Return to the Conservative View of Security Agreements in Commercial Transactions," see 8 Campbell L. Rev. 505 (1986).

### CASE NOTES

**Editor's Note.** — *The cases cited below were decided under former G.S. 25-1-102.*

**Use of Cases from Other Jurisdictions.** — Cases from other jurisdictions, including some opinions by referees in bankruptcy and by the federal district courts, were not necessarily authoritative in this jurisdiction, but the Court of Appeals would look to them for guidance and explanation, remembering that one of the purposes of the Uniform Commercial Code is "to make uniform the law among various jurisdictions." *Evans v. Everett*, 10 N.C. App. 435, 179 S.E.2d 120.

**A contractual provision expanding seller's damages** upon breach of the buyer will be upheld where the contractual provision is reasonable and in good faith. *Martin v. Sheffer*, 102 N.C. App. 802, 403 S.E.2d 555 (1991).

Parties were free to shape their remedies according to their particular needs, and an expansion of the seller's remedies beyond those specified in the Uniform Commercial Code to include specific performance was neither unreasonable nor unconscionable. *Martin v. Sheffer*, 102 N.C. App. 802, 403 S.E.2d 555 (1991).

## § 25-1-303. Course of performance, course of dealing, and usage of trade.

(a) A "course of performance" is a sequence of conduct between the parties to a particular transaction that exists if:

- (1) The agreement of the parties with respect to the transaction involves repeated occasions for performance by a party; and
- (2) The other party, with knowledge of the nature of the performance and opportunity for objection to it, accepts the performance or acquiesces in it without objection.

(b) A "course of dealing" is a sequence of conduct concerning previous transactions between the parties to a particular transaction that is fairly to be regarded as establishing a common basis of understanding for interpreting their expressions and other conduct.

(c) A "usage of trade" is any practice or method of dealing having such regularity of observance in a place, vocation, or trade as to justify an expectation that it will be observed with respect to the transaction in question. The existence and scope of such a usage must be proved as facts. If it is established that such a usage is embodied in a trade code or similar record, the interpretation of the record is a question of law.

(d) A course of performance or course of dealing between the parties or usage of trade in the vocation or trade in which they are engaged or of which they are or should be aware is relevant in ascertaining the meaning of the parties' agreement, may give particular meaning to specific terms of the agreement, and may supplement or qualify the terms of the agreement. A usage of trade applicable in the place in which part of the performance under the agreement is to occur may be so utilized as to that part of the performance.

(e) Except as otherwise provided in subsection (f) of this section, the express terms of an agreement and any applicable course of performance, course of dealing, or usage of trade must be construed whenever reasonable as consistent with each other. If such a construction is unreasonable:

- (1) Express terms prevail over course of performance, course of dealing, and usage of trade;
- (2) Course of performance prevails over course of dealing and usage of trade; and
- (3) Course of dealing prevails over usage of trade.

(f) Subject to G.S. 25-2-209, a course of performance is relevant to show a waiver or modification of any term inconsistent with the course of performance.

(g) Evidence of a relevant usage of trade offered by one party is not admissible unless that party has given the other party notice that the court finds sufficient to prevent unfair surprise to the other party. (1965, c. 700, s. 1; 2006-112, s. 1.)

**Legal Periodicals.** — For article, "Stock Equipment for the Bargain in Fact: Trade Usage, Express Terms, and Consistency Under Section 1-205 of the Uniform Commercial

Code," see 64 N.C.L. Rev. 777 (1986).

For article, "Court Adjustment of Long-Term Contracts: An Analysis Under Modern Contract Law," see 1987 Duke L.J. 1.

## CASE NOTES

**Editor's Note.** — *The cases cited below were decided under former G.S. 25-1-205.*

**Trade Usage May Be Matter of Fact or Law.** — Ordinarily, the existence and the scope of a usage of trade are questions of fact to be determined by the fact finder. When, however, it is established that a usage of trade is embodied in a written code or similar writing, the interpretation of the writing becomes a question of law for the court. *Superior Foods, Inc. v. Harris-Teeter Super Mkts., Inc.*, 288 N.C. 213, 217 S.E.2d 566 (1975).

**Subsequent Conduct.** — As a course of dealing is a sequence of "previous conduct" between the parties, conduct of the parties after they entered into an agreement could not be used to show a course of dealing. *GATX*

*Logistics, Inc. v. Lowe's Cos.*, 143 N.C. App. 695, 548 S.E.2d 193, 2001 N.C. App. LEXIS 338 (2001).

**Express Contract Definition Prevailed.** — In a manufacturer's action against a seller and individuals, alleging the breach of contract and other claims, although the course of dealing between the parties as to the type of products covered by the agreement indicated a narrower definition of "product" than that asserted by the manufacturer, under former G.S. 25-1-205 the express definition in the contract prevailed because it was different from that suggested by the parties' course of dealing and it would have been unreasonable to construe the two consistently; however, while the course of performance could not be interpreted to change



the express definition of “product” in the agreement, a reasonable jury could have found that the seller provided sufficient evidence that the course of performance acted as a modification of the express definition, creating a genuine issue of material fact in the resolution of the parties’

disputes under the agreement and precluding the grant of either the seller’s or the manufacturer’s motion for summary judgment. *Interstate Narrow Fabrics, Inc. v. Century USA, Inc.*, 218 F.R.D. 455, 2003 U.S. Dist. LEXIS 18227 (M.D.N.C. 2003).

## § 25-1-304. Obligation of good faith.

Every contract or duty within this Chapter imposes an obligation of good faith in its performance and enforcement. (1965, c. 700, s. 1; 2006-112, s. 1.)

**Legal Periodicals.** — For discussion of the limitations on the obligation of good faith, see 1981, 4 Duke Law J. 619.

For note, “Check Kiting: The Inadequacy of the Uniform Commercial Code,” see 1986 Duke L.J. 728.

For note, “Real Estate Finance—Subordination Causes: North Carolina Subordinates Sub-

stance to Form—*MCB Ltd. v. McGowan*,” see 23 Wake Forest L. Rev. 575 (1988).

Application of the Uniform Commercial Code to Option Contracts for the Sale of Goods, and Implying Promises to Find Sufficient Consideration: Why and How the North Carolina Supreme Court Got It Wrong in *Fordham v. Eason*, 23 Campbell L. Rev. 49 (2000).

### CASE NOTES

**Editor’s Note.** — *The cases cited below were decided under former G.S. 25-1-203.*

**Honesty in Fact Required of Supplier.** — A good faith duty requiring a supplier of products to disclose its internal strategies to distributors was inappropriate, as the breadth of good faith required was limited to the “honesty in fact” definition of former G.S. 25-1-201, which governed distributor’s claim under this section, rather than the more expansive “reasonable commercial standards of fair dealing in the trade” definition of former G.S. 25-2-203. *L.C. Williams Oil Co. v. Exxon Corp.*, 625 F. Supp. 477 (M.D.N.C. 1985).

**Course of Dealing Modifying Contract Term.** — In a manufacturer’s action against a seller and individuals, alleging the breach of contract and other claims, the seller’s evidence of the parties’ dealings under a prior contract and their subsequent dealings under the contract at issue indicated a course of dealing as contemplated in former G.S. 25-1-203 that could have modified the term “product” in the contract. *Interstate Narrow Fabrics, Inc. v. Century USA, Inc.*, 218 F.R.D. 455, 2003 U.S. Dist. LEXIS 18227 (M.D.N.C. 2003).

**Good Faith Obligation Not Breached.** —

Apparel company did not breach its obligation of good faith in the performance of its contract with an apparel assembler where (1) there was no evidence to support the assembler’s claim that the company failed to provide it with sufficient cut parts under the contract, rather, the evidence showed that, despite having sufficient cut parts, the assembler often failed to meet the contract production levels, (2) the company did not induce the assembler to invest in T-shirt manufacturing machinery or to rely on alleged promises of continued work as the parties did not negotiate a new agreement regarding T-shirt production, and (3) the company did not unlawfully conceal the fact that it was building its own shirt manufacturing capability with the intent of terminating its relationship with the assembler as the parties’ contract stated that the assembler was not the company’s sole supplier, the contract gave the company the power to determine the assembler’s quantities and to terminate their relationship, and the company did not have any obligation to disclose its future plans to the assembler. *Sara Lee Corp. v. Quality Mfg.*, 201 F. Supp. 2d 608, 2002 U.S. Dist. LEXIS 27687 (M.D.N.C. 2002).

## § 25-1-305. Remedies to be liberally administered.

(a) The remedies provided by this Chapter shall be liberally administered to the end that the aggrieved party may be put in as good a position as if the other party had fully performed, but neither consequential or special damages nor penal damages may be had except as specifically provided in this Chapter or by other rule of law.

(b) Any right or obligation declared by this Chapter is enforceable by action unless the provision declaring it specifies a different and limited effect. (1965, c. 700, s. 1; 2006-112, s. 1.)



**Legal Periodicals.** — For article, “The Seller’s Election of Remedies Under the Uniform

Commercial Code: An Expectation Theory,” see 23 Wake Forest L. Rev. 429 (1988).

#### CASE NOTES

**Editor’s Note.** — *The case cited below was decided under former G.S. 25-1-106.*

**Purpose of Point 4 of Official Comment to G.S. 25-2-715.** — It was to bring the law into harmony with the market place that the draftsmen of the Uniform Commercial Code said in Point 4 of the Official Comment to G.S. 25-2-715: “The burden of proving the extent of loss incurred by way of consequential damage is on

the buyer, but the section on liberal administration of remedies rejects any doctrine of certainty which requires almost mathematical precision in the proof of loss. Loss may be determined in any manner which is reasonable under the circumstances.” *Gurney Indus., Inc. v. St. Paul Fire & Marine Ins. Co.*, 467 F.2d 588 (4th Cir. 1972).

### § 25-1-306. Waiver or renunciation of claim or right after breach.

A claim or right arising out of an alleged breach may be discharged in whole or in part without consideration by agreement of the aggrieved party in an authenticated record. (1965, c. 700, s. 1; 2006-112, s. 1.)

#### CASE NOTES

**Editor’s Note.** — *The case cited below was decided under former G.S. 25-1-107.*

**Acceptance of Full Payment.** — This section does not change the common-law rule

regarding acceptance of a “full payment check.” *Sharpe v. Nationwide Mut. Fire Ins. Co.*, 62 N.C. App. 564, 302 S.E.2d 893, cert. denied, 309 N.C. 823, 310 S.E.2d 353 (1983).

### § 25-1-307. Prima facie evidence by third-party documents.

A document in due form purporting to be a bill of lading, policy or certificate of insurance, official weigher’s or inspector’s certificate, consular invoice, or any other document authorized or required by the contract to be issued by a third party is prima facie evidence of its own authenticity and genuineness and of the facts stated in the document by the third party. (1965, c. 700, s. 1; 2006-112, s. 1.)

#### CASE NOTES

**Editor’s Note.** — *The cases cited below were decided under former G.S. 25-1-202.*

**The bill of lading** is evidence of the fact that the goods were delivered in good condition in the absence of notation or entry thereon to the contrary. *American Home Prods. Corp. v. Howell’s Motor Freight, Inc.*, 46 N.C. App. 276, 264 S.E.2d 774 (1980).

While a nonnotated bill of lading was some

evidence of good condition at time of receipt, it was not sufficient alone to survive a motion for directed verdict where the bill of lading contained the words “in apparent good order, contents and condition of package unknown.” *American Home Prods. Corp. v. Howell’s Motor Freight, Inc.*, 46 N.C. App. 276, 264 S.E.2d 774 (1980).

### § 25-1-308. Performance or acceptance under reservation of rights.

(a) A party that with explicit reservation of rights performs or promises performance or assents to performance in a manner demanded or offered by the other party does not thereby prejudice the rights reserved. Such words as “without prejudice,” “under protest,” or the like are sufficient.

(b) Subsection (a) of this section does not apply to an accord and satisfaction. (1965, c. 700, s. 1; 1995, c. 232, s. 4; 2006-112, s. 1.)

**Legal Periodicals.** — For article on contract modification under Article 2, see 59 N.C.L. Rev. 335 (1981).

For survey of 1980 commercial law, see 59 N.C.L. Rev. 1076 (1981).

CASE NOTES

*Editor's Note.* — The cases cited below were decided under former G.S. 25-1-207.

**This section does not apply to a check tendered in full payment of a disputed claim.** Thus, a disputed claim for compensation for employment was extinguished when the debtor-employer tendered to the creditor-employee a check marked "account in full" and the creditor deposited the check after striking these words from the check and notified the debtor he was reserving his right to contend for the balance of the claim. *Brown v. Coastal Truckways, Inc.*, 44 N.C. App. 454, 261 S.E.2d 266 (1980).

This section does not apply to a "full payment check," that is a check marked with some indi-

cation that it is tendered in full payment of a disputed claim. *Barber v. White*, 46 N.C. App. 110, 264 S.E.2d 385 (1980).

**Reservation of Right to Collect Remainder of Unpaid Account.** — Where debtor pays thirty-five percent of an account with checks bearing on the face of one the words "first instalment of agreed settlement" and on the other "final instalment of agreed settlement," the creditor reserves its right to collect the remainder of the unpaid account when it indorses the checks "with reservation of all our rights." *Baillie Lumber Co. v. Kincaid Carolina Corp.*, 4 N.C. App. 342, 167 S.E.2d 85 (1969).

§ 25-1-309. Option to accelerate at will.

A term providing that one party or that party's successor in interest may accelerate payment or performance or require collateral or additional collateral "at will" or when the party "deems itself insecure," or words of similar import, means that the party has power to do so only if that party in good faith believes that the prospect of payment or performance is impaired. The burden of establishing lack of good faith is on the party against which the power has been exercised. (1965, c. 700, s. 1; 2006-112, s. 1.)

**Legal Periodicals.** — For note on the operation of a due-on-sale clause in a deed of trust to allow a lender to exact higher interest rates

from the grantee of a mortgagor, see 13 Wake Forest L. Rev. 490 (1977).

CASE NOTES

*Editor's Note.* — The cases cited below were decided under former G.S. 25-1-208.

**"Good Faith" Standard Applicable Only to Insecurity Clauses.** — This section imposes the "good faith" standard in G.S. 25-1-201(19) (now G.S. 25-1-201(20)) only on insecurity-type clauses. *Crockett v. First Fed. Sav. & Loan Ass'n*, 289 N.C. 620, 224 S.E.2d 580 (1976).

**Insecurity and Default Clauses Distinguished.** — Insecurity-type clauses are clearly distinguished from default-type clauses where the right to accelerate is conditioned upon the

occurrence of a condition which is within the control of the debtor. *Crockett v. First Fed. Sav. & Loan Ass'n*, 289 N.C. 620, 224 S.E.2d 580 (1976); *In re Foreclosure of Sutton Invs.*, 46 N.C. App. 654, 266 S.E.2d 686 (1989).

**Repeated Occasions for Performance.** — Because an agreement between the parties did not call for repeated occasions for performance by either party, it did not establish a course of performance. *GATX Logistics, Inc. v. Lowe's Cos.*, 143 N.C. App. 695, 548 S.E.2d 193, 2001 N.C. App. LEXIS 338 (2001).

§ 25-1-310. Subordinated obligations.

An obligation may be issued as subordinated to performance of another

obligation of the person obligated, or a creditor may subordinate its right to performance of an obligation by agreement with either the person obligated or another creditor of the person obligated. Subordination does not create a security interest as against either the common debtor or a subordinated creditor. (1967, c. 562, s. 1; 2006-112, s. 1.)



# TABLES OF COMPARABLE SECTIONS FOR CHAPTER 25, REVISED ARTICLE 1

## Former to Present

**Editor's Note.**— The following table shows G.S. sections from former Chapter 25, Article 1, and their comparable, new revised Chapter 25, Article 1 numbers. Where there is no comparable new number, the term "Omitted" has been inserted.

Former Section	Present Section	Former Section	Present Section
25-1-101 .....	25-1-101	25-1-201(25), (27) .....	25-1-202
25-1-102 .....	25-1-102, 25-1-103	25-1-201(31) .....	25-1-206
25-1-102(3) .....	25-1-302	25-1-201(37) .....	25-1-203
25-1-102(4) .....	25-1-302	25-1-201(44) .....	25-1-204
25-1-102(5) .....	25-1-106	25-1-202 .....	25-1-307
25-1-103 .....	25-1-103	25-1-203 .....	25-1-304
25-1-104 .....	25-1-104	25-1-204 .....	25-1-205
25-1-105 .....	25-1-301	25-1-204(1) .....	25-1-302
25-1-106 .....	25-1-305	25-1-205 .....	25-1-303
25-1-107 .....	25-1-306	25-1-207 .....	25-1-308
25-1-108 .....	25-1-105	25-1-208 .....	25-1-309
25-1-109 .....	25-1-107	25-1-209 .....	25-1-310
25-1-201 .....	25-1-201		

## ARTICLE 2.

*Sales.*

## PART 1.

## SHORT TITLE, GENERAL CONSTRUCTION AND SUBJECT MATTER.

## § 25-2-101. Short title.

## CASE NOTES

**Cited in Riddle Farm Equip., Inc. v. Boles** (In re Boles), — Bankr. —, 2004 Bankr. LEXIS 2384 (Bankr. M.D.N.C. Oct. 26, 2004).

## § 25-2-102. Scope; certain security and other transactions excluded from this article.

## CASE NOTES

**New Tractor Is a Good.** — UCC art. 2, enacted in North Carolina as G.S. 25-2-101 et seq., was controlling in a case where a seller sold and delivered a new tractor to a buyer, but the seller claimed that title to the tractor never

passed from the seller to the buyer, because the transaction was a transaction involving a good. *Riddle Farm Equip., Inc. v. Boles* (In re Boles), — Bankr. —, 2004 Bankr. LEXIS 2384 (Bankr. M.D.N.C. Oct. 26, 2004).

## § 25-2-103. Definitions and index of definitions.

- (1) In this article unless the context otherwise requires
  - (a) “Buyer” means a person who buys or contracts to buy goods.
  - (b) Repealed by Session Laws 2006-112, s. 2, effective October 1, 2006.
  - (c) “Receipt” of goods means taking physical possession of them.
  - (d) “Seller” means a person who sells or contracts to sell goods. Any manufacturer of self-propelled motor vehicles, as defined in G.S. 20-4.01, is also a “seller” with respect to buyers of its product to whom it makes an express warranty, notwithstanding any lack of privity between them, for purposes of all rights and remedies available to buyers under this Article.
- (2) Other definitions applying to this article or to specified parts thereof, and the sections in which they appear are:
  - “Acceptance.” G.S. 25-2-606.
  - “Banker’s credit.” G.S. 25-2-325.
  - “Between merchants.” G.S. 25-2-104.
  - “Cancellation.” G.S. 25-2-106 (4).
  - “Commercial unit.” G.S. 25-2-105.
  - “Confirmed credit.” G.S. 25-2-325.
  - “Conforming to contract.” G.S. 25-2-106.
  - “Contract for sale.” G.S. 25-2-106.
  - “Cover.” G.S. 25-2-712.
  - “Entrusting.” G.S. 25-2-403.
  - “Financing agency.” G.S. 25-2-104.
  - “Future goods.” G.S. 25-2-105.
  - “Goods.” G.S. 25-2-105.

“Identification.” G.S. 25-2-501.

“Installment contract.” G.S. 25-2-612.

“Letter of credit.” G.S. 25-2-325.

“Lot.” G.S. 25-2-105.

“Merchant.” G.S. 25-2-104.

“Overseas.” G.S. 25-2-323.

“Person in position of seller.” G.S. 25-2-707.

“Present sale.” G.S. 25-2-106.

“Sale.” G.S. 25-2-106.

“Sale on approval.” G.S. 25-2-326.

“Sale or return.” G.S. 25-2-326.

“Termination.” G.S. 25-2-106.

(3) “Control” as provided in G.S. 25-7-106 and the following definitions in other Articles apply to this Article:

“Check” G.S. 25-3-104.

“Consignee” G.S. 25-7-102.

“Consignor” G.S. 25-7-102.

“Consumer Goods” G.S. 25-9-102.

“Dishonor” G.S. 25-3-502.

“Draft” G.S. 25-3-104.

(4) In addition article 1 contains general definitions and principles of construction and interpretation applicable throughout this article. (1965, c. 700, s. 1; 1983, c. 598; 2000-169, s. 8; 2006-112, ss. 2, 27.)

**Editor’s Note.** — Session Laws 2006-112, s. 59, provides: “Subparts A and B of Part II of this act apply to a document of title that is issued or a bailment that arises on or after the effective date of this act. Subparts A and B of Part II of this act do not apply to a document of title that is issued or a bailment that arises before the effective date of this act even if the document of title or bailment would be subject to this act if the document of title had been issued or bailment had arisen on or after the effective date of this act. Subparts A and B of Part II of this act do not apply to a right of action that has accrued before the effective date of this act.”

Session Laws 2006-112, s. 60, provides: “A

document of title issued or a bailment that arises before the effective date of this act and the rights, obligations, and interests flowing from that document or bailment are governed by any statute amended or repealed by this act as if amendment or repeal had not occurred and may be terminated, completed, consummated, or enforced under that statute.”

**Effect of Amendments.** — Session Laws 2006-112, ss. 2 and 27, effective October 1, 2006, repealed subdivision (1)(b) and in subsection (3), added “‘Control’ as provided in G.S. 25-7-106 and” at the beginning of the introductory paragraph and made minor stylistic changes throughout the subsection.

## § 25-2-104. Definitions: “Merchant”; “between merchants”; “financing agency.”

(1) “Merchant” means a person who deals in goods of the kind or otherwise by his occupation holds himself out as having knowledge or skill peculiar to the practices or goods involved in the transaction or to whom such knowledge or skill may be attributed by his employment of an agent or broker or other intermediary who by his occupation holds himself out as having such knowledge or skill.

(2) “Financing agency” means a bank, finance company or other person who in the ordinary course of business makes advances against goods or documents of title or who by arrangement with either the seller or the buyer intervenes in ordinary course to make or collect payment due or claimed under the contract for sale, as by purchasing or paying the seller’s draft or making advances against it or by merely taking it for collection whether or not documents of title accompany or are associated with the draft. “Financing agency” includes also



a bank or other person who similarly intervenes between persons who are in the position of seller and buyer in respect to the goods (G.S. 25-2-707).

(3) “Between merchants” means in any transaction with respect to which both parties are chargeable with the knowledge or skill of merchants. (1965, c. 700, s. 1; 2006-112, s. 28.)

**Editor’s Note.** — Session Laws 2006-112, s. 59, provides: “Subparts A and B of Part II of this act apply to a document of title that is issued or a bailment that arises on or after the effective date of this act. Subparts A and B of Part II of this act do not apply to a document of title that is issued or a bailment that arises before the effective date of this act even if the document of title or bailment would be subject to this act if the document of title had been issued or bailment had arisen on or after the effective date of this act. Subparts A and B of Part II of this act do not apply to a right of action that has accrued before the effective date of this act.”

Session Laws 2006-112, s. 60, provides: “A document of title issued or a bailment that arises before the effective date of this act and the rights, obligations, and interests flowing from that document or bailment are governed by any statute amended or repealed by this act as if amendment or repeal had not occurred and may be terminated, completed, consummated, or enforced under that statute.”

**Effect of Amendments.** — Session Laws 2006-112, s. 28, effective October 1, 2006, inserted “or are associated with” in the first sentence of subsection (2).

## § 25-2-105. Definitions: “Transferability”; “goods”; “future” goods; “lot”; “commercial unit.”

### CASE NOTES

**New Tractor Is a Good.** — UCC art. 2, enacted in North Carolina as G.S. 25-2-101 et seq., was controlling in a case where a seller sold and delivered a new tractor to a buyer, but the seller claimed that title to the tractor never

passed from the seller to the buyer, because the transaction was a transaction involving a good. *Riddle Farm Equip., Inc. v. Boles (In re Boles)*, — Bankr. —, 2004 Bankr. LEXIS 2384 (Bankr. M.D.N.C. Oct. 26, 2004).

## PART 2.

### FORM, FORMATION AND READJUSTMENT OF CONTRACT.

## § 25-2-202. Final written expression; parol or extrinsic evidence.

Terms with respect to which the confirmatory memoranda of the parties agree or which are otherwise set forth in a writing intended by the parties as a final expression of their agreement with respect to such terms as are included therein may not be contradicted by evidence of any prior agreement or of a contemporaneous oral agreement but may be explained or supplemented

- (a) by course of performance, course of dealing, or usage of trade (G.S. 25-1-303); and
- (b) by evidence of consistent additional terms unless the court finds the writing to have been intended also as a complete and exclusive statement of the terms of the agreement. (1965, c. 700, s. 1; 2006-112, s. 3.)

**Editor’s Note.** — Session Laws 2006-112, s. 60, provides: “A document of title issued or a bailment that arises before the effective date of this act and the rights, obligations, and inter-

ests flowing from that document or bailment are governed by any statute amended or repealed by this act as if amendment or repeal had not occurred and may be terminated, com-

pleted, consummated, or enforced under that statute.”

**Effect of Amendments.** — Session Laws

2006-112, s. 3, effective October 1, 2006, rewrote subdivision (a).

## § 25-2-207. Additional terms in acceptance or confirmation.

### CASE NOTES

#### “Yarn Contracts” Attempting to Attach Additional Terms to Oral Contracts. —

Arbitration clauses contained in contracts received by buyers from sellers of cotton yarn contravened public policy because they reduced the period of limitations that the buyers had to seek damages on their claim of violation of the Sherman Act by conspiring to fix prices for

cotton yarn sold in the United States, and did not allow buyers to join all sellers in arbitration; the clauses were excised from the buyers’ contracts and arbitration was not ordered. In re Cotton Yarn Antitrust Litig., 406 F. Supp. 2d 585, 2005 U.S. Dist. LEXIS 28777 (M.D.N.C. 2005).

## § 25-2-208: Repealed by Session Laws 2006-112, s. 4, effective October 1, 2006.

**Cross References.** — For present provisions similar to repealed G.S. 25-2-208, see G.S. 25-1-303.

**Editor’s Note.** — Session Laws 2006-112, s. 60, provides: “A document of title issued or a bailment that arises before the effective date of this act and the rights, obligations, and inter-

ests flowing from that document or bailment are governed by any statute amended or repealed by this act as if amendment or repeal had not occurred and may be terminated, completed, consummated, or enforced under that statute.”

## PART 3.

### GENERAL OBLIGATION AND CONSTRUCTION OF CONTRACT.

## § 25-2-310. Open time for payment or running of credit; authority to ship under reservation.

Unless otherwise agreed

- (a) payment is due at the time and place at which the buyer is to receive the goods even though the place of shipment is the place of delivery; and
- (b) if the seller is authorized to send the goods he may ship them under reservation, and may tender the documents of title, but the buyer may inspect the goods after their arrival before payment is due unless such inspection is inconsistent with the terms of the contract (G.S. 25-2-513); and
- (c) if delivery is authorized and made by way of documents of title otherwise than by subsection (b) then payment is due regardless of where the goods are to be received (i) at the time and place at which the buyer is to receive delivery of the tangible documents or (ii) at the time the buyer is to receive delivery of the electronic documents and at the seller’s place of business or if none, the seller’s residence; and
- (d) where the seller is required or authorized to ship the goods on credit the credit period runs from the time of shipment but postdating the invoice or delaying its dispatch will correspondingly delay the starting of the credit period. (1965, c. 700, s. 1; 2006-112, s. 29.)

**Editor’s Note.** — Session Laws 2006-112, s. 59, provides: “Subparts A and B of Part II of this act apply to a document of title that is issued or a bailment that arises on or after the effective date of this act. Subparts A and B of Part II of this act do not apply to a document of title that is issued or a bailment that arises before the effective date of this act even if the document of title or bailment would be subject to this act if the document of title had been issued or bailment had arisen on or after the effective date of this act. Subparts A and B of Part II of this act do not apply to a right of action that has accrued before the effective date of this act.”

Session Laws 2006-112, s. 60, provides: “A document of title issued or a bailment that arises before the effective date of this act and the rights, obligations, and interests flowing from that document or bailment are governed by any statute amended or repealed by this act as if amendment or repeal had not occurred and may be terminated, completed, consummated, or enforced under that statute.”

**Effect of Amendments.** — Session Laws 2006-112, s. 29, effective October 1, 2006, rewrote subsection (c).

**§ 25-2-313. Express warranties by affirmation, promise, description, sample.**

CASE NOTES

**Applied** in McDonald Bros., Inc. v. Tinder Wholesale, LLC, 395 F. Supp. 2d 255, 2005 U.S. Dist. LEXIS 25446 (M.D.N.C. 2005).

**§ 25-2-314. Implied warranty: Merchantability; usage of trade.**

CASE NOTES

**Applied** in McDonald Bros., Inc. v. Tinder Wholesale, LLC, 395 F. Supp. 2d 255, 2005 U.S. Dist. LEXIS 25446 (M.D.N.C. 2005).

**§ 25-2-315. Implied warranty: Fitness for particular purpose.**

CASE NOTES

**Ordinary use of product precludes recovery.** — Ordinary use of a product forecloses recovery under the implied warranty of fitness for a particular purpose; therefore, a retailer of building products and materials was unable to proceed on its claim against a supplier of lumber products for breach of the implied warranty

of fitness for a particular purpose because the finger-jointed trim boards for use in home construction that formed the basis of the complaint had been put to their ordinary use. McDonald Bros., Inc. v. Tinder Wholesale, LLC, 395 F. Supp. 2d 255, 2005 U.S. Dist. LEXIS 25446 (M.D.N.C. 2005).

**§ 25-2-323. Form of bill of lading required in overseas shipment; “overseas.”**

(1) Where the contract contemplates overseas shipment and contains a term C.I.F. or C. & F. or F.O.B. vessel, the seller unless otherwise agreed must obtain a negotiable bill of lading stating that the goods have been loaded on board or, in the case of a term C.I.F. or C. & F., received for shipment.

(2) Where in a case within subsection (1) of this section a tangible bill of lading has been issued in a set of parts, unless otherwise agreed if the



documents are not to be sent from abroad the buyer may demand tender of the full set; otherwise only one part of the bill of lading need be tendered. Even if the agreement expressly requires a full set

- (a) due tender of a single part is acceptable within the provisions of this Article on cure of improper delivery (subsection (1) of G.S.25-2-508); and
  - (b) even though the full set is demanded, if the documents are sent from abroad the person tendering an incomplete set may nevertheless require payment upon furnishing an indemnity which the buyer in good faith deems adequate.
- (3) A shipment by water or by air or a contract contemplating such shipment is “overseas” insofar as by usage of trade or agreement it is subject to the commercial, financing or shipping practices characteristic of international deep water commerce. (1965, c. 700, s. 1; 2006-112, s. 30.)

**Editor’s Note.** — Session Laws 2006-112, s. 59, provides: “Subparts A and B of Part II of this act apply to a document of title that is issued or a bailment that arises on or after the effective date of this act. Subparts A and B of Part II of this act do not apply to a document of title that is issued or a bailment that arises before the effective date of this act even if the document of title or bailment would be subject to this act if the document of title had been issued or bailment had arisen on or after the effective date of this act. Subparts A and B of Part II of this act do not apply to a right of action that has accrued before the effective date of this act.”

Session Laws 2006-112, s. 60, provides: “A

document of title issued or a bailment that arises before the effective date of this act and the rights, obligations, and interests flowing from that document or bailment are governed by any statute amended or repealed by this act as if amendment or repeal had not occurred and may be terminated, completed, consummated, or enforced under that statute.”

**Effect of Amendments.** — Session Laws 2006-112, s. 30, effective October 1, 2006, substituted “subsection (1) of this section a tangible bill of lading” for “subsection (1) a bill of lading” in the introductory paragraph of subsection (2); and made a minor stylistic change in subdivision (2)(a).

## PART 4.

### TITLE, CREDITORS AND GOOD FAITH PURCHASERS.

#### § 25-2-401. Passing of title; reservation for security; limited application of this section.

Each provision of this article with regard to the rights, obligations and remedies of the seller, the buyer, purchasers or other third parties applies irrespective of title to the goods except where the provision refers to such title. Insofar as situations are not covered by the other provisions of this article and matters concerning title become material the following rules apply:

- (1) Title to goods cannot pass under a contract for sale prior to their identification to the contract (G.S. 25-2-501), and unless otherwise explicitly agreed the buyer acquires by their identification a special property as limited by this chapter. Any retention or reservation by the seller of the title (property) in goods shipped or delivered to the buyer is limited in effect to a reservation of a security interest. Subject to these provisions and to the provisions of the article on secured transactions (article 9), title to goods passes from the seller to the buyer in any manner and on any conditions explicitly agreed on by the parties.
- (2) Unless otherwise explicitly agreed title passes to the buyer at the time and place at which the seller completes his performance with reference to the physical delivery of the goods, despite any reservation of a

security interest and even though a document of title is to be delivered at a different time or place; and in particular and despite any reservation of a security interest by the bill of lading

- (a) if the contract requires or authorizes the seller to send the goods to the buyer but does not require him to deliver them at destination, title passes to the buyer at the time and place of shipment; but
  - (b) if the contract requires delivery at destination, title passes on tender there.
- (3) Unless otherwise explicitly agreed where delivery is to be made without moving the goods,
- (a) if the seller is to deliver a tangible document of title, title passes at the time when and the place where he delivers such documents and if the seller is to deliver an electronic document of title, title passes when the seller delivers the document; or
  - (b) if the goods are at the time of contracting already identified and no documents of title are to be delivered, title passes at the time and place of contracting.
- (4) A rejection or other refusal by the buyer to receive or retain the goods, whether or not justified, or a justified revocation of acceptance revests title to the goods in the seller. Such revesting occurs by operation of law and is not a “sale.” (1965, c. 700, s. 1; 2006-112, s. 31.)

**Editor’s Note.** — Session Laws 2006-112, s. 59, provides: “Subparts A and B of Part II of this act apply to a document of title that is issued or a bailment that arises on or after the effective date of this act. Subparts A and B of Part II of this act do not apply to a document of title that is issued or a bailment that arises before the effective date of this act even if the document of title or bailment would be subject to this act if the document of title had been issued or bailment had arisen on or after the effective date of this act. Subparts A and B of Part II of this act do not apply to a right of action that has accrued before the effective date of this act.”

Session Laws 2006-112, s. 60, provides: “A document of title issued or a bailment that

arises before the effective date of this act and the rights, obligations, and interests flowing from that document or bailment are governed by any statute amended or repealed by this act as if amendment or repeal had not occurred and may be terminated, completed, consummated, or enforced under that statute.”

**Effect of Amendments.** — Session Laws 2006-112, s. 31, effective October 1, 2006, in subdivision (3)(a), inserted “tangible” preceding “document of title,” near the beginning, and added “and if the seller is to deliver an electronic document of title, title passes when the seller delivers the document” at the end; and inserted “of title” following “documents” in subdivision (3)(b).

## CASE NOTES

**Passing of Title Upon Delivery.** — Seller’s motion to amend a complaint to add a claim to recover possession of a new tractor that the seller sold to the buyer, based upon the seller’s assertion that title to the tractor never passed from the seller to the buyer, was denied because

the seller failed to state a claim as, pursuant to G.S. 25-2-401, the title to the tractor passed to the buyer when the seller delivered the tractor to the buyer. *Riddle Farm Equip., Inc. v. Boles* (In re Boles), — Bankr. —, 2004 Bankr. LEXIS 2384 (Bankr. M.D.N.C. Oct. 26, 2004).

## PART 5.

### PERFORMANCE.

## § 25-2-503. Manner of seller’s tender of delivery.

(1) Tender of delivery requires that the seller put and hold conforming goods at the buyer’s disposition and give the buyer any notification reasonably



necessary to enable him to take delivery. The manner, time and place for tender are determined by the agreement and this article, and in particular

- (a) tender must be at a reasonable hour, and if it is of goods they must be kept available for the period reasonably necessary to enable the buyer to take possession; but
  - (b) unless otherwise agreed the buyer must furnish facilities reasonably suited to the receipt of the goods.
- (2) Where the case is within the next section [G.S. 25-2-504] respecting shipment tender requires that the seller comply with its provisions.
- (3) Where the seller is required to deliver at a particular destination tender requires that he comply with subsection (1) and also in any appropriate case tender documents as described in subsections (4) and (5) of this section.
- (4) Where goods are in the possession of a bailee and are to be delivered without being moved
- (a) tender requires that the seller either tender a negotiable document of title covering such goods or procure acknowledgment by the bailee of the buyer's right to possession of the goods; but
  - (b) tender to the buyer of a non-negotiable document of title or of a record directing the bailee to deliver is sufficient tender unless the buyer seasonably objects, and, except as otherwise provided in Article 9 of this Chapter, receipt by the bailee of notification of the buyer's rights fixes those rights as against the bailee and all third persons; but risk of loss of the goods and of any failure by the bailee to honor the nonnegotiable document of title or to obey the direction remains on the seller until the buyer has had a reasonable time to present the document or direction, and a refusal by the bailee to honor the document or to obey the direction defeats the tender.
- (5) Where the contract requires the seller to deliver documents
- (a) he must tender all such documents in correct form, except as provided in this article with respect to bills of lading in a set (subsection (2) of G.S. 25-2-323); and
  - (b) tender through customary banking channels is sufficient and dishonor of a draft accompanying or associated with the documents constitutes non-acceptance or rejection. (1965, c. 700, s. 1; 2006-112, s. 32.)

**Editor's Note.** — Session Laws 2006-112, s. 59, provides: "Subparts A and B of Part II of this act apply to a document of title that is issued or a bailment that arises on or after the effective date of this act. Subparts A and B of Part II of this act do not apply to a document of title that is issued or a bailment that arises before the effective date of this act even if the document of title or bailment would be subject to this act if the document of title had been issued or bailment had arisen on or after the effective date of this act. Subparts A and B of Part II of this act do not apply to a right of action that has accrued before the effective date of this act."

Session Laws 2006-112, s. 60, provides: "A

document of title issued or a bailment that arises before the effective date of this act and the rights, obligations, and interests flowing from that document or bailment are governed by any statute amended or repealed by this act as if amendment or repeal had not occurred and may be terminated, completed, consummated, or enforced under that statute."

**Effect of Amendments.** — Session Laws 2006-112, s. 32, effective October 1, 2006, in subdivision (4)(b), substituted "record directing" for "written direction to" near the beginning, and inserted "except as otherwise provided in Article 9 of this Chapter"; and inserted "or associated with" in subdivision (5)(b).

## § 25-2-505. Seller's shipment under reservation.

(1) Where the seller has identified goods to the contract by or before shipment:

- (a) his procurement of a negotiable bill of lading to his own order or otherwise reserves in him a security interest in the goods. His



procurement of the bill to the order of a financing agency or of the buyer indicates in addition only the seller's expectation of transferring that interest to the person named.

- (b) a nonnegotiable bill of lading to himself or his nominee reserves possession of the goods as security but except in a case of conditional delivery (subsection (2) of G.S. 25-2-507) a nonnegotiable bill of lading naming the buyer as consignee reserves no security interest even though the seller retains possession or control of the bill of lading.

(2) When shipment by the seller with reservation of a security interest is in violation of the contract for sale it constitutes an improper contract for transportation within G.S. 25-2-504 but impairs neither the rights given to the buyer by shipment and identification of the goods to the contract nor the seller's powers as a holder of a negotiable document of title. (1965, c. 700, s. 1; 2006-112, s. 33.)

**Editor's Note.** — Session Laws 2006-112, s. 59, provides: "Subparts A and B of Part II of this act apply to a document of title that is issued or a bailment that arises on or after the effective date of this act. Subparts A and B of Part II of this act do not apply to a document of title that is issued or a bailment that arises before the effective date of this act even if the document of title or bailment would be subject to this act if the document of title had been issued or bailment had arisen on or after the effective date of this act. Subparts A and B of Part II of this act do not apply to a right of action that has accrued before the effective date of this act."

Session Laws 2006-112, s. 60, provides: "A document of title issued or a bailment that arises before the effective date of this act and the rights, obligations, and interests flowing from that document or bailment are governed by any statute amended or repealed by this act as if amendment or repeal had not occurred and may be terminated, completed, consummated, or enforced under that statute."

**Effect of Amendments.** — Session Laws 2006-112, s. 33, effective October 1, 2006, inserted "or control" near the end of subdivision (1)(b); in subsection (2), substituted "G.S. 25-2-504" for "the preceding section" in the middle, and added "of title" at the end.

## § 25-2-506. Rights of financing agency.

(1) A financing agency by paying or purchasing for value a draft which relates to a shipment of goods acquires to the extent of the payment or purchase and in addition to its own rights under the draft and any document of title securing it any rights of the shipper in the goods including the right to stop delivery and the shipper's right to have the draft honored by the buyer.

(2) The right to reimbursement of a financing agency which has in good faith honored or purchased the draft under commitment to or authority from the buyer is not impaired by subsequent discovery of defects with reference to any relevant document which was apparently regular. (1965, c. 700, s. 1; 2006-112, s. 34.)

**Editor's Note.** — Session Laws 2006-112, s. 59, provides: "Subparts A and B of Part II of this act apply to a document of title that is issued or a bailment that arises on or after the effective date of this act. Subparts A and B of Part II of this act do not apply to a document of title that is issued or a bailment that arises before the effective date of this act even if the document of title or bailment would be subject to this act if the document of title had been issued or bailment had arisen on or after the effective date of this act. Subparts A and B of Part II of this act do not apply to a right of action that has accrued before the effective date of this act."

Session Laws 2006-112, s. 60, provides: "A document of title issued or a bailment that arises before the effective date of this act and the rights, obligations, and interests flowing from that document or bailment are governed by any statute amended or repealed by this act as if amendment or repeal had not occurred and may be terminated, completed, consummated, or enforced under that statute."

**Effect of Amendments.** — Session Laws 2006-112, s. 34, effective October 1, 2006, substituted "regular" for "regular on its face" in subsection (2).

## § 25-2-509. Risk of loss in the absence of breach.

(1) Where the contract requires or authorizes the seller to ship the goods by carrier

- (a) if it does not require him to deliver them at a particular destination, the risk of loss passes to the buyer when the goods are duly delivered to the carrier even though the shipment is under reservation (G.S. 25-2-505); but
- (b) if it does require him to deliver them at a particular destination and the goods are there duly tendered while in the possession of the carrier, the risk of loss passes to the buyer when the goods are there duly so tendered as to enable the buyer to take delivery.

(2) Where the goods are held by a bailee to be delivered without being moved, the risk of loss passes to the buyer

- (a) on his receipt of possession or control of a negotiable document of title covering the goods; or
- (b) on acknowledgment by the bailee of the buyer's right to possession of the goods; or
- (c) after his receipt of possession or control of a nonnegotiable document of title or other direction to deliver in a record, as provided in subsection (4)(b) of G.S. 25-2-503.

(3) In any case not within subsection (1) or (2), the risk of loss passes to the buyer on his receipt of the goods if the seller is a merchant; otherwise the risk passes to the buyer on tender of delivery.

(4) The provisions of this section are subject to contrary agreement of the parties and to the provisions of this article on sale on approval (G.S. 25-2-327) and on effect of breach on risk of loss (G.S. 25-2-510). (1965, c. 700, s. 1; 2006-112, s. 35.)

**Editor's Note.** — Session Laws 2006-112, s. 59, provides: "Subparts A and B of Part II of this act apply to a document of title that is issued or a bailment that arises on or after the effective date of this act. Subparts A and B of Part II of this act do not apply to a document of title that is issued or a bailment that arises before the effective date of this act even if the document of title or bailment would be subject to this act if the document of title had been issued or bailment had arisen on or after the effective date of this act. Subparts A and B of Part II of this act do not apply to a right of action that has accrued before the effective date of this act."

Session Laws 2006-112, s. 60, provides: "A document of title issued or a bailment that arises before the effective date of this act and the rights, obligations, and interests flowing from that document or bailment are governed by any statute amended or repealed by this act as if amendment or repeal had not occurred and may be terminated, completed, consummated, or enforced under that statute."

**Effect of Amendments.** — Session Laws 2006-112, s. 35, effective October 1, 2006, inserted "possession or control of" in subdivisions (2)(a) and (2)(c); in subdivision (2)(c), deleted "written" preceding "direction to," and substituted "deliver in a record" for "deliver."

## PART 6.

### BREACH, REPUDIATION AND EXCUSE.

## § 25-2-605. Waiver of buyer's objections by failure to particularize.

(1) The buyer's failure to state in connection with rejection a particular defect which is ascertainable by reasonable inspection precludes him from relying on the unstated defect to justify rejection or to establish breach

- (a) where the seller could have cured it if stated seasonably; or



- (b) between merchants when the seller has after rejection made a request in writing for a full and final written statement of all defects on which the buyer proposes to rely.

(2) Payment against documents made without reservation of rights precludes recovery of the payment for defects apparent in the documents. (1965, c. 700, s. 1; 2006-112, s. 36.)

**Editor's Note.** — Session Laws 2006-112, s. 59, provides: "Subparts A and B of Part II of this act apply to a document of title that is issued or a bailment that arises on or after the effective date of this act. Subparts A and B of Part II of this act do not apply to a document of title that is issued or a bailment that arises before the effective date of this act even if the document of title or bailment would be subject to this act if the document of title had been issued or bailment had arisen on or after the effective date of this act. Subparts A and B of Part II of this act do not apply to a right of action that has accrued before the effective date of this act."

Session Laws 2006-112, s. 60, provides: "A document of title issued or a bailment that arises before the effective date of this act and the rights, obligations, and interests flowing from that document or bailment are governed by any statute amended or repealed by this act as if amendment or repeal had not occurred and may be terminated, completed, consummated, or enforced under that statute."

**Effect of Amendments.** — Session Laws 2006-112, s. 36, effective October 1, 2006, substituted "in" for "on the face of" in subsection (2).

## PART 7.

### REMEDIES.

#### § 25-2-705. Seller's stoppage of delivery in transit or otherwise.

(1) The seller may stop delivery of goods in the possession of a carrier or other bailee when he discovers the buyer to be insolvent (G.S. 25-2-702) and may stop delivery of carload, truckload, planeload or larger shipments of express or freight when the buyer repudiates or fails to make a payment due before delivery or if for any other reason the seller has a right to withhold or reclaim the goods.

(2) As against such buyer the seller may stop delivery until

- (a) receipt of the goods by the buyer; or
- (b) acknowledgment to the buyer by any bailee of the goods except a carrier that the bailee holds the goods for the buyer; or
- (c) such acknowledgment to the buyer by a carrier by reshipment or as a warehouse; or
- (d) negotiation to the buyer of any negotiable document of title covering the goods.

(3)(a) To stop delivery the seller must so notify as to enable the bailee by reasonable diligence to prevent delivery of the goods.

(b) After such notification the bailee must hold and deliver the goods according to the directions of the seller but the seller is liable to the bailee for any ensuing charges or damages.

(c) If a negotiable document of title has been issued for goods the bailee is not obliged to obey a notification to stop until surrender of possession or control of the document.

(d) A carrier who has issued a nonnegotiable bill of lading is not obliged to obey a notification to stop received from a person other than the consignor. (1965, c. 700, s. 1; 2006-112, s. 37.)



**Editor's Note.** — Session Laws 2006-112, s. 59, provides: "Subparts A and B of Part II of this act apply to a document of title that is issued or a bailment that arises on or after the effective date of this act. Subparts A and B of Part II of this act do not apply to a document of title that is issued or a bailment that arises before the effective date of this act even if the document of title or bailment would be subject to this act if the document of title had been issued or bailment had arisen on or after the effective date of this act. Subparts A and B of Part II of this act do not apply to a right of action that has accrued before the effective date of this act."

Session Laws 2006-112, s. 60, provides: "A document of title issued or a bailment that arises before the effective date of this act and the rights, obligations, and interests flowing from that document or bailment are governed by any statute amended or repealed by this act as if amendment or repeal had not occurred and may be terminated, completed, consummated, or enforced under that statute."

**Effect of Amendments.** — Session Laws 2006-112, s. 37, effective October 1, 2006, substituted "a warehouse" for "warehouseman" in subdivision (2)(c); and inserted "of possession or control" in subdivision (3)(c).

## ARTICLE 2A.

### *Leases.*

## PART 1.

### GENERAL PROVISIONS.

## § 25-2A-103. Definitions and index of definitions.

(1) In this Article unless the context otherwise requires:

- (a) "Buyer in ordinary course of business" means a person who, in good faith and without knowledge that the sale to him is in violation of the ownership rights or security interest or leasehold interest of a third party in the goods, buys in ordinary course from a person in the business of selling goods of that kind but does not include a pawnbroker. "Buying" may be for cash or by exchange of other property or on secured or unsecured credit and includes acquiring goods or documents of title under a preexisting contract for sale but does not include a transfer in bulk or as security for or in total or partial satisfaction of a money debt.
- (b) "Cancellation" occurs when either party puts an end to the lease contract for default by the other party.
- (c) "Commercial unit" means such a unit of goods as by commercial usage is a single whole for purposes of lease and division of which materially impairs its character or value on the market or in use. A commercial unit may be a single article, as a machine, or a set of articles, as a suite of furniture or a line of machinery, or a quantity, as a gross or carload, or any other unit treated in use or in the relevant market as a single whole.
- (d) "Conforming" goods or performance under a lease contract means goods or performance that are in accordance with the obligations under the lease contract.
- (e) "Consumer lease" means a lease that a lessor regularly engaged in the business of leasing or selling makes to a lessee who is an individual and who takes under the lease primarily for a personal, family, or household purpose, if the total payments to be made under the lease contract, excluding payments for options to renew or buy, do not exceed twenty-five thousand dollars (\$25,000).
- (f) "Fault" means wrongful act, omission, breach, or default.

- (g) “Finance lease” means a lease with respect to which: (i) the lessor does not select, manufacture, or supply the goods; (ii) the lessor acquires the goods or the right to possession and use of the goods in connection with the lease; and (iii) one of the following occurs:
- (A) the lessee receives a copy of the contract by which the lessor acquired the goods or the right to possession and use of the goods before signing the lease contract;
  - (B) the lessee’s approval of the contract by which the lessor acquired the goods or the right to possession and use of the goods is a condition to effectiveness of the lease contract;
  - (C) the lessee, before signing the lease contract, receives an accurate and complete statement designating the promises and warranties, and any disclaimers of warranties, limitations or modifications of remedies, or liquidated damages, including those of a third party, such as the manufacturer of the goods, provided to the lessor by the person supplying the goods in connection with or as part of the contract by which the lessor acquired the goods or the right to possession and use of the goods; or
  - (D) if the lease is not a consumer lease, the lessor, before the lessee signs the lease contract, informs the lessee in writing (a) of the identity of the person supplying the goods to the lessor, unless the lessee has selected that person and directed the lessor to acquire the goods or the right to possession and use of the goods from that person, (b) that the lessee is entitled under this Article to the promises and warranties, including those of any third party, provided to the lessor by the person supplying the goods in connection with or as part of the contract by which the lessor acquired the goods or the right to possession and use of the goods, and (c) that the lessee may communicate with the person supplying the goods to the lessor and receive an accurate and complete statement of those promises and warranties, including any disclaimers and limitations of them or of remedies.
- (h) “Goods” means all things that are movable at the time of identification to the lease contract, or are fixtures (G.S. 25- 2A-309), but the term does not include money, documents, instruments, accounts, chattel paper, general intangibles, or minerals or the like, including oil and gas, before extraction. The term also includes the unborn young of animals.
- (i) “Installment lease contract” means a lease contract that authorizes or requires the delivery of goods in separate lots to be separately accepted, even though the lease contract contains a clause “each delivery is a separate lease” or its equivalent.
- (j) “Lease” means a transfer of the right to possession and use of goods for a term in return for consideration, but a sale, including a sale on approval or a sale or return, or retention or creation of a security interest is not a lease. Unless the context clearly indicates otherwise, the term includes a sublease. The term includes a motor vehicle operating agreement that is considered a lease under § 7701(h) of the Internal Revenue Code.
- (k) “Lease agreement” means the bargain, with respect to the lease, of the lessor and the lessee in fact as found in their language or by implication from other circumstances including course of dealing or usage of trade or course of performance as provided in this Article. Unless the context clearly indicates otherwise, the term includes a sublease agreement.
- (l) “Lease contract” means the total legal obligation that results from the lease agreement as affected by this Article and any other applicable



rules of law. Unless the context clearly indicates otherwise, the term includes a sublease contract.

- (m) "Leasehold interest" means the interest of the lessor or the lessee under a lease contract.
- (n) "Lessee" means a person who acquires the right to possession and use of goods under a lease. Unless the context clearly indicates otherwise, the term includes a sublessee.
- (o) "Lessee in ordinary course of business" means a person who, in good faith and without knowledge that the lease to him is in violation of the ownership rights or security interest or leasehold interest of a third party in the goods, leases in ordinary course from a person in the business of selling or leasing goods of that kind but does not include a pawnbroker. "Leasing" may be for cash or by exchange of other property or on secured or unsecured credit and includes acquiring goods or documents of title under a preexisting lease contract but does not include a transfer in bulk or as security for or in total or partial satisfaction of a money debt.
- (p) "Lessor" means a person who transfers the right to possession and use of goods under a lease. Unless the context clearly indicates otherwise, the term includes a sublessor.
- (q) "Lessor's residual interest" means the lessor's interest in the goods after expiration, termination, or cancellation of the lease contract.
- (r) "Lien" means a charge against or interest in goods to secure payment of a debt or performance of an obligation, but the term does not include a security interest.
- (s) "Lot" means a parcel or a single article that is the subject matter of a separate lease or delivery, whether or not it is sufficient to perform the lease contract.
- (t) "Merchant lessee" means a lessee that is a merchant with respect to goods of the kind subject to the lease.
- (u) "Present value" means the amount as of a date certain of one or more sums payable in the future, discounted to the date certain. The discount is determined by the interest rate specified by the parties if the rate was not manifestly unreasonable at the time the transaction was entered into; otherwise, the discount is determined by a commercially reasonable rate that takes into account the facts and circumstances of each case at the time the transaction was entered into.
- (v) "Purchase" includes taking by sale, lease, mortgage, security interest, pledge, gift, or any other voluntary transaction creating an interest in goods.
- (w) "Sublease" means a lease of goods the right to possession and use of which was acquired by the lessor as a lessee under an existing lease.
- (x) "Supplier" means a person from whom a lessor buys or leases goods to be leased under a finance lease.
- (y) "Supply contract" means a contract under which a lessor buys or leases goods to be leased.
- (z) "Termination" occurs when either party pursuant to a power created by agreement or law puts an end to the lease contract otherwise than for default.

(2) Other definitions applying to this Article and the sections in which they appear are:

"Accessions". G.S. 25-2A-310(1).

"Construction mortgage". G.S. 25-2A-309(1)(d).

"Encumbrance". G.S. 25-2A-309(1)(e).

"Fixtures". G.S. 25-2A-309(1)(a).

"Fixture filing". G.S. 25-2A-309(1)(b).



“Purchase money lease”. G.S. 25-2A-309(1)(c).

(3) The following definitions in other Articles apply to this Article:

“Account”	G.S. 25-9-102(a)(2).
“Between merchants”	G.S. 25-2-104(3).
“Buyer”	G.S. 25-2-103(1)(a).
“Chattel paper”	G.S. 25-9-102(a)(11).
“Consumer goods”	G.S. 25-9-102(a)(23).
“Document”	G.S. 25-9-102(a)(30).
“Entrusting”	G.S. 25-2-403(3).
“General intangible”	G.S. 25-9-102(a)(42).
“Instrument”	G.S. 25-9-102(a)(47).
“Merchant”	G.S. 25-2-104(1).
“Mortgage”	G.S. 25-9-102(a)(55).
“Pursuant to commitment”	G.S. 25-9-102(a)(68).
“Receipt”	G.S. 25-2-103(1)(c).
“Sale”	G.S. 25-2-106(1).
“Sale on approval”	G.S. 25-2-326.
“Sale or return”	G.S. 25-2-326.
“Seller”	G.S. 25-2-103(1)(d).

(4) In addition, Article 1 contains general definitions and principles of construction and interpretation applicable throughout this Article. (1993, c. 463, s. 1; 1993 (Reg. Sess., 1994), c. 756, s. 1; 1995, c. 509, s. 21; 2000-169, s. 13; 2006-112, ss. 5, 38.)

**Editor’s Note.** — Session Laws 2006-112, s. 59, provides: “Subparts A and B of Part II of this act apply to a document of title that is issued or a bailment that arises on or after the effective date of this act. Subparts A and B of Part II of this act do not apply to a document of title that is issued or a bailment that arises before the effective date of this act even if the document of title or bailment would be subject to this act if the document of title had been issued or bailment had arisen on or after the effective date of this act. Subparts A and B of Part II of this act do not apply to a right of action that has accrued before the effective date of this act.”

Session Laws 2006-112, s. 60, provides: “A

document of title issued or a bailment that arises before the effective date of this act and the rights, obligations, and interests flowing from that document or bailment are governed by any statute amended or repealed by this act as if amendment or repeal had not occurred and may be terminated, completed, consummated, or enforced under that statute.”

**Effect of Amendments.** — Session Laws 2006-112, ss. 5 and 38, effective October 1, 2006, in subsection (3), deleted “‘Good faith’.” G.S. 25-2-103(1)(b).” and made minor stylistic changes, and in subdivisions (1)(a) and (o), substituted “acquiring” for “receiving” and made minor stylistic changes.

## CASE NOTES

**Suit Not Barred by Statute of Limitations for Breach of Lease.** — Trial court erred in granting a lessee’s summary judgment motion in a breach of a contract action filed by a lessor based on a three-year statute of limitations as the agreement was a lease under the North Carolina Uniform Commercial Code, specifically G.S. 25-2A-103(j), since it was originally structured with a four-year lease term;

after the lease was modified by the bankruptcy court, the lessee was obligated to make 21 consecutive monthly payments beginning in August 1998 and the suit was not barred under the four-year statute of limitations for leases set forth in G.S. 25-2A-506(1). *Finova Capital Corp. v. Beach Pharm. II, Ltd.*, — N.C. App. —, 623 S.E.2d 289, 2005 N.C. App. LEXIS 2741 (2005).

## PART 2.

### FORMATION AND CONSTRUCTION OF LEASE CONTRACT.

§ 25-2A-207: Repealed by Session Laws 2006-112, s. 6, effective October 1, 2006.

**Editor’s Note.** — Session Laws 2006-112, s. 60, provides: “A document of title issued or a bailment that arises before the effective date of this act and the rights, obligations, and interests flowing from that document or bailment

are governed by any statute amended or repealed by this act as if amendment or repeal had not occurred and may be terminated, completed, consummated, or enforced under that statute.”

PART 5.

DEFAULT.

SUBPART A. In General.

§ 25-2A-501. Default: procedure.

(1) Whether the lessor or the lessee is in default under a lease contract is determined by the lease agreement and this Article.

(2) If the lessor or the lessee is in default under the lease contract, the party seeking enforcement has rights and remedies as provided in this Article and, except as limited by this Article, as provided in the lease agreement.

(3) If the lessor or the lessee is in default under the lease contract, the party seeking enforcement may reduce the party’s claim to judgment, or otherwise enforce the lease contract by self-help or any available judicial procedure or nonjudicial procedure, including administrative proceeding, arbitration, or the like, in accordance with this Article.

(4) Except as otherwise provided in G.S. 25-1-305(a) or this Article or the lease agreement, the rights and remedies referred to in subsections (2) and (3) of this section are cumulative.

(5) If the lease agreement covers both real property and goods, the party seeking enforcement may proceed under this Part as to the goods, or under other applicable law as to both the real property and the goods in accordance with that party’s rights and remedies in respect of the real property, in which case this Part does not apply. (1993, c. 463, s. 1; 2006-112, s. 7.)

**Editor’s Note.** — Session Laws 2006-112, s. 60, provides: “A document of title issued or a bailment that arises before the effective date of this act and the rights, obligations, and interests flowing from that document or bailment are governed by any statute amended or repealed by this act as if amendment or repeal

had not occurred and may be terminated, completed, consummated, or enforced under that statute.”

**Effect of Amendments.** — Session Laws 2006-112, s. 7, effective October 1, 2006, substituted “G.S. 25-1-305(a)” for “G.S. 25-1-106(1)” in subsection (4).

§ 25-2A-506. Statute of limitations.

CASE NOTES

**Breach of Lease Suit Not Barred by Statute of Limitations.** — Trial court erred in granting a lessee’s summary judgment motion in a breach of a contract action filed by a lessor based on a three-year statute of limitations as the agreement was a lease under the North Carolina Uniform Commercial Code, specifically G.S. 25-2A-103(j), since it was originally structured with a four-year lease term; after

the lease was modified by the bankruptcy court, the lessee was obligated to make 21 consecutive monthly payments beginning in August 1998 and the suit was not barred under the four-year statute of limitations for leases set forth in G.S. 25-2A-506(1). *Finova Capital Corp. v. Beach Pharm. II, Ltd.*, — N.C. App. —, 623 S.E.2d 289, 2005 N.C. App. LEXIS 2741 (2005).

## SUBPART B. Default by Lessor.

## § 25-2A-514. Waiver of lessee's objections.

(1) In rejecting goods, a lessee's failure to state a particular defect that is ascertainable by reasonable inspection precludes the lessee from relying on the defect to justify rejection or to establish default:

- (a) if, stated seasonably, the lessor or the supplier could have cured it (G.S. 25-2A-513); or
- (b) between merchants if the lessor or the supplier after rejection has made a request in writing for a full and final written statement of all defects on which the lessee proposes to rely.

(2) A lessee's failure to reserve rights when paying rent or other consideration against documents precludes recovery of the payment for defects apparent in the documents. (1993, c. 463, s. 1; 2006-112, s. 39.)

**Editor's Note.** — Session Laws 2006-112, s. 59, provides: "Subparts A and B of Part II of this act apply to a document of title that is issued or a bailment that arises on or after the effective date of this act. Subparts A and B of Part II of this act do not apply to a document of title that is issued or a bailment that arises before the effective date of this act even if the document of title or bailment would be subject to this act if the document of title had been issued or bailment had arisen on or after the effective date of this act. Subparts A and B of Part II of this act do not apply to a right of action that has accrued before the effective date of this act."

Session Laws 2006-112, s. 60, provides: "A document of title issued or a bailment that arises before the effective date of this act and the rights, obligations, and interests flowing from that document or bailment are governed by any statute amended or repealed by this act as if amendment or repeal had not occurred and may be terminated, completed, consummated, or enforced under that statute."

**Effect of Amendments.** — Session Laws 2006-112, s. 39, effective October 1, 2006, substituted "in" for "on the face of" in subsection (2).

## § 25-2A-518. Cover; substitute goods.

(1) After a default by a lessor under the lease contract of the type described in G.S. 25-2A-508(1), or, if agreed, after other default by the lessor, the lessee may cover by making any purchase or lease of or contract to purchase or lease goods in substitution for those due from the lessor.

(2) Except as otherwise provided with respect to damages liquidated in the lease agreement (G.S. 25-2A-504) or otherwise determined pursuant to agreement of the parties (G.S. 25-1-302 and G.S. 25-2A-503), if a lessee's cover is by a lease agreement substantially similar to the original lease agreement and the new lease agreement is made in good faith and in a commercially reasonable manner, the lessee may recover from the lessor as damages (i) the present value, as of the date of the commencement of the term of the new lease agreement, of the rent under the new lease agreement applicable to that period of the new lease term which is comparable to the then remaining term of the original lease agreement minus the present value as of the same date of the total rent for the then remaining lease term of the original lease agreement, and (ii) any incidental or consequential damages, less expenses saved in consequence of the lessor's default.

(3) If a lessee's cover is by lease agreement that for any reason does not qualify for treatment under subsection (2) of this section, or is by purchase or otherwise, the lessee may recover from the lessor as if the lessee had elected not to cover and G.S. 25-2A-519 governs. (1993, c. 463, s. 1; 2006-112, s. 8.)



**Editor's Note.** — Session Laws 2006-112, s. 60, provides: “A document of title issued or a bailment that arises before the effective date of this act and the rights, obligations, and interests flowing from that document or bailment are governed by any statute amended or repealed by this act as if amendment or repeal

had not occurred and may be terminated, completed, consummated, or enforced under that statute.”

**Effect of Amendments.** — Session Laws 2006-112, s. 8, effective October 1, 2006, substituted “G.S. 25-1-302” for “G.S. 25-1-102(3)” in subsection (2).

## § 25-2A-519. Lessee's damages for nondelivery, repudiation, default, and breach of warranty in regard to accepted goods.

(1) Except as otherwise provided with respect to damages liquidated in the lease agreement (G.S. 25-2A-504) or otherwise determined pursuant to agreement of the parties (G.S. 25-1-302 and G.S. 25-2A-503), if a lessee elects not to cover or a lessee elects to cover and the cover is by lease agreement that for any reason does not qualify for treatment under G.S. 25-2A 518(2), or is by purchase or otherwise, the measure of damages for nondelivery or repudiation by the lessor or for rejection or revocation of acceptance by the lessee is the present value, as of the date of the default, of the then market rent minus the present value as of the same date of the original rent, computed for the remaining lease term of the original lease agreement, together with incidental and consequential damages, less expenses saved in consequence of the lessor's default.

(2) Market rent is to be determined as of the place for tender or, in cases of rejection after arrival or revocation of acceptance, as of the place of arrival.

(3) Except as otherwise agreed, if the lessee has accepted goods and given notification (G.S. 25-2A-516(3)), the measure of damages for nonconforming tender or delivery or other default by a lessor is the loss resulting in the ordinary course of events from the lessor's default as determined in any manner that is reasonable together with incidental and consequential damages, less expenses saved in consequence of the lessor's default.

(4) Except as otherwise agreed, the measure of damages for breach of warranty is the present value at the time and place of acceptance of the difference between the value of the use of the goods accepted and the value if they had been as warranted for the lease term, unless special circumstances show proximate damages of a different amount, together with incidental and consequential damages, less expenses saved in consequence of the lessor's default or breach of warranty. (1993, c. 463, s. 1; 2006-112, s. 9.)

**Editor's Note.** — Session Laws 2006-112, s. 60, provides: “A document of title issued or a bailment that arises before the effective date of this act and the rights, obligations, and interests flowing from that document or bailment are governed by any statute amended or repealed by this act as if amendment or repeal

had not occurred and may be terminated, completed, consummated, or enforced under that statute.”

**Effect of Amendments.** — Session Laws 2006-112, s. 9, effective October 1, 2006, substituted “G.S. 25-1-302” for “G.S. 25-1-102(3)” in subsection (1).

## SUBPART C. Default by Lessee.

## § 25-2A-526. Lessor's stoppage of delivery in transit or otherwise.

(1) A lessor may stop delivery of goods in the possession of a carrier or other bailee if the lessor discovers the lessee to be insolvent and may stop delivery of carload, truckload, planeload, or larger shipments of express or freight if the lessee repudiates or fails to make a payment due before delivery, whether for

rent, security, or otherwise under the lease contract, or for any other reason the lessor has a right to withhold or take possession of the goods.

(2) In pursuing its remedies under subsection (1) of this section, the lessor may stop delivery until

- (a) receipt of the goods by the lessee;
- (b) acknowledgment to the lessee by any bailee of the goods, except a carrier, that the bailee holds the goods for the lessee; or
- (c) such an acknowledgment to the lessee by a carrier via reshipment or as a warehouse.

(3)(a) To stop delivery, a lessor shall so notify as to enable the bailee by reasonable diligence to prevent delivery of the goods.

(b) After notification, the bailee shall hold and deliver the goods according to the directions of the lessor, but the lessor is liable to the bailee for any ensuing charges or damages.

(c) A carrier who has issued a nonnegotiable bill of lading is not obliged to obey a notification to stop received from a person other than the consignor. (1993, c. 463, s. 1; 1995, c. 509, s. 23; 2006-112, s. 40.)

**Editor's Note.** — Session Laws 2006-112, s. 59, provides: "Subparts A and B of Part II of this act apply to a document of title that is issued or a bailment that arises on or after the effective date of this act. Subparts A and B of Part II of this act do not apply to a document of title that is issued or a bailment that arises before the effective date of this act even if the document of title or bailment would be subject to this act if the document of title had been issued or bailment had arisen on or after the effective date of this act. Subparts A and B of Part II of this act do not apply to a right of action that has accrued before the effective date of this act."

Session Laws 2006-112, s. 60, provides: "A document of title issued or a bailment that arises before the effective date of this act and the rights, obligations, and interests flowing from that document or bailment are governed by any statute amended or repealed by this act as if amendment or repeal had not occurred and may be terminated, completed, consummated, or enforced under that statute."

**Effect of Amendments.** — Session Laws 2006-112, s. 40, effective October 1, 2006, substituted "a warehouse" for "warehouseman" in subdivision (2)(c).

## § 25-2A-527. Lessor's rights to dispose of goods.

(1) After a default by a lessee under the lease contract of the type described in G.S. 25-2A-523(1) or G.S. 25-2A-523(3)(a) or after the lessor refuses to deliver or takes possession of goods (G.S. 25-2A-525 or G.S. 25-2A-526), or, if agreed, after other default by a lessee, the lessor may dispose of the goods concerned or the undelivered balance thereof by lease, sale, or otherwise.

(2) Except as otherwise provided with respect to damages liquidated in the lease agreement (G.S. 25-2A-504) or otherwise determined pursuant to agreement of the parties (G.S. 25-1-302 and G.S. 25-2A-503), if the disposition is by lease agreement substantially similar to the original lease agreement and the new lease agreement is made in good faith and in a commercially reasonable manner, the lessor may recover from the lessee as damages (i) accrued and unpaid rent as of the date of the commencement of the term of the new lease agreement, (ii) the present value, as of the same date, of the total rent for the then remaining lease term of the original lease agreement minus the present value, as of the same date, of the rent under the new lease agreement applicable to that period of the new lease term which is comparable to the then remaining term of the original lease agreement, and (iii) any incidental damages allowed under G.S. 25-2A-530, less expenses saved in consequence of the lessee's default.

(3) If the lessor's disposition is by lease agreement that for any reason does not qualify for treatment under subsection (2) of this section, or is by sale or



otherwise, the lessor may recover from the lessee as if the lessor had elected not to dispose of the goods and G.S. 25-2A-528 governs.

(4) A subsequent buyer or lessee who buys or leases from the lessor in good faith for value as a result of a disposition under this section takes the goods free of the original lease contract and any rights of the original lessee even though the lessor fails to comply with one or more of the requirements of this Article.

(5) The lessor is not accountable to the lessee for any profit made on any disposition. A lessee who has rightfully rejected or justifiably revoked acceptance shall account to the lessor for any excess over the amount of the lessee's security interest (G.S. 25-2A-508(5)). (1993, c. 463, s. 1; 2006-112, s. 10.)

**Editor's Note.** — Session Laws 2006-112, s. 60, provides: "A document of title issued or a bailment that arises before the effective date of this act and the rights, obligations, and interests flowing from that document or bailment are governed by any statute amended or repealed by this act as if amendment or repeal

had not occurred and may be terminated, completed, consummated, or enforced under that statute."

**Effect of Amendments.** — Session Laws 2006-112, s. 10, effective October 1, 2006, substituted "G.S. 25-1-302" for "G.S. 25-1-102(3)" in subsection (2).

## § 25-2A-528. Lessor's damages for nonacceptance, failure to pay, repudiation, or other default.

(1) Except as otherwise provided with respect to damages liquidated in the lease agreement (G.S. 25-2A-504) or otherwise determined pursuant to agreement of the parties (G.S. 25-1-302 and G.S. 25-2A-503), if a lessor elects to retain the goods or a lessor elects to dispose of the goods and the disposition is by lease agreement that for any reason does not qualify for treatment under G.S. 25-2A-527(2), or is by sale or otherwise, the lessor may recover from the lessee as damages for a default of the type described in G.S. 25-2A-523(1) or G.S. 25-2A-523(3)(a), or if agreed, for other default of the lessee, (i) accrued and unpaid rent as of the date of default if the lessee has never taken possession of the goods, or, if the lessee has taken possession of the goods, as of the date the lessor repossesses the goods or an earlier date on which the lessee makes a tender of the goods to the lessor, (ii) the present value as of the date determined under clause (i) of the total rent for the then remaining lease term of the original lease agreement minus the present value as of the same date of the market rent at the place where the goods are located computed for the same lease term, and (iii) any incidental damages allowed under G.S. 25-2A-530, less expenses saved in consequence of the lessee's default.

(2) If the measure of damages provided in subsection (1) of this section, is inadequate to put a lessor in as good a position as performance would have, the measure of damages is the present value of the profit, including reasonable overhead, the lessor would have made from full performance by the lessee, together with any incidental damages allowed under G.S. 25-2A-530, due allowance for costs reasonably incurred and due credit for payments or proceeds of disposition. (1993, c. 463, s. 1; 2006-112, s. 11.)

**Editor's Note.** — Session Laws 2006-112, s. 60, provides: "A document of title issued or a bailment that arises before the effective date of this act and the rights, obligations, and interests flowing from that document or bailment are governed by any statute amended or repealed by this act as if amendment or repeal

had not occurred and may be terminated, completed, consummated, or enforced under that statute."

**Effect of Amendments.** — Session Laws 2006-112, s. 11, effective October 1, 2006, in subsection (1), substituted "G.S. 25-1-302" for "G.S. 25-1-102(3)" and "G.S. 25-2A-530" for "2A-530."



## ARTICLE 3.

*Negotiable Instruments.*

(Revised)

## PART 1.

## GENERAL PROVISIONS AND DEFINITIONS.

**§ 25-3-103. Definitions.**

(a) In this Article:

- (1) "Acceptor" means a drawee who has accepted a draft.
- (2) "Drawee" means a person ordered in a draft to make payment.
- (3) "Drawer" means a person who signs or is identified in a draft as a person ordering payment.
- (4) Repealed by Session Laws 2006-112, s. 12, effective October 1, 2006.
- (5) "Maker" means a person who signs or is identified in a note as a person undertaking to pay.
- (6) "Order" means a written instruction to pay money signed by the person giving the instruction. The instruction may be addressed to any person, including the person giving the instruction, or to one or more persons jointly or in the alternative but not in succession. An authorization to pay is not an order unless the person authorized to pay is also instructed to pay.
- (7) "Ordinary care" in the case of a person engaged in business means observance of reasonable commercial standards, prevailing in the area in which the person is located, with respect to the business in which the person is engaged. In the case of a bank that takes an instrument for processing for collection or payment by automated means, reasonable commercial standards do not require the bank to examine the instrument if the failure to examine does not violate the bank's prescribed procedures and the bank's procedures do not vary unreasonably from general banking usage not disapproved by this Article or Article 4.
- (8) "Party" means a party to an instrument.
- (9) "Promise" means a written undertaking to pay money signed by the person undertaking to pay. An acknowledgment of an obligation by the obligor is not a promise unless the obligor also undertakes to pay the obligation.
- (10) "Prove" with respect to a fact means to meet the burden of establishing the fact (G.S. 25-1-201(b)(8)).
- (11) "Remitter" means a person who purchases an instrument from its issuer if the instrument is payable to an identified person other than the purchaser.

(b) Other definitions applying to this Article and the sections in which they appear are:

"Acceptance"	G.S. 25-3-409.
"Accommodated party"	G.S. 25-3-419.
"Accommodation party"	G.S. 25-3-419.
"Alteration"	G.S. 25-3-407.
"Anomalous indorsement"	G.S. 25-3-205.
"Blank indorsement"	G.S. 25-3-205.

“Cashier’s check”	G.S. 25-3-104.
“Certificate of deposit”	G.S. 25-3-104.
“Certified check”	G.S. 25-3-409.
“Check”	G.S. 25-3-104.
“Consideration”	G.S. 25-3-303.
“Draft”	G.S. 25-3-104.
“Holder in due course”	G.S. 25-3-302.
“Incomplete instrument”	G.S. 25-3-115.
“Indorsement”	G.S. 25-3-204.
“Indorser”	G.S. 25-3-204.
“Instrument”	G.S. 25-3-104.
“Issue”	G.S. 25-3-105.
“Issuer”	G.S. 25-3-105.
“Negotiable instrument”	G.S. 25-3-104.
“Negotiation”	G.S. 25-3-201.
“Note”	G.S. 25-3-104.
“Payable at a definite time”	G.S. 25-3-108.
“Payable on demand”	G.S. 25-3-108.
“Payable to bearer”	G.S. 25-3-109.
“Payable to order”	G.S. 25-3-109.
“Payment”	G.S. 25-3-602.
“Person entitled to enforce”	G.S. 25-3-301.
“Presentment”	G.S. 25-3-501.
“Reacquisition”	G.S. 25-3-207.
“Special indorsement”	G.S. 25-3-205.
“Teller’s check”	G.S. 25-3-104.
“Transfer of instrument”	G.S. 25-3-203.
“Traveler’s check”	G.S. 25-3-104.
“Value”	G.S. 25-3-303.

(c) The following definitions in other Articles apply to this Article:

“Bank”	G.S. 25-4-105.
“Banking day”	G.S. 25-4-104.
“Clearing house”	G.S. 25-4-104.
“Collecting bank”	G.S. 25-4-105.
“Depositary bank”	G.S. 25-4-105.
“Documentary draft”	G.S. 25-4-104.
“Intermediary bank”	G.S. 25-4-105.
“Item”	G.S. 25-4-104.
“Payor bank”	G.S. 25-4-105.
“Suspends payments”	G.S. 25-4-104.

(d) In addition, Article 1 contains general definitions and principles of construction and interpretation applicable throughout this Article. (1899, c. 733, ss. 17, 68; Rev., ss. 1952, 2217, 2341; C.S., ss. 2998, 3049; 1965, c. 700, s. 1; 1995, c. 232, s. 1; 2006-112, ss. 12, 13.)

**Editor’s Note.** — Session Laws 2006-112, s. 60, provides: “A document of title issued or a bailment that arises before the effective date of this act and the rights, obligations, and interests flowing from that document or bailment are governed by any statute amended or repealed by this act as if amendment or repeal had not occurred and may be terminated, completed, consummated, or enforced under that statute.”

**Effect of Amendments.** — Session Laws 2006-112, ss. 12 and 13, effective October 1, 2006, repealed subdivision (a)(4), which read: “‘Good faith’ means honesty in fact and the observance of reasonable commercial standards of fair dealing.”; and substituted “(G.S. 25-1-201(b)(8))” for “(G.S. 25-1-201(8))” in subdivision (a)(10).

## § 25-3-104. Negotiable instrument.

### CASE NOTES

#### I. General Consideration.

##### I. GENERAL CONSIDERATION.

**Nonbankrupt Wife Remained Liable Under Note That Was Partly Reaffirmed by Bankrupt Husband.** — Promissory note was subject to the Uniform Commercial Code as complying with all of the provisions under G.S. 25-3-104(a)(1)-(3) and not conspicuously stating it was not negotiable, so the nonbankrupt

wife remained liable under G.S. 25-3-604(a), since the bank did not release her in a “signed” writing as part of the bankrupt husband’s agreement to reaffirm part of defaulted note’s debt so that he could keep the collateral that was titled only in his name. *First Commerce Bank v. Dockery*, 171 N.C. App. 297, 615 S.E.2d 314, 2005 N.C. App. LEXIS 1202 (2005).

### PART 6.

#### DISCHARGE AND PAYMENT.

## § 25-3-604. Discharge by cancellation or renunciation.

### CASE NOTES

**Nonbankrupt wife remained liable under G.S. 25-3-604(a) where bank did not release wife in a “signed” writing** as part of the bankrupt husband’s agreement to reaffirm part of defaulted note’s debt so that he could

keep the collateral that was titled only in his name. *First Commerce Bank v. Dockery*, 171 N.C. App. 297, 615 S.E.2d 314, 2005 N.C. App. LEXIS 1202 (2005).

### ARTICLE 4.

#### *Bank Deposits and Collections.*

### PART 1.

#### GENERAL PROVISIONS AND DEFINITIONS.

## § 25-4-104. Definitions and index of definitions.

(a) In this Article, unless the context otherwise requires:

- (1) “Account” means any deposit or credit account with a bank, including a demand, time, savings, passbook, share draft, or like account, other than an account evidenced by a certificate of deposit.
- (2) “Afternoon” means the period of a day between noon and midnight.
- (3) “Banking day” means the part of a day on which a bank is open to the public for carrying on substantially all of its banking functions.
- (4) “Clearing house” means an association of banks or other payors regularly clearing items.
- (5) “Customer” means a person having an account with a bank or for whom a bank has agreed to collect items, including a bank that maintains an account at another bank.
- (6) “Documentary draft” means a draft to be presented for acceptance or payment if specified documents, certificated securities (G.S. 25-8-102)



or instructions for uncertificated securities (G.S. 25-8-102), or other certificates, statements, or the like are to be received by the drawee or other payor before acceptance or payment of the draft.

- (7) "Draft" means a draft as defined in G.S. 25-3-104 or an item, other than an instrument, that is an order.
- (8) "Drawee" means a person ordered in a draft to make payment.
- (9) "Item" means an instrument or a promise or order to pay money handled by a bank for collection or payment. The term does not include a payment order governed by Article 4A or a credit or debit card slip.
- (10) "Midnight deadline" with respect to a bank is midnight on its next banking day following the banking day on which it receives the relevant item or notice or from which the time for taking action commences to run, whichever is later.
- (11) "Settle" means to pay in cash, by clearing-house settlement, in a charge or credit, by remittance, or otherwise as agreed. A settlement may be either provisional or final.
- (12) "Suspends payments" with respect to a bank means that it has been closed by order of the supervisory authorities, that a public officer has been appointed to take it over, or that it ceases or refuses to make payments in the ordinary course of business.

(b) Other definitions applying to this Article and the sections in which they appear are:

"Agreement for electronic presentment"	G.S. 25-4-110.
"Bank"	G.S. 25-4-105.
"Collecting bank"	G.S. 25-4-105.
"Depository bank"	G.S. 25-4-105.
"Intermediary bank"	G.S. 25-4-105.
"Payor bank"	G.S. 25-4-105.
"Presenting bank"	G.S. 25-4-105.
"Presentment notice"	G.S. 25-4-110.

(c) "Control" as provided in G.S. 25-7-106 and the following definitions in other Articles apply to this Article:

"Acceptance"	G.S. 25-3-409.
"Alteration"	G.S. 25-3-407.
"Cashier's check"	G.S. 25-3-104.
"Certificate of deposit"	G.S. 25-3-104.
"Certified check"	G.S. 25-3-409.
"Check"	G.S. 25-3-104.
"Draft"	G.S. 25-3-104.
"Holder in due course"	G.S. 25-3-302.
"Instrument"	G.S. 25-3-104.
"Notice of dishonor"	G.S. 25-3-503.
"Order"	G.S. 25-3-103.
"Ordinary care"	G.S. 25-3-103.
"Person entitled to enforce"	G.S. 25-3-301.
"Presentment"	G.S. 25-3-501.
"Promise"	G.S. 25-3-103.
"Prove"	G.S. 25-3-103.
"Teller's check"	G.S. 25-3-104.
"Unauthorized signature"	G.S. 25-3-403.

(d) In addition Article 1 contains general definitions and principles of construction and interpretation applicable throughout this Article. (1965, c. 700, s. 1; 1995, c. 232, s. 2; 1997-181, s. 19; 2006-112, ss. 14, 41.)

**Editor's Note.** — Session Laws 2006-112, s. 59, provides: "Subparts A and B of Part II of this act apply to a document of title that is issued or a bailment that arises on or after the effective date of this act. Subparts A and B of Part II of this act do not apply to a document of title that is issued or a bailment that arises before the effective date of this act even if the document of title or bailment would be subject to this act if the document of title had been issued or bailment had arisen on or after the effective date of this act. Subparts A and B of Part II of this act do not apply to a right of action that has accrued before the effective date of this act."

Session Laws 2006-112, s. 60, provides: "A document of title issued or a bailment that arises before the effective date of this act and the rights, obligations, and interests flowing from that document or bailment are governed by any statute amended or repealed by this act as if amendment or repeal had not occurred and may be terminated, completed, consummated, or enforced under that statute."

**Effect of Amendments.** — Session Laws 2006-112, ss. 14 and 41, effective October 1, 2006, in subsection (c), deleted "Good faith" G.S. 25-3-103." and added "Control" as provided in G.S. 25-7-106 and" at the beginning of the introductory paragraph.

## PART 2.

### COLLECTION OF ITEMS: DEPOSITARY AND COLLECTING BANKS.

#### § 25-4-208. Security interest of collecting bank in items, accompanying documents and proceeds.

(a) A collecting bank has a security interest in an item and any accompanying documents or the proceeds of either:

- (1) In case of an item deposited in an account, to the extent to which credit given for the item has been withdrawn or applied;
- (2) In case of an item for which it has given credit available for withdrawal as of right, to the extent of the credit given, whether or not the credit is drawn upon or there is a right of charge-back; or
- (3) If it makes an advance on or against the item.

(b) If credit given for several items received at one time or pursuant to a single agreement is withdrawn or applied in part, the security interest remains upon all the items, any accompanying documents or the proceeds of either. For the purpose of this section, credits first given are first withdrawn.

(c) Receipt by a collecting bank of a final settlement for an item is a realization on its security interest in the item, accompanying documents, and proceeds. So long as the bank does not receive final settlement for the item or give up possession of the item or possession or control of the accompanying documents for purposes other than collection, the security interest continues to that extent and is subject to Article 9, but:

- (1) No security agreement is necessary to make the security interest enforceable (G.S. 25-9-203(b)(3)a.);
- (2) No filing is required to perfect the security interest; and
- (3) The security interest has priority over conflicting perfected security interests in the item, accompanying documents, or proceeds. (1965, c. 700, s. 1; 1995, c. 232, s. 2; 2000-169, s. 17; 2006-112, s. 42.)

**Editor's Note.** —

Session Laws 2006-112, s. 59, provides: "Subparts A and B of Part II of this act apply to a document of title that is issued or a bailment that arises on or after the effective date of this act. Subparts A and B of Part II of this act do not apply to a document of title that is issued or a bailment that arises before the effective date of this act even if the document of title or

bailment would be subject to this act if the document of title had been issued or bailment had arisen on or after the effective date of this act. Subparts A and B of Part II of this act do not apply to a right of action that has accrued before the effective date of this act."

Session Laws 2006-112, s. 60, provides: "A document of title issued or a bailment that arises before the effective date of this act and

the rights, obligations, and interests flowing from that document or bailment are governed by any statute amended or repealed by this act as if amendment or repeal had not occurred and may be terminated, completed, consummated, or enforced under that statute.”

**Effect of Amendments.** — Session Laws 2006-112, s. 42, effective October 1, 2006, inserted “possession or control of the” in the introductory language of subsection (c); and made a minor punctuation change in subdivision (c)(3).

ARTICLE 4A.

*Funds Transfers.*

PART 1.

SUBJECT MATTER AND DEFINITIONS.

§ 25-4A-105. Other definitions.

- (a) In this Article:
- (1) “Authorized account” means a deposit account of a customer in a bank designated by the customer as a source of payment of payment orders issued by the customer to the bank. If a customer does not so designate an account, any account of the customer is an authorized account if payment of a payment order from that account is not inconsistent with a restriction on the use of that account.
  - (2) “Bank” means a person engaged in the business of banking and includes a savings bank, savings and loan association, credit union, and trust company. A branch or separate office of a bank is a separate bank for purposes of this Article.
  - (3) “Customer” means a person, including a bank, having an account with a bank or from whom a bank has agreed to receive payment orders.
  - (4) “Funds-transfer business day” of a receiving bank means the part of a day during which the receiving bank is open for the receipt, processing, and transmittal of payment orders and cancellations and amendments of payment orders.
  - (5) “Funds-transfer system” means a wire transfer network, automated clearinghouse, or other communication system of a clearinghouse or other association of banks through which a payment order by a bank may be transmitted to the bank to which the order is addressed.
  - (6) Repealed by Session Laws 2006-112, s. 15, effective October 1, 2006.
  - (7) “Prove” with respect to a fact means to meet the burden of establishing the fact (G.S. 25-1-201(b)(8)).
- (b) Other definitions applying to this Article and the sections in which they appear are:
- |                              |                |
|------------------------------|----------------|
| “Acceptance”                 | G.S. 25-4A-209 |
| “Beneficiary”                | G.S. 25-4A-103 |
| “Beneficiary’s bank”         | G.S. 25-4A-103 |
| “Executed”                   | G.S. 25-4A-301 |
| “Execution date”             | G.S. 25-4A-301 |
| “Funds transfer”             | G.S. 25-4A-104 |
| “Funds-transfer system rule” | G.S. 25-4A-501 |
| “Intermediary bank”          | G.S. 25-4A-104 |
| “Originator”                 | G.S. 25-4A-104 |
| “Originator’s bank”          | G.S. 25-4A-104 |



"Payment by beneficiary's bank to beneficiary"	G.S. 25-4A-405
"Payment by originator to beneficiary"	G.S. 25-4A-406
"Payment by sender to receiving bank"	G.S. 25-4A-403
"Payment date"	G.S. 25-4A-401
"Payment order"	G.S. 25-4A-103
"Receiving bank"	G.S. 25-4A-103
"Security procedure"	G.S. 25-4A-201
"Sender"	G.S. 25-4A-103.
(c) The following definitions in Article 4 apply to this Article:	
"Clearing house"	G.S. 25-4-104
"Item"	G.S. 25-4-104
"Suspends payments"	G.S. 25-4-104.
(d) In addition, Article 1 of this Chapter contains general definitions and principles of construction and interpretation applicable throughout this Article. (1993, c. 157, s. 1; 2006-112, ss. 15, 16.)	

**Editor's Note.** — Session Laws 2006-112, s. 60, provides: "A document of title issued or a bailment that arises before the effective date of this act and the rights, obligations, and interests flowing from that document or bailment are governed by any statute amended or repealed by this act as if amendment or repeal had not occurred and may be terminated, com-

pleted, consummated, or enforced under that statute."

**Effect of Amendments.** — Session Laws 2006-112, ss. 15 and 16, effective October 1, 2006, repealed subdivision (a)(6) and substituted "(G.S. 25-1-201(b)(8))" for "(G.S. 25-1-201(8))" in subdivision (a)(7).

§ 25-4A-106. Time payment order is received.

(a) The time of receipt of a payment order or communication cancelling or amending a payment order is determined by the rules applicable to receipt of a notice stated in G.S. 25-1-202. A receiving bank may fix a cutoff time or times on a funds-transfer business day for the receipt and processing of payment orders and communications cancelling or amending payment orders. Different cutoff times may apply to payment orders, cancellations, or amendments, or to different categories of payment orders, cancellations, or amendments. A cutoff time may apply to senders generally or different cutoff times may apply to different senders or categories of payment orders. If a payment order or communication cancelling or amending a payment order is received after the close of a funds-transfer business day or after the appropriate cutoff time on a funds-transfer business day, the receiving bank may treat the payment order or communication as received at the opening of the next funds-transfer business day.

(b) If this Article refers to an execution date or payment date or states a day on which a receiving bank is required to take action, and the date or day does not fall on a funds-transfer business day, the next day that is a funds-transfer business day is treated as the date or day stated, unless the contrary is stated in this Article. (1993, c. 157, s. 1; 2006-112, s. 17.)

**Editor's Note.** — Session Laws 2006-112, s. 60, provides: "A document of title issued or a bailment that arises before the effective date of this act and the rights, obligations, and interests flowing from that document or bailment are governed by any statute amended or repealed by this act as if amendment or repeal

had not occurred and may be terminated, completed, consummated, or enforced under that statute."

**Effect of Amendments.** — Session Laws 2006-112, s. 17, effective October 1, 2006, substituted "G.S. 25-1-202" for "G.S. 25-1-201(27)" in the first sentence of subsection (a).

## PART 2.

## ISSUE AND ACCEPTANCE OF PAYMENT ORDER.

**§ 25-4A-204. Refund of payment and duty of customer to report with respect to unauthorized payment order.**

(a) If a receiving bank accepts a payment order issued in the name of its customer as sender which is (i) not authorized and not effective as the order of the customer under G.S. 25-4A-202, or (ii) not enforceable, in whole or in part, against the customer under G.S. 25-4A-203, the bank shall refund any payment of the payment order received from the customer to the extent the bank is not entitled to enforce payment and shall pay interest on the refundable amount calculated from the date the bank received payment to the date of the refund. However, the customer is not entitled to interest from the bank on the amount to be refunded if the customer fails to exercise ordinary care to determine that the order was not authorized by the customer and to notify the bank of the relevant facts within a reasonable time not exceeding 90 days after the date the customer received notification from the bank that the order was accepted or that the customer's account was debited with respect to the order. The bank is not entitled to any recovery from the customer on account of a failure by the customer to give notification as stated in this section.

(b) Reasonable time under subsection (a) of this section may be fixed by agreement as stated in G.S. 25-1-302(b), but the obligation of a receiving bank to refund payment as stated in subsection (a) of this section may not otherwise be varied by agreement. (1993, c. 157, s. 1; 2006-112, s. 18.)

**Editor's Note.** — Session Laws 2006-112, s. 60, provides: "A document of title issued or a bailment that arises before the effective date of this act and the rights, obligations, and interests flowing from that document or bailment are governed by any statute amended or repealed by this act as if amendment or repeal had not occurred and may be terminated, com-

pleted, consummated, or enforced under that statute."

**Effect of Amendments.** — Session Laws 2006-112, s. 18, effective October 1, 2006, in subsection (b), substituted "G.S. 25-1-302(b)" for "G.S. 25-1-204(1)", and inserted "of this section" in two places.

## ARTICLE 5.

*Letters Of Credit.*

(Revised)

**§ 25-5-103. Scope.**

(a) This Article applies to letters of credit and to certain rights and obligations arising out of transactions involving letters of credit.

(b) The statement of a rule in this Article does not by itself require, imply, or negate application of the same or a different rule to a situation not provided for, or to a person not specified, in this Article.

(c) With the exception of this subsection, subsections (a) and (d) of this section, G.S. 25-5-102(a)(9) and (10), 25-5-106(d), and 25-5-114(d), and except to the extent prohibited in G.S. 25-1-302 and G.S. 25-5-117(d), the effect of this Article may be varied by agreement or by a provision stated or incorporated by

reference in an undertaking. A term in an agreement or undertaking generally excusing liability or generally limiting remedies for failure to perform obligations is not sufficient to vary obligations prescribed by this Article.

(d) Rights and obligations of an issuer to a beneficiary or a nominated person under a letter of credit are independent of the existence, performance, or nonperformance of a contract or arrangement out of which the letter of credit arises or which underlies it, including contracts or arrangements between the issuer and the applicant and between the applicant and the beneficiary. (1999-73, s. 1; 2006-112, s. 19.)

**Effect of Amendments.** — Session Laws 2006-112, s. 19, effective October 1, 2006, substituted “G.S. 25-1-302” for “G.S. 25-1-102(3)” in subsection (c).

## ARTICLE 7.

### *Documents of Title.*

(Revised)

## PART 1.

### GENERAL.

#### § 25-7-101. Short title.

This Article may be cited as Uniform Commercial Code — Documents of Title. (1965, c. 700, s. 1; 2006-112, s. 25.)

**Editor’s Note.** — Session Laws 2006-112, s. 25, effective October 1, 2006, rewrote Article 7 of Chapter 25 of the General Statutes. Where appropriate, historical citations to sections of former Article 7 have been placed under corresponding sections of revised Article 7.

Session Laws 2006-112, s. 59, provides: “Subparts A and B of Part II of this act apply to a document of title that is issued or a bailment that arises on or after the effective date of this act. Subparts A and B of Part II of this act do not apply to a document of title that is issued or a bailment that arises before the effective date of this act even if the document of title or bailment would be subject to this act if the document of title had been issued or bailment had arisen on or after the effective date of this act. Subparts A and B of Part II of this act do not apply to a right of action that has accrued before the effective date of this act.”

Session Laws 2006-112, s. 60, provides: “A document of title issued or a bailment that arises before the effective date of this act and the rights, obligations, and interests flowing from that document or bailment are governed by any statute amended or repealed by this act as if amendment or repeal had not occurred and may be terminated, completed, consummated, or enforced under that statute.”

Session Laws 2006-112, s. 61, provides: “The Revisor of Statutes shall cause to be printed along with this act all relevant portions of the official comments to Uniform Commercial Code Revised Article 1 and Uniform Commercial Code Revised Article 7 and all explanatory comments of the drafters of this act as the Revisor deems appropriate.”

#### § 25-7-102. Definitions and index of definitions.

(a) In this Article, unless the context otherwise requires:

- (1) “Bailee” means a person that by a warehouse receipt, bill of lading, or other document of title acknowledges possession of goods and contracts to deliver them.
- (2) “Carrier” means a person that issues a bill of lading.



- (3) "Consignee" means a person named in a bill of lading to whom or to whose order the bill promises delivery.
  - (4) "Consignor" means a person named in a bill of lading as the person from whom the goods have been received for shipment.
  - (5) "Delivery order" means a record that contains an order to deliver goods directed to a warehouse, carrier, or other person that in the ordinary course of business issues warehouse receipts or bills of lading.
  - (6) Reserved for future codification purposes.
  - (7) "Goods" means all things that are treated as movable for the purposes of a contract for storage or transportation.
  - (8) "Issuer" means a bailee that issues a document of title or, in the case of an unaccepted delivery order, the person that orders the possessor of goods to deliver. The term includes a person for whom an agent or employee purports to act in issuing a document if the agent or employee has real or apparent authority to issue documents, even if the issuer did not receive any goods, the goods were misdescribed, or in any other respect the agent or employee violated the issuer's instructions.
  - (9) "Person entitled under the document" means the holder, in the case of a negotiable document of title, or the person to whom delivery of the goods is to be made by the terms of, or pursuant to instructions in a record under, a nonnegotiable document of title.
  - (10) Reserved for future codification purposes.
  - (11) "Sign" means, with present intent to authenticate or adopt a record:
    - a. To execute or adopt a tangible symbol; or
    - b. To attach to or logically associate with the record an electronic sound, symbol, or process.
  - (12) "Shipper" means a person that enters into a contract of transportation with a carrier.
  - (13) "Warehouse" means a person engaged in the business of storing goods for hire.
- (b) Definitions in other Articles applying to this Article and the sections in which they appear are:
- (1) "Contract for sale," G.S. 25-2-106.
  - (2) "Lessee in the ordinary course of business," G.S. 25-2A-103.
  - (3) "Receipt" of goods, G.S. 25-2-103.
- (c) In addition, Article 1 of this Chapter contains general definitions and principles of construction and interpretation applicable throughout this Article. (1917, c. 37, s. 58; 1919, c. 65, s. 42; C.S., ss. 280, 4037; 1965, c. 700, s. 1; 2006-112, s. 25.)

## § 25-7-103. Relation of Article to treaty or statute.

(a) This Article is subject to any treaty or statute of the United States or regulatory statute of this State to the extent the treaty, statute, or regulatory statute is applicable.

(b) This Article does not modify or repeal any law prescribing the form or content of a document of title or the services or facilities to be afforded by a bailee or otherwise regulating a bailee's business in respects not specifically treated in this Article. However, violation of such a law does not affect the status of a document of title that otherwise is within the definition of a document of title.

(c) This Article modifies, limits, and supersedes the federal Electronic Signatures in Global and National Commerce Act (15 U.S.C. § 7001, et seq.) but does not modify, limit, or supersede section 101(c) of that Act (15 U.S.C. § 7001(c)) or authorize electronic delivery of any of the notices described in section 103(b) of that Act (15 U.S.C. § 7003(b)).

(d) To the extent there is a conflict between Article 40 of Chapter 66 of the General Statutes (the Uniform Electronic Transactions Act) and this Article, this Article governs. (1965, c. 700, s. 1; 1997-181, s. 21; 2006-112, s. 25.)

### **§ 25-7-104. Negotiable and nonnegotiable document of title.**

(a) Except as otherwise provided in subsection (c) of this section, a document of title is negotiable if by its terms the goods are to be delivered to bearer or to the order of a named person.

(b) A document of title other than one described in subsection (a) of this section is nonnegotiable. A bill of lading that states that the goods are consigned to a named person is not made negotiable by a provision that the goods are to be delivered only against an order in a record signed by the same or another named person.

(c) A document of title is nonnegotiable if, at the time it is issued, the document has a conspicuous legend, however expressed, that it is nonnegotiable. (Rev., s. 3032; 1917, c. 37, ss. 4, 7; 1919, c. 65, ss. 3, 6, 7; C.S., ss. 285, 288, 289, 4044, 4045; 1965, c. 700, s. 1; 2006-112, s. 25.)

### **§ 25-7-105. Reissuance in alternative medium.**

(a) Upon request of a person entitled under an electronic document of title, the issuer of the electronic document may issue a tangible document of title as a substitute for the electronic document if:

- (1) The person entitled under the electronic document surrenders control of the document to the issuer; and
- (2) The tangible document when issued contains a statement that it is issued in substitution for the electronic document.

(b) Upon issuance of a tangible document of title in substitution for an electronic document of title in accordance with subsection (a) of this section:

- (1) The electronic document ceases to have any effect or validity; and
- (2) The person that procured issuance of the tangible document warrants to all subsequent persons entitled under the tangible document that the warrantor was a person entitled under the electronic document when the warrantor surrendered control of the electronic document to the issuer.

(c) Upon request of a person entitled under a tangible document of title, the issuer of the tangible document may issue an electronic document of title as a substitute for the tangible document if:

- (1) The person entitled under the tangible document surrenders possession of the document to the issuer; and
- (2) The electronic document when issued contains a statement that it is issued in substitution for the tangible document.

(d) Upon issuance of an electronic document of title in substitution for a tangible document of title in accordance with subsection (c) of this section:

- (1) The tangible document ceases to have any effect or validity; and
- (2) The person that procured issuance of the electronic document warrants to all subsequent persons entitled under the electronic document that the warrantor was a person entitled under the tangible document when the warrantor surrendered possession of the tangible document to the issuer. (2006-112, s. 25.)

### **§ 25-7-106. Control of electronic document of title.**

(a) A person has control of an electronic document of title if a system employed for evidencing the transfer of interests in the electronic document



reliably establishes that person as the person to which the electronic document was issued or transferred.

(b) A system satisfies subsection (a) of this section, and a person is deemed to have control of an electronic document of title, if the document is created, stored, and assigned in such a manner that:

- (1) A single authoritative copy of the document exists which is unique, identifiable, and, except as otherwise provided in subdivisions (4), (5), and (6) of this subsection, unalterable;
- (2) The authoritative copy identifies the person asserting control as:
  - a. The person to whom the document was issued; or
  - b. If the authoritative copy indicates that the document has been transferred, the person to whom the document was most recently transferred;
- (3) The authoritative copy is communicated to and maintained by the person asserting control or its designated custodian;
- (4) Copies or amendments that add or change an identified assignee of the authoritative copy can be made only with the consent of the person asserting control;
- (5) Each copy of the authoritative copy and any copy of a copy is readily identifiable as a copy that is not the authoritative copy; and
- (6) Any amendment of the authoritative copy is readily identifiable as authorized or unauthorized. (2006-112, s. 25.)

## PART 2.

### WAREHOUSE RECEIPTS: SPECIAL PROVISIONS.

#### **§ 25-7-201. Person that may issue a warehouse receipt; storage under bond.**

(a) A warehouse receipt may be issued by any warehouse.

(b) If goods, including distilled spirits and agricultural commodities, are stored under a statute requiring a bond against withdrawal or a license for the issuance of receipts in the nature of warehouse receipts, a receipt issued for the goods is deemed to be a warehouse receipt even if issued by a person that is the owner of the goods and is not a warehouse. (1917, c. 37, s. 1; C.S., s. 4041; 1965, c. 700, s. 1; 2006-112, s. 25.)

#### **§ 25-7-202. Form of warehouse receipt; effect of omission.**

(a) A warehouse receipt need not be in any particular form.

(b) Unless a warehouse receipt provides for each of the following, the warehouse is liable for damages caused to a person injured by its omission:

- (1) A statement of the location of the warehouse facility where the goods are stored;
- (2) The date of issue of the receipt;
- (3) The unique identification code of the receipt;
- (4) A statement whether the goods received will be delivered to the bearer, to a named person, or to a named person or its order;
- (5) The rate of storage and handling charges, unless goods are stored under a field warehousing arrangement, in which case a statement of that fact is sufficient on a nonnegotiable receipt;
- (6) A description of the goods or the packages containing them;
- (7) The signature of the warehouse or its agent;



- (8) If the receipt is issued for goods that the warehouse owns, either solely, jointly, or in common with others, a statement of the fact of that ownership; and
- (9) A statement of the amount of advances made and of liabilities incurred for which the warehouse claims a lien or security interest, unless the precise amount of advances made or liabilities incurred, at the time of the issue of the receipt, is unknown to the warehouse or to its agent that issued the receipt, in which case a statement of the fact that advances have been made or liabilities incurred and the purpose of the advances or liabilities is sufficient.

(c) A warehouse may insert in its receipt any terms that are not contrary to this Chapter and do not impair its obligation of delivery under G.S. 25-7-403 or its duty of care under G.S. 25-7-204. Any contrary provision is ineffective. (Rev., s. 3032; 1917, c. 37, ss. 2, 3; C.S., ss. 4042, 4043; 1965, c. 700, s. 1; 2006-112, s. 25.)

### **§ 25-7-203. Liability for nonreceipt or misdescription.**

A party to or purchaser for value in good faith of a document of title, other than a bill of lading, that relies upon the description of the goods in the document may recover from the issuer damages caused by the nonreceipt or misdescription of the goods, except to the extent that:

- (1) The document conspicuously indicates that the issuer does not know whether all or part of the goods in fact were received or conform to the description, such as a case in which the description is in terms of marks or labels or kind, quantity, or condition, or the receipt or description is qualified by “contents, condition, and quality unknown,” “said to contain,” or words of similar import, if the indication is true; or
- (2) The party or purchaser otherwise has notice of the nonreceipt or misdescription. (1917, c. 37, s. 20; C.S., s. 4060; 1931, c. 358, s. 1; 1965, c. 700, s. 1; 2006-112, s. 25.)

### **§ 25-7-204. Duty of care; contractual limitation of warehouse’s liability.**

(a) A warehouse is liable for damages for loss of or injury to the goods caused by its failure to exercise care with regard to the goods that a reasonably careful person would exercise under similar circumstances. Unless otherwise agreed, the warehouse is not liable for damages that could not have been avoided by the exercise of that care.

(b) Damages may be limited by a term in the warehouse receipt or storage agreement limiting the amount of liability in case of loss or damage beyond which the warehouse is not liable. Such a limitation is not effective with respect to the warehouse’s liability for conversion to its own use. On request of the bailor in a record at the time of signing the storage agreement or within a reasonable time after receipt of the warehouse receipt, the warehouse’s liability may be increased on part or all of the goods covered by the storage agreement or the warehouse receipt. In this event, increased rates may be charged based on an increased valuation of the goods.

(c) Reasonable provisions as to the time and manner of presenting claims and commencing actions based on the bailment may be included in the warehouse receipt or storage agreement.

(d) This section does not modify or repeal any statute that imposes a higher responsibility upon the warehouse or invalidates a contractual limitation that would be permissible under this Article. (1917, c. 37, s. 21; C.S., s. 4061; 1965, c. 700, s. 1; 2006-112, s. 25.)

## NORTH CAROLINA COMMENT

The General Statutes Commission modified subsection (d) to bring forward former G.S. 25-7-204(4).

### **§ 25-7-205. Title under warehouse receipt defeated in certain cases.**

A buyer in ordinary course of business of fungible goods sold and delivered by a warehouse that is also in the business of buying and selling such goods takes the goods free of any claim under a warehouse receipt even if the receipt is negotiable and has been duly negotiated. (1965, c. 700, s. 1; 2006-112, s. 25.)

### **§ 25-7-206. Termination of storage at warehouse's option.**

(a) A warehouse, by giving notice to the person on whose account the goods are held and any other person known to claim an interest in the goods, may require payment of any charges and removal of the goods from the warehouse at the termination of the period of storage fixed by the document of title or, if a period is not fixed, within a stated period not less than 30 days after the warehouse gives notice. If the goods are not removed before the date specified in the notice, the warehouse may sell them pursuant to G.S. 25-7-210.

(b) If a warehouse in good faith believes that goods are about to deteriorate or decline in value to less than the amount of its lien within the time provided in subsection (a) of this section and G.S. 25-7-210, the warehouse may specify in the notice given under subsection (a) of this section any reasonable shorter time for removal of the goods and, if the goods are not removed, may sell them at public sale held not less than one week after a single advertisement or posting.

(c) If, as a result of a quality or condition of the goods of which the warehouse did not have notice at the time of deposit, the goods are a hazard to other property, the warehouse facilities, or other persons, the warehouse may sell the goods at public or private sale without advertisement or posting on reasonable notification to all persons known to claim an interest in the goods. If the warehouse, after a reasonable effort, is unable to sell the goods, it may dispose of them in any lawful manner and does not incur liability by reason of that disposition.

(d) A warehouse shall deliver the goods to any person entitled to them under this Article upon due demand made at any time before sale or other disposition under this section.

(e) A warehouse may satisfy its lien from the proceeds of any sale or disposition under this section but shall hold the balance for delivery on the demand of any person to whom the warehouse would have been bound to deliver the goods. (Rev., ss. 3036 to 3040; 1917, c. 37, ss. 33, 34; C.S., ss. 4073, 4074; 1965, c. 700, s. 1; 2006-112, s. 25.)

### **§ 25-7-207. Goods must be kept separate; fungible goods.**

(a) Unless the warehouse receipt provides otherwise, a warehouse shall keep separate the goods covered by each receipt so as to permit at all times identification and delivery of those goods. However, different lots of fungible goods may be commingled.

(b) If different lots of fungible goods are commingled, the goods are owned in common by the persons entitled thereto and the warehouse is severally liable to each owner for that owner's share. If, because of overissue, a mass of



fungible goods is insufficient to meet all the receipts the warehouse has issued against it, the persons entitled include all holders to whom overissued receipts have been duly negotiated. (Rev., s. 3034; 1917, c. 37, ss. 22 to 24; C.S., ss. 4062 to 4064; 1965, c. 700, s. 1; 2006-112, s. 25.)

### § 25-7-208. Altered warehouse receipts.

If a blank in a negotiable tangible warehouse receipt has been filled in without authority, a good-faith purchaser for value and without notice of the lack of authority may treat the insertion as authorized. Any other unauthorized alteration leaves any tangible or electronic warehouse receipt enforceable against the issuer according to its original tenor. (1917, c. 37, s. 13; C.S., s. 4053; 1965, c. 700, s. 1; 2006-112, s. 25.)

### § 25-7-209. Lien of warehouse.

(a) A warehouse has a lien against the bailor on the goods covered by a warehouse receipt or storage agreement or on the proceeds thereof in its possession for charges for storage or transportation, including demurrage and terminal charges, insurance, labor, or other charges, present or future, in relation to the goods, and for expenses necessary for preservation of the goods or reasonably incurred in their sale pursuant to law. If the person on whose account the goods are held is liable for similar charges or expenses in relation to other goods whenever deposited and it is stated in the warehouse receipt or storage agreement that a lien is claimed for charges and expenses in relation to other goods, the warehouse also has a lien against the goods covered by the warehouse receipt or storage agreement or on the proceeds thereof in its possession for those charges and expenses, whether or not the other goods have been delivered by the warehouse. However, as against a person to which a negotiable warehouse receipt is duly negotiated, a warehouse's lien is limited to charges in an amount or at a rate specified in the warehouse receipt or, if no charges are so specified, to a reasonable charge for storage of the specific goods covered by the receipt subsequent to the date of the receipt.

(b) A warehouse may also reserve a security interest against the bailor for the maximum amount specified on the receipt for charges other than those specified in subsection (a) of this section, such as for money advanced and interest. The security interest is governed by Article 9 of this Chapter.

(c) A warehouse's lien for charges and expenses under subsection (a) of this section or a security interest under subsection (b) of this section is also effective against any person that so entrusted the bailor with possession of the goods that a pledge of them by the bailor to a good-faith purchaser for value would have been valid. However, the lien or security interest is not effective against a person that before issuance of a document of title had a legal interest or a perfected security interest in the goods and that did not:

- (1) Deliver or entrust the goods or any document of title covering the goods to the bailor or the bailor's nominee with:
  - a. Actual or apparent authority to ship, store, or sell;
  - b. Power to obtain delivery under G.S. 25-7-403; or
  - c. Power of disposition under G.S. 25-2-403, 25-2A-304(2), 25-2A-305(2), 25-9-320, or 25-9-321(c) or other statute or rule of law; or
- (2) Acquiesce in the procurement by the bailor or its nominee of any document.

(d) A warehouse's lien on household goods for charges and expenses in relation to the goods under subsection (a) of this section is also effective against all persons if the depositor was the legal possessor of the goods at the time of deposit. In this subsection, "household goods" means furniture, furnishings, or personal effects used by the depositor in a dwelling.



(e) A warehouse loses its lien on any goods that it voluntarily delivers or unjustifiably refuses to deliver. (1917, c. 37, ss. 27 to 31, 41; 1919, c. 65, s. 31; C.S., ss. 313, 4067 to 4071, 4081; 1965, c. 700, s. 1; 1967, c. 562, s. 1; 2000-169, s. 20; 2006-112, s. 25.)

## § 25-7-210. Enforcement of warehouse's lien.

(a) Except as otherwise provided in subsection (b) of this section, a warehouse's lien may be enforced by public or private sale of the goods, in bulk or in packages, at any time or place and on any terms that are commercially reasonable, after notifying all persons known to claim an interest in the goods. The notification must include a statement of the amount due, the nature of the proposed sale, and the time and place of any public sale. The fact that a better price could have been obtained by a sale at a different time or in a method different from that selected by the warehouse is not of itself sufficient to establish that the sale was not made in a commercially reasonable manner. The warehouse sells in a commercially reasonable manner if the warehouse sells the goods in the usual manner in any recognized market therefore, sells at the price current in that market at the time of the sale, or otherwise sells in conformity with commercially reasonable practices among dealers in the type of goods sold. A sale of more goods than apparently necessary to be offered to ensure satisfaction of the obligation is not commercially reasonable, except in cases covered by the preceding sentence.

(b) A warehouse may enforce its lien on goods, other than goods stored by a merchant in the course of its business, only if the following requirements are satisfied:

- (1) All persons known to claim an interest in the goods must be notified.
- (2) The notification must include an itemized statement of the claim, a description of the goods subject to the lien, a demand for payment within a specified time not less than 10 days after receipt of the notification, and a conspicuous statement that unless the claim is paid within that time the goods will be advertised for sale and sold by auction at a specified time and place.
- (3) The sale must conform to the terms of the notification.
- (4) The sale must be held at the nearest suitable place to where the goods are held or stored.
- (5) After the expiration of the time given in the notification, an advertisement of the sale must be published once a week for two weeks consecutively in a newspaper of general circulation where the sale is to be held. The advertisement must include a description of the goods, the name of the person on whose account the goods are being held, and the time and place of the sale. The sale must take place at least 15 days after the first publication. If there is no newspaper of general circulation where the sale is to be held, the advertisement must be posted at least 10 days before the sale in not fewer than six conspicuous places in the neighborhood of the proposed sale.

(c) Before any sale pursuant to this section, any person claiming a right in the goods may pay the amount necessary to satisfy the lien and the reasonable expenses incurred in complying with this section. In that event, the goods may not be sold but must be retained by the warehouse subject to the terms of the receipt and this Article.

(d) A warehouse may buy at any public sale held pursuant to this section.

(e) A purchaser in good faith of goods sold to enforce a warehouse's lien takes the goods free of any rights of persons against whom the lien was valid, despite the warehouse's noncompliance with this section.

(f) A warehouse may satisfy its lien from the proceeds of any sale pursuant to this section but shall hold the balance, if any, for delivery on demand to any person to whom the warehouse would have been bound to deliver the goods.

(g) The rights provided by this section are in addition to all other rights allowed by law to a creditor against a debtor.

(h) If a lien is on goods stored by a merchant in the course of its business, the lien may be enforced in accordance with subsection (a) or (b) of this section.

(i) A warehouse is liable for damages caused by failure to comply with the requirements for sale under this section and, in case of willful violation, is liable for conversion. (Rev., ss. 3036 to 3038, 3041; 1917, c. 37, ss. 32, 33, 35; C.S., ss. 4072, 4073, 4075; 1965, c. 700, s. 1; 2006-112, s. 25.)

### PART 3.

#### BILLS OF LADING: SPECIAL PROVISIONS.

#### **§ 25-7-301. Liability for nonreceipt or misdescription; “said to contain”; “shipper’s weight, load, and count”; improper handling.**

(a) A consignee of a nonnegotiable bill of lading which has given value in good faith, or a holder to which a negotiable bill has been duly negotiated, relying upon the description of the goods in the bill or upon the date shown in the bill, may recover from the issuer damages caused by the misdating of the bill or the nonreceipt or misdescription of the goods, except to the extent that the bill indicates that the issuer does not know whether any part or all of the goods in fact were received or conform to the description, such as in a case in which the description is in terms of marks or labels or kind, quantity, or condition or the receipt or description is qualified by “contents or condition of contents of packages unknown,” “said to contain,” “shipper’s weight, load, and count,” or words of similar import, if that indication is true.

(b) If goods are loaded by the issuer of a bill of lading:

- (1) The issuer shall count the packages of goods if shipped in packages and ascertain the kind and quantity if shipped in bulk; and
- (2) Words such as “shipper’s weight, load, and count,” or words of similar import indicating that the description was made by the shipper are ineffective except as to goods concealed in packages.

(c) If bulk goods are loaded by a shipper that makes available to the issuer of a bill of lading adequate facilities for weighing those goods, the issuer shall ascertain the kind and quantity within a reasonable time after receiving the shipper’s request in a record to do so. In that case, “shipper’s weight” or words of similar import are ineffective.

(d) The issuer of a bill of lading, by including in the bill the words “shipper’s weight, load, and count,” or words of similar import, may indicate that the goods were loaded by the shipper, and, if that statement is true, the issuer is not liable for damages caused by the improper loading. However, omission of such words does not imply liability for damages caused by improper loading.

(e) A shipper guarantees to an issuer the accuracy at the time of shipment of the description, marks, labels, number, kind, quantity, condition, and weight, as furnished by the shipper, and the shipper shall indemnify the issuer against damage caused by inaccuracies in those particulars. This right of indemnity does not limit the issuer’s responsibility or liability under the contract of carriage to any person other than the shipper. (1919, c. 65, ss. 20 to 22; C.S., ss. 302 to 304; 1965, c. 700, s. 1; 1967, c. 24, s. 12; 2006-112, s. 25.)

#### **§ 25-7-302. Through bills of lading and similar documents of title.**

(a) The issuer of a through bill of lading, or other document of title embodying an undertaking to be performed in part by a person acting as its



agent or by a performing carrier, is liable to any person entitled to recover on the bill or other document for any breach by the other person or the performing carrier of its obligation under the bill or other document. However, to the extent that the bill or other document covers an undertaking to be performed overseas or in territory not contiguous to the continental United States or an undertaking including matters other than transportation, this liability for breach by the other person or the performing carrier may be varied by agreement of the parties.

(b) If goods covered by a through bill of lading or other document of title embodying an undertaking to be performed in part by a person other than the issuer are received by that person, the person is subject, with respect to its own performance while the goods are in its possession, to the obligation of the issuer. The person's obligation is discharged by delivery of the goods to another person pursuant to the bill or other document and does not include liability for breach by any other person or by the issuer.

(c) The issuer of a through bill of lading or other document of title described in subsection (a) of this section is entitled to recover from the performing carrier, or other person in possession of the goods when the breach of the obligation under the bill or other document occurred:

- (1) The amount it may be required to pay to any person entitled to recover on the bill or other document for the breach, as may be evidenced by any receipt, judgment, or transcript of judgment; and
- (2) The amount of any expense reasonably incurred by the issuer in defending any action commenced by any person entitled to recover on the bill or other document for the breach. (1965, c. 700, s. 1; 2006-112, s. 25.)

### **§ 25-7-303. Diversion; reconsignment; change of instructions.**

(a) Unless the bill of lading otherwise provides, a carrier may deliver the goods to a person or destination other than that stated in the bill or may otherwise dispose of the goods, without liability for misdelivery, on instructions from:

- (1) The holder of a negotiable bill;
- (2) The consignor on a nonnegotiable bill, even if the consignee has given contrary instructions;
- (3) The consignee on a nonnegotiable bill in the absence of contrary instructions from the consignor, if the goods have arrived at the billed destination or if the consignee is in possession of the tangible bill or in control of the electronic bill; or
- (4) The consignee on a nonnegotiable bill, if the consignee is entitled as against the consignor to dispose of the goods.

(b) Unless instructions described in subsection (a) of this section are included in a negotiable bill of lading, a person to whom the bill is duly negotiated may hold the bailee according to the original terms. (1919, c. 65, ss. 9, 10; C.S., ss. 291, 292; 1965, c. 700, s. 1; 2006-112, s. 25.)

### **§ 25-7-304. Tangible bills of lading in a set.**

(a) Except as customary in international transportation, a tangible bill of lading may not be issued in a set of parts. The issuer is liable for damages caused by violation of this subsection.

(b) If a tangible bill of lading is lawfully issued in a set of parts, each of which contains an identification code and is expressed to be valid only if the goods have not been delivered against any other part, the whole of the parts constitutes one bill.



(c) If a tangible negotiable bill of lading is lawfully issued in a set of parts and different parts are negotiated to different persons, the title of the holder to which the first due negotiation is made prevails as to both the document of title and the goods even if any later holder may have received the goods from the carrier in good faith and discharged the carrier's obligation by surrendering its part.

(d) A person that negotiates or transfers a single part of a tangible bill of lading issued in a set is liable to holders of that part as if it were the whole set.

(e) The bailee shall deliver in accordance with Part 4 of this Article against the first presented part of a tangible bill of lading lawfully issued in a set. Delivery in this manner discharges the bailee's obligation on the whole bill. (1919, c. 65, s. 4; C.S., s. 286; 1965, c. 700, s. 1; 2006-112, s. 25.)

### **§ 25-7-305. Destination bills.**

(a) Instead of issuing a bill of lading to the consignor at the place of shipment, a carrier, at the request of the consignor, may procure the bill to be issued at destination or at any other place designated in the request.

(b) Upon request of any person entitled as against a carrier to control the goods while in transit and on surrender of possession or control of any outstanding bill of lading or other receipt covering the goods, the issuer, subject to G.S. 25-7-105, may procure a substitute bill to be issued at any place designated in the request. (1965, c. 700, s. 1; 2006-112, s. 25.)

### **§ 25-7-306. Altered bills of lading.**

An unauthorized alteration or filling in of a blank in a bill of lading leaves the bill enforceable according to its original tenor. (1919, c. 65, s. 13; C.S., s. 295; 1965, c. 700, s. 1; 2006-112, s. 25.)

### **§ 25-7-307. Lien of carrier.**

(a) A carrier has a lien on the goods covered by a bill of lading or on the proceeds thereof in its possession for charges after the date of the carrier's receipt of the goods for storage or transportation, including demurrage and terminal charges, and for expenses necessary for preservation of the goods incident to their transportation or reasonably incurred in their sale pursuant to law. However, against a purchaser for value of a negotiable bill of lading, a carrier's lien is limited to charges stated in the bill or the applicable tariffs or, if no charges are stated, a reasonable charge.

(b) A lien for charges and expenses under subsection (a) of this section on goods that the carrier was required by law to receive for transportation is effective against the consignor or any person entitled to the goods unless the carrier had notice that the consignor lacked authority to subject the goods to those charges and expenses. Any other lien under subsection (a) of this section is effective against the consignor and any person that permitted the bailor to have control or possession of the goods unless the carrier had notice that the bailor lacked authority.

(c) A carrier loses its lien on any goods that it voluntarily delivers or unjustifiably refuses to deliver. (1919, c. 65, s. 25; C.S., s. 307; 1965, c. 700, s. 1; 2006-112, s. 25.)

### **§ 25-7-308. Enforcement of carrier's lien.**

(a) A carrier's lien on goods may be enforced by public or private sale of the goods, in bulk or in packages, at any time or place and on any terms that are commercially reasonable, after notifying all persons known to claim an interest in the goods. The notification must include a statement of the amount due, the nature of the proposed sale, and the time and place of any public sale. The fact that a better price could have been obtained by a sale at a different

time or in a method different from that selected by the carrier is not of itself sufficient to establish that the sale was not made in a commercially reasonable manner. The carrier sells goods in a commercially reasonable manner if the carrier sells the goods in the usual manner in any recognized market therefor, sells at the price current in that market at the time of the sale, or otherwise sells in conformity with commercially reasonable practices among dealers in the type of goods sold. A sale of more goods than apparently necessary to be offered to ensure satisfaction of the obligation is not commercially reasonable, except in cases covered by the preceding sentence.

(b) Before any sale pursuant to this section, any person claiming a right in the goods may pay the amount necessary to satisfy the lien and the reasonable expenses incurred in complying with this section. In that event, the goods may not be sold but shall be retained by the carrier, subject to the terms of the bill of lading and this Article.

(c) A carrier may buy at any public sale pursuant to this section.

(d) A purchaser in good faith of goods sold to enforce a carrier's lien takes the goods free of any rights of persons against which the lien was valid, despite the carrier's noncompliance with this section.

(e) A carrier may satisfy its lien from the proceeds of any sale pursuant to this section but shall hold the balance, if any, for delivery on demand to any person to whom the carrier would have been bound to deliver the goods.

(f) The rights provided by this section are in addition to all other rights allowed by law to a creditor against a debtor.

(g) A carrier's lien may be enforced pursuant to either subsection (a) of this section or the procedure set forth in G.S. 25-7-210(b).

(h) A carrier is liable for damages caused by failure to comply with the requirements for sale under this section and, in case of willful violation, is liable for conversion. (1965, c. 700, s. 1; 2006-112, s. 25.)

### **§ 25-7-309. Duty of care; contractual limitation of carrier's liability.**

(a) A carrier that issues a bill of lading, whether negotiable or nonnegotiable, shall exercise the degree of care in relation to the goods which a reasonably careful person would exercise under similar circumstances. This subsection does not affect any statute, regulation, or rule of law that imposes liability upon a common carrier for damages not caused by its negligence.

(b) Damages may be limited by a term in the bill of lading or in a transportation agreement that the carrier's liability may not exceed a value stated in the bill or transportation agreement if the carrier's rates are dependent upon value and the consignor is afforded an opportunity to declare a higher value and the consignor is advised of the opportunity. However, such a limitation is not effective with respect to the carrier's liability for conversion to its own use.

(c) Reasonable provisions as to the time and manner of presenting claims and commencing actions based on the shipment may be included in a bill of lading or a transportation agreement. (1965, c. 700, s. 1; 2006-112, s. 25.)

## **PART 4.**

### **WAREHOUSE RECEIPTS AND BILLS OF LADING: GENERAL OBLIGATIONS.**

### **§ 25-7-401. Irregularities in issue of receipt or bill or conduct of issuer.**

The obligations imposed by this Article on an issuer apply to a document of title even if:



- (1) The document does not comply with the requirements of this Article or of any other statute, rule, or regulation regarding its issuance, form, or content;
- (2) The issuer violated laws regulating the conduct of its business;
- (3) The goods covered by the document were owned by the bailee when the document was issued; or
- (4) The person issuing the document is not a warehouse but the document purports to be a warehouse receipt. (1917, c. 37, s. 20; 1919, c. 65, ss. 21, 22; C.S., ss. 303, 304, 4060; 1931, c. 358, s. 1; 1965, c. 700, s. 1; 2006-112, s. 25.)

### **§ 25-7-402. Duplicate document of title; overissue.**

A duplicate or any other document of title purporting to cover goods already represented by an outstanding document of the same issuer does not confer any right in the goods, except as provided in the case of tangible bills of lading in a set of parts, overissue of documents for fungible goods, substitutes for lost, stolen, or destroyed documents, or substitute documents issued pursuant to G.S. 25-7-105. The issuer is liable for damages caused by its overissue or failure to identify a duplicate document by a conspicuous notation. (1917, c. 37, s. 6; 1919, c. 65, s. 5; C.S., ss. 287, 4047; 1965, c. 700, s. 1; 2006-112, s. 25.)

### **§ 25-7-403. Obligation of bailee to deliver; excuse.**

(a) A bailee shall deliver the goods to a person entitled under a document of title if the person complies with subsections (b) and (c) of this section, unless and to the extent that the bailee establishes any of the following:

- (1) Delivery of the goods to a person whose receipt was rightful as against the claimant;
- (2) Damage to or delay, loss, or destruction of the goods for which the bailee is not liable;
- (3) Previous sale or other disposition of the goods in lawful enforcement of a lien or on a warehouse's lawful termination of storage;
- (4) The exercise by a seller of its right to stop delivery pursuant to G.S. 25-2-705 or by a lessor of its right to stop delivery pursuant to G.S. 25-2A-526;
- (5) A diversion, reconsignment, or other disposition pursuant to G.S. 25-7-303;
- (6) Release, satisfaction, or any other personal defense against the claimant; or
- (7) Any other lawful excuse.

(b) A person claiming goods covered by a document of title shall satisfy the bailee's lien if the bailee so requests or if the bailee is prohibited by law from delivering the goods until the charges are paid.

(c) Unless a person claiming the goods is a person against whom the document of title does not confer a right under G.S. 25-7-503(a):

- (1) The person claiming under a document shall surrender possession or control of any outstanding negotiable document covering the goods for cancellation or indication of partial deliveries; and
- (2) The bailee shall cancel the document or conspicuously indicate in the document the partial delivery or the bailee is liable to any person to whom the document is duly negotiated. (1917, c. 37, ss. 8, 9, 11, 12, 36; 1919, c. 65, ss. 8, 9, 11, 12, 26; C.S., ss. 290, 291, 293, 294, 308, 4048, 4049, 4051, 4052, 4076; 1965, c. 700, s. 1; 2006-112, s. 25.)



### § 25-7-404. No liability for good-faith delivery pursuant to document of title.

A bailee that in good faith has received goods and delivered or otherwise disposed of the goods according to the terms of a document of title or pursuant to this Article is not liable for the goods even if:

- (1) The person from whom the bailee received the goods did not have authority to procure the document or to dispose of the goods; or
- (2) The person to whom the bailee delivered the goods did not have authority to receive the goods. (1917, c. 37, s. 10; 1919, c. 65, s. 10; C.S., ss. 292, 4050; 1965, c. 700, s. 1; 2006-112, s. 25.)

## PART 5.

### WAREHOUSE RECEIPTS AND BILLS OF LADING: NEGOTIATION AND TRANSFER.

### § 25-7-501. Form of negotiation and requirements of due negotiation.

(a) The following rules apply to a negotiable tangible document of title:

- (1) If the document's original terms run to the order of a named person, the document is negotiated by the named person's indorsement and delivery. After the named person's indorsement in blank or to bearer, any person may negotiate the document by delivery alone.
- (2) If the document's original terms run to bearer, it is negotiated by delivery alone.
- (3) If the document's original terms run to the order of a named person and it is delivered to the named person, the effect is the same as if the document had been negotiated.
- (4) Negotiation of the document after it has been indorsed to a named person requires indorsement by the named person and delivery.
- (5) A document is duly negotiated if it is negotiated in the manner stated in this subsection to a holder that purchases it in good faith, without notice of any defense against or claim to it on the part of any person, and for value, unless it is established that the negotiation is not in the regular course of business or financing or involves receiving the document in settlement or payment of a monetary obligation.

(b) The following rules apply to a negotiable electronic document of title:

- (1) If the document's original terms run to the order of a named person or to bearer, the document is negotiated by delivery of the document to another person. Indorsement by the named person is not required to negotiate the document.
- (2) If the document's original terms run to the order of a named person and the named person has control of the document, the effect is the same as if the document had been negotiated.
- (3) A document is duly negotiated if it is negotiated in the manner stated in this subsection to a holder that purchases it in good faith, without notice of any defense against or claim to it on the part of any person, and for value, unless it is established that the negotiation is not in the regular course of business or financing or involves taking delivery of the document in settlement or payment of a monetary obligation.

(c) Indorsement of a nonnegotiable document of title neither makes it negotiable nor adds to the transferee's rights.

(d) The naming in a negotiable bill of lading of a person to be notified of the arrival of the goods does not limit the negotiability of the bill or constitute notice to a purchaser of the bill of any interest of that person in the goods. (1917, c. 37, ss. 37 to 40, 47; 1919, c. 65, ss. 3, 7, 27 to 30, 37; C.S., ss. 285, 289, 309 to 312, 319, 4077 to 4080, 4087; 1931, c. 358, ss. 2, 3; 1965, c. 700, s. 1; 2006-112, s. 25.)

## **§ 25-7-502. Rights acquired by due negotiation.**

(a) Subject to G.S. 25-7-205 and G.S. 25-7-503, a holder to which a negotiable document of title has been duly negotiated acquires thereby:

- (1) Title to the document;
- (2) Title to the goods;
- (3) All rights accruing under the law of agency or estoppel, including rights to goods delivered to the bailee after the document was issued; and
- (4) The direct obligation of the issuer to hold or deliver the goods according to the terms of the document free of any defense or claim by the issuer except those arising under the terms of the document or under this Article, but in the case of a delivery order, the bailee's obligation accrues only upon the bailee's acceptance of the delivery order, and the obligation acquired by the holder is that the issuer and any indorser will procure the acceptance of the bailee.

(b) Subject to G.S. 25-7-503, title and rights acquired by due negotiation are not defeated by any stoppage of the goods represented by the document of title or by surrender of the goods by the bailee and are not impaired even if:

- (1) The due negotiation or any prior due negotiation constituted a breach of duty;
- (2) Any person has been deprived of possession of a negotiable tangible document or control of a negotiable electronic document by misrepresentation, fraud, accident, mistake, duress, loss, theft, or conversion; or
- (3) A previous sale or other transfer of the goods or document has been made to a third person. (1917, c. 37, ss. 41, 47 to 49; 1919, c. 65, ss. 31, 37 to 39; C.S., ss. 313, 319 to 321, 4081, 4087 to 4089; 1931, c. 358, s. 3; 1965, c. 700, s. 1; 1998-217, s. 4(b); 2006-112, s. 25.)

## **§ 25-7-503. Document of title to goods defeated in certain cases.**

(a) A document of title confers no right in goods against a person that before issuance of the document had a legal interest or a perfected security interest in the goods and that did not:

- (1) Deliver or entrust the goods or any document of title covering the goods to the bailor or the bailor's nominee with:
  - a. Actual or apparent authority to ship, store, or sell;
  - b. Power to obtain delivery under G.S. 25-7-403; or
  - c. Power of disposition under G.S. 25-2-403, 25-2A-304(2), 25-2A-305(2), 25-9-320, or 25-9-321(c) or other statute or rule of law; or
- (2) Acquiesce in the procurement by the bailor or its nominee of any document.

(b) Title to goods based upon an unaccepted delivery order is subject to the rights of any person to whom a negotiable warehouse receipt or bill of lading covering the goods has been duly negotiated. That title may be defeated under G.S. 25-7-504 to the same extent as the rights of the issuer or a transferee from the issuer.



(c) Title to goods based upon a bill of lading issued to a freight forwarder is subject to the rights of any person to which a bill issued by the freight forwarder is duly negotiated. However, delivery by the carrier in accordance with Part 4 of this Article pursuant to its own bill of lading discharges the carrier's obligation to deliver. (1917, c. 37, s. 41; 1919, c. 65, s. 31; C.S., ss. 313, 4081; 1965, c. 700, s. 1; 2000-169, s. 20; 2006-112, s. 25.)

### **§ 25-7-504. Rights acquired in absence of due negotiation; effect of diversion; stoppage of delivery.**

(a) A transferee of a document of title, whether negotiable or nonnegotiable, to which the document has been delivered but not duly negotiated, acquires the title and rights that its transferor had or had actual authority to convey.

(b) In the case of a transfer of a nonnegotiable document of title, until but not after the bailee receives notice of the transfer, the rights of the transferee may be defeated:

- (1) By those creditors of the transferor which could treat the transfer as void under G.S. 25-2-402 or G.S. 25-2A-308;
- (2) By a buyer from the transferor in ordinary course of business if the bailee has delivered the goods to the buyer or received notification of the buyer's rights;
- (3) By a lessee from the transferor in ordinary course of business if the bailee has delivered the goods to the lessee or received notification of the lessee's rights; or
- (4) As against the bailee, by good-faith dealings of the bailee with the transferor.

(c) A diversion or other change of shipping instructions by the consignor in a nonnegotiable bill of lading which causes the bailee not to deliver the goods to the consignee defeats the consignee's title to the goods if the goods have been delivered to a buyer in ordinary course of business or a lessee in ordinary course of business and, in any event, defeats the consignee's rights against the bailee.

(d) Delivery of the goods pursuant to a nonnegotiable document of title may be stopped by a seller under G.S. 25-2-705 or a lessor under G.S. 25-2A-526, subject to the requirements of due notification in those sections. A bailee that honors the seller's or lessor's instructions is entitled to be indemnified by the seller or lessor against any resulting loss or expense. (1917, c. 37, s. 42; 1919, c. 65, s. 32; c. 290; C.S., ss. 314, 4082; 1965, c. 700, s. 1; 2006-112, s. 25.)

### **§ 25-7-505. Indorser not guarantor for other parties.**

The indorsement of a tangible document of title issued by a bailee does not make the indorser liable for any default by the bailee or previous indorsers. (1917, c. 37, s. 45; 1919, c. 65, s. 35; C.S., ss. 317, 4085; 1965, c. 700, s. 1; 2006-112, s. 25.)

### **§ 25-7-506. Delivery without indorsement; right to compel indorsement.**

The transferee of a negotiable tangible document of title has a specifically enforceable right to have its transferor supply any necessary indorsement, but the transfer becomes a negotiation only as of the time the indorsement is supplied. (1917, c. 37, s. 43; 1919, c. 65, s. 33; C.S., ss. 315, 4083; 1965, c. 700, s. 1; 2006-112, s. 25.)



### **§ 25-7-507. Warranties on negotiation or delivery of document of title.**

If a person negotiates or delivers a document of title for value, otherwise than as a mere intermediary under G.S. 25-7-508, unless otherwise agreed, the transferor, in addition to any warranty made in selling or leasing the goods, warrants to its immediate purchaser only that:

- (1) The document is genuine;
- (2) The transferor does not have knowledge of any fact that would impair the document's validity or worth; and
- (3) The negotiation or delivery is rightful and fully effective with respect to the title to the document and the goods it represents. (1917, c. 37, s. 44; 1919, c. 65, s. 34; C.S., ss. 316, 4084; 1965, c. 700, s. 1; 1998-217, s. 4(c); 2006-112, s. 25.)

### **§ 25-7-508. Warranties of collecting bank as to documents of title.**

A collecting bank or other intermediary known to be entrusted with documents of title on behalf of another or with collection of a draft or other claim against delivery of documents warrants by the delivery of the documents only its own good faith and authority even if the collecting bank or other intermediary has purchased or made advances against the claim or draft to be collected. (1917, c. 37, s. 46; 1919, c. 65, s. 36; C.S., ss. 318, 4086; 1965, c. 700, s. 1; 2006-112, s. 25.)

### **§ 25-7-509. Adequate compliance with commercial contract.**

Whether a document of title is adequate to fulfill the obligations of a contract for sale, a contract for lease, or the conditions of a letter of credit is determined by Article 2, 2A, or 5 of this Chapter. (1965, c. 700, s. 1; 2006-112, s. 25.)

## **PART 6.**

### **WAREHOUSE RECEIPTS AND BILLS OF LADING: MISCELLANEOUS PROVISIONS.**

### **§ 25-7-601. Lost, stolen, or destroyed documents of title.**

(a) If a document of title is lost, stolen, or destroyed, a court may order delivery of the goods or issuance of a substitute document, and the bailee may without liability to any person comply with the order. If the document was negotiable, a court may not order delivery of the goods or issuance of a substitute document without the claimant's posting security unless it finds that any person that may suffer loss as a result of nonsurrender of possession or control of the document is adequately protected against the loss. If the document was nonnegotiable, the court may require security. The court may also order payment of the bailee's reasonable costs and attorneys' fees in any action under this subsection.

(b) A bailee that, without a court order, delivers goods to a person claiming under a missing negotiable document of title is liable to any person injured thereby. If the delivery is not in good faith, the bailee is liable for conversion. Delivery in good faith is not conversion if the claimant posts security with the bailee in an amount at least double the value of the goods at the time of posting

to indemnify any person injured by the delivery that files a notice of claim within one year after the delivery. (1917, c. 37, ss. 11, 14; 1919, c. 65, ss. 11, 14; C.S., ss. 293, 296, 4051, 4054; 1965, c. 700, s. 1; 2006-112, s. 25.)

### **§ 25-7-602. Judicial process against goods covered by negotiable document of title.**

Unless a document of title was originally issued upon delivery of the goods by a person that did not have power to dispose of them, a lien does not attach by virtue of any judicial process to goods in the possession of a bailee for which a negotiable document of title is outstanding unless possession or control of the document is first surrendered to the bailee or the document's negotiation is enjoined. The bailee may not be compelled to deliver the goods pursuant to process until possession or control of the document is surrendered to the bailee or to the court. A purchaser of the document for value without notice of the process or injunction takes free of the lien imposed by judicial process. (1917, c. 37, s. 25; 1919, c. 65, s. 23; C.S., ss. 305, 4065; 1965, c. 700, s. 1; 2006-112, s. 25.)

### **§ 25-7-603. Conflicting claims; interpleader.**

If more than one person claims title to or possession of the goods, the bailee is excused from delivery until the bailee has a reasonable time to ascertain the validity of the adverse claims or to commence an action for interpleader. The bailee may assert an interpleader either in defending an action for nondelivery of the goods or by original action. (1917, c. 37, ss. 17, 18; 1919, c. 65, ss. 17, 18; C.S., ss. 299, 300, 4057, 4058; 1965, c. 700, s. 1; 2006-112, s. 25.)

## ARTICLE 8.

### *Investment Securities.*

(Revised)

## PART 1.

### SHORT TITLE AND GENERAL MATTERS.

### **§ 25-8-102. Definitions.**

(a) In this Article:

- (1) "Adverse claim" means a claim that a claimant has a property interest in a financial asset and that it is a violation of the rights of the claimant for another person to hold, transfer, or deal with the financial asset.
- (2) "Bearer form", as applied to a certificated security, means a form in which the security is payable to the bearer of the security certificate according to its terms but not by reason of an indorsement.
- (3) "Broker" means a person defined as a broker or dealer under the federal securities laws, but without excluding a bank acting in that capacity.
- (4) "Certificated security" means a security that is represented by a certificate.
- (5) "Clearing corporation" means:

- (i) A person that is registered as a “clearing agency” under the federal securities laws;
  - (ii) A federal reserve bank; or
  - (iii) Any other person that provides clearance or settlement services with respect to financial assets that would require it to register as a clearing agency under the federal securities laws but for an exclusion or exemption from the registration requirement, if its activities as a clearing corporation, including promulgation of rules, are subject to regulation by a federal or state governmental authority.
- (6) “Communicate” means to:
- (i) Send a signed writing; or
  - (ii) Transmit information by any mechanism agreed upon by the persons transmitting and receiving the information.
- (7) “Entitlement holder” means a person identified in the records of a securities intermediary as the person having a security entitlement against the securities intermediary. If a person acquires a security entitlement by virtue of G.S. 25-8-501(b)(2) or (3), that person is the entitlement holder.
- (8) “Entitlement order” means a notification communicated to a securities intermediary directing transfer or redemption of a financial asset to which the entitlement holder has a security entitlement.
- (9) “Financial asset”, except as otherwise provided in G.S. 25-8-103, means:
- (i) A security;
  - (ii) An obligation of a person or a share, participation, or other interest in a person or in property or an enterprise of a person, which is, or is of a type, dealt in or traded on financial markets, or which is recognized in any area in which it is issued or dealt in as a medium for investment; or
  - (iii) Any property that is held by a securities intermediary for another person in a securities account if the securities intermediary has expressly agreed with the other person that the property is to be treated as a financial asset under this Article.
- As context requires, the term means either the interest itself or the means by which a person’s claim to it is evidenced, including a certificated or uncertificated security, a security certificate, or a security entitlement.
- (10) Repealed by Session Laws 2006-112, s. 20, effective October 1, 2006.
- (11) “Indorsement” means a signature that alone or accompanied by other words is made on a security certificate in registered form or on a separate document for the purpose of assigning, transferring, or redeeming the security or granting a power to assign, transfer, or redeem it.
- (12) “Instruction” means a notification communicated to the issuer of an uncertificated security which directs that the transfer of the security be registered or that the security be redeemed.
- (13) “Registered form”, as applied to a certificated security, means a form in which:
- (i) The security certificate specifies a person entitled to the security; and
  - (ii) A transfer of the security may be registered upon books maintained for that purpose by or on behalf of the issuer, or the security certificate so states.
- (14) “Securities intermediary” means:
- (i) A clearing corporation; or



- (ii) A person, including a bank or broker, that in the ordinary course of its business maintains securities accounts for others and is acting in that capacity.
- (15) “Security”, except as otherwise provided in G.S. 25-8-103, means an obligation of an issuer or a share, participation, or other interest in an issuer or in property or an enterprise of an issuer:
- (i) Which is represented by a security certificate in bearer or registered form, or the transfer of which may be registered upon books maintained for that purpose by or on behalf of the issuer;
  - (ii) Which is one of a class or series or by its terms is divisible into a class or series of shares, participations, interests, or obligations; and
  - (iii) Which:
    - (A) Is, or is of a type, dealt in or traded on securities exchanges or securities markets; or
    - (B) Is a medium for investment and by its terms expressly provides that it is a security governed by this Article.
- (16) “Security certificate” means a certificate representing a security.
- (17) “Security entitlement” means the rights and property interest of an entitlement holder with respect to a financial asset specified in Part 5 of this Article.
- (18) “Uncertificated security” means a security that is not represented by a certificate.
- (b) Other definitions applying to this Article and the sections in which they appear are:
- |                               |                |
|-------------------------------|----------------|
| “Appropriate person”          | G.S. 25-8-107. |
| “Control”                     | G.S. 25-8-106. |
| “Delivery”                    | G.S. 25-8-301. |
| “Investment company security” | G.S. 25-8-103. |
| “Issuer”                      | G.S. 25-8-201. |
| “Overissue”                   | G.S. 25-8-210. |
| “Protected purchaser”         | G.S. 25-8-303. |
| “Securities account”          | G.S. 25-8-501. |
- (c) In addition, Article 1 of this Chapter contains general definitions and principles of construction and interpretation applicable throughout this Article.
- (d) The characterization of a person, business, or transaction for purposes of this Article does not determine the characterization of the person, business, or transaction for purposes of any other law, regulation, or rule. (1965, c. 700, s. 1; 1973, c. 497, s. 3; 1989, c. 588, s. 1; 1989 (Reg. Sess., 1990), c. 1024, s. 9(a); 1997-181, s. 1; 2006-112, s. 20.)

**Editor’s Note.** — Session Laws 2006-112, s. 60, provides: “A document of title issued or a bailment that arises before the effective date of this act and the rights, obligations, and interests flowing from that document or bailment are governed by any statute amended or repealed by this act as if amendment or repeal

had not occurred and may be terminated, completed, consummated, or enforced under that statute.”

**Effect of Amendments.** — Session Laws 2006-112, s. 20, effective October 1, 2006, repealed subdivision (a)(10).

## § 25-8-103. Rules for determining whether certain obligations and interests are securities or financial assets.

- (a) A share or similar equity interest issued by a corporation, business trust, joint stock company, or similar entity is a security.

(b) An “investment company security” is a security. “Investment company security” means a share or similar equity interest issued by an entity that is registered as an investment company under the federal investment company laws, an interest in a unit investment trust that is so registered, or a face-amount certificate issued by a face-amount certificate company that is so registered. Investment company security does not include an insurance policy or endowment policy or annuity contract issued by an insurance company.

(c) An interest in a partnership or limited liability company is not a security unless it is dealt in or traded on securities exchanges or in securities markets, its terms expressly provide that it is a security governed by this Article, or it is an investment company security. However, an interest in a partnership or limited liability company is a financial asset if it is held in a securities account.

(d) A writing that is a security certificate is governed by this Article and not by Article 3 of this Chapter, even though it also meets the requirements of that Article. However, a negotiable instrument governed by Article 3 is a financial asset if it is held in a securities account.

(e) An option or similar obligation issued by a clearing corporation to its participants is not a security, but is a financial asset.

(f) A commodity contract, as defined in G.S. 25-9-102(a)(15), is not a security or financial asset.

(g) A document of title is not a financial asset unless G.S. 25-8-102(a)(9)(iii) applies. (1941, c. 353, s. 15; G.S., s. 55-95; 1955, c. 1371, s. 2; 1965, c. 700, s. 1; 1989, c. 588, s. 1; 1997-181, s. 1; 1998-217, s. 5; 2000-169, s. 21; 2006-112, s. 43.)

**Editor’s Note.** — Session Laws 2006-112, s. 59, provides: “Subparts A and B of Part II of this act apply to a document of title that is issued or a bailment that arises on or after the effective date of this act. Subparts A and B of Part II of this act do not apply to a document of title that is issued or a bailment that arises before the effective date of this act even if the document of title or bailment would be subject to this act if the document of title had been issued or bailment had arisen on or after the effective date of this act. Subparts A and B of Part II of this act do not apply to a right of action that has accrued before the effective date of this act.”

Session Laws 2006-112, s. 60, provides: “A document of title issued or a bailment that arises before the effective date of this act and the rights, obligations, and interests flowing from that document or bailment are governed by any statute amended or repealed by this act as if amendment or repeal had not occurred and may be terminated, completed, consummated, or enforced under that statute.”

**Effect of Amendments.** — Session Laws 2006-112, s. 43, effective October 1, 2006, added subsection (g).

## ARTICLE 9.

### *Secured Transactions.*

(Revised)

## PART 1.

### GENERAL PROVISIONS.

#### SUBPART 1. Short Title, Definitions, and General Concepts.

### § 25-9-102. Definitions and index of definitions.

(a) Article 9 definitions. — In this Article:

- (1) "Accession" means goods that are physically united with other goods in such a manner that the identity of the original goods is not lost.
- (2) "Account", except as used in "account for", means a right to payment of a monetary obligation, whether or not earned by performance, (i) for property that has been or is to be sold, leased, licensed, assigned, or otherwise disposed of, (ii) for services rendered or to be rendered, (iii) for a policy of insurance issued or to be issued, (iv) for a secondary obligation incurred or to be incurred, (v) for energy provided or to be provided, (vi) for the use or hire of a vessel under a charter or other contract, (vii) arising out of the use of a credit or charge card or information contained on or for use with the card, or (viii) as winnings in a lottery or other game of chance operated or sponsored by a state, governmental unit of a state, or person licensed or authorized to operate the game by a state or governmental unit of a state. The term includes health-care-insurance receivables. The term does not include (i) rights to payment evidenced by chattel paper or an instrument, (ii) commercial tort claims, (iii) deposit accounts, (iv) investment property, (v) letter-of-credit rights or letters of credit, or (vi) rights to payment for money or funds advanced or sold, other than rights arising out of the use of a credit or charge card or information contained on or for use with the card.
- (3) "Account debtor" means a person obligated on an account, chattel paper, or general intangible. The term does not include persons obligated to pay a negotiable instrument, even if the instrument constitutes part of chattel paper.
- (4) "Accounting", except as used in "accounting for", means a record:
  - a. Authenticated by a secured party;
  - b. Indicating the aggregate unpaid secured obligations as of a date not more than 35 days earlier or 35 days later than the date of the record; and
  - c. Identifying the components of the obligations in reasonable detail.
- (5) "Agricultural lien" means an interest, other than a security interest, in farm products:
  - a. Which secures payment or performance of an obligation for:
    1. Goods or services furnished in connection with a debtor's farming operation; or
    2. Rent on real property leased by a debtor in connection with its farming operation;
  - b. Which is created by statute in favor of a person that:
    1. In the ordinary course of its business furnished goods or services to a debtor in connection with a debtor's farming operation; or
    2. Leased real property to a debtor in connection with the debtor's farming operation; and
  - c. Whose effectiveness does not depend on the person's possession of the personal property.
- (6) "As-extracted collateral" means:
  - a. Oil, gas, or other minerals that are subject to a security interest that:
    1. Is created by a debtor having an interest in the minerals before extraction; and
    2. Attaches to the minerals as extracted; or
  - b. Accounts arising out of the sale at the wellhead or minehead of oil, gas, or other minerals in which the debtor had an interest before extraction.
- (7) "Authenticate" means:
  - a. To sign; or



- b. To execute or otherwise adopt a symbol, or encrypt or similarly process a record in whole or in part, with the present intent of the authenticating person to identify the person and adopt or accept a record.
- (8) "Bank" means an organization that is engaged in the business of banking. The term includes savings banks, savings and loan associations, credit unions, and trust companies.
- (9) "Cash proceeds" means proceeds that are money, checks, deposit accounts, or the like.
- (10) "Certificate of title" means a certificate of title with respect to which a statute provides for the security interest in question to be indicated on the certificate as a condition or result of the security interest's obtaining priority over the rights of a lien creditor with respect to the collateral.
- (11) "Chattel paper" means a record or records that evidence both a monetary obligation and a security interest in specific goods, a security interest in specific goods and software used in the goods, a security interest in specific goods and license of software used in the goods, a lease of specific goods, or a lease of specific goods and license of software used in the goods. In this subdivision, "monetary obligation" means a monetary obligation secured by the goods or owed under a lease of the goods and includes a monetary obligation with respect to software used in the goods. The term does not include (i) charters or other contracts involving the use or hire of a vessel or (ii) records that evidence a right to payment arising out of the use of a credit or charge card or information contained on or for use with the card. If a transaction is evidenced by records that include an instrument or series of instruments, the group of records taken together constitutes chattel paper.
- (12) "Collateral" means the property subject to a security interest or agricultural lien. The term includes:
  - a. Proceeds to which a security interest attaches;
  - b. Accounts, chattel paper, payment intangibles, and promissory notes that have been sold; and
  - c. Goods that are the subject of a consignment.
- (13) "Commercial tort claim" means a claim arising in tort with respect to which:
  - a. The claimant is an organization; or
  - b. The claimant is an individual and the claim:
    - 1. Arose in the course of the claimant's business or profession; and
    - 2. Does not include damages arising out of personal injury to or the death of an individual.
- (14) "Commodity account" means an account maintained by a commodity intermediary in which a commodity contract is carried for a commodity customer.
- (15) "Commodity contract" means a commodity futures contract, an option on a commodity futures contract, a commodity option, or another contract if the contract or option is:
  - a. Traded on or subject to the rules of a board of trade that has been designated as a contract market for such a contract pursuant to federal commodities laws; or
  - b. Traded on a foreign commodity board of trade, exchange, or market, and is carried on the books of a commodity intermediary for a commodity customer.
- (16) "Commodity customer" means a person for which a commodity intermediary carries a commodity contract on its books.

- (17) "Commodity intermediary" means a person that:
- Is registered as a futures commission merchant under federal commodities law; or
  - In the ordinary course of its business provides clearance or settlement services for a board of trade that has been designated as a contract market pursuant to federal commodities law.
- (18) "Communicate" means:
- To send a written or other tangible record;
  - To transmit a record by any means agreed upon by the persons sending and receiving the record; or
  - In the case of transmission of a record to or by a filing office, to transmit a record by any means prescribed by filing-office rule.
- (19) "Consignee" means a merchant to which goods are delivered in a consignment.
- (20) "Consignment" means a transaction, regardless of its form, in which a person delivers goods to a merchant for the purpose of sale and:
- The merchant:
    - Deals in goods of that kind under a name other than the name of the person making delivery;
    - Is not an auctioneer; and
    - Is not generally known by its creditors to be substantially engaged in selling the goods of others;
  - With respect to each delivery, the aggregate value of the goods is one thousand dollars (\$1,000) or more at the time of delivery;
  - The goods are not consumer goods immediately before delivery; and
  - The transaction does not create a security interest that secures an obligation.
- (21) "Consignor" means a person that delivers goods to a consignee in a consignment.
- (22) "Consumer debtor" means a debtor in a consumer transaction.
- (23) "Consumer goods" means goods that are used or bought for use primarily for personal, family, or household purposes.
- (24) "Consumer-goods transaction" means a consumer transaction in which:
- An individual incurs an obligation primarily for personal, family, or household purposes; and
  - A security interest in consumer goods secures the obligation.
- (25) "Consumer obligor" means an obligor who is an individual and who incurred the obligation as part of a transaction entered into primarily for personal, family, or household purposes.
- (26) "Consumer transaction" means a transaction in which (i) an individual incurs an obligation primarily for personal, family, or household purposes, (ii) a security interest secures the obligation, and (iii) the collateral is held or acquired primarily for personal, family, or household purposes. The term includes consumer-goods transactions.
- (27) "Continuation statement" means an amendment of a financing statement which:
- Identifies, by its file number, the initial financing statement to which it relates; and
  - Indicates that it is a continuation statement for, or that it is filed to continue the effectiveness of, the identified financing statement.
- (28) "Debtor" means:
- A person having an interest, other than a security interest or other lien, in the collateral, whether or not the person is an obligor;
  - A seller of accounts, chattel paper, payment intangibles, or promissory notes; or
  - A consignee.



- (29) "Deposit account" means a demand, time, savings, passbook, or similar account maintained with a bank. The term does not include investment property or accounts evidenced by an instrument.
- (30) "Document" means a document of title or a receipt of the type described in G.S. 25-7-201(b).
- (31) "Electronic chattel paper" means chattel paper evidenced by a record or records consisting of information stored in an electronic medium.
- (32) "Encumbrance" means a right, other than an ownership interest, in real property. The term includes mortgages and other liens on real property.
- (33) "Equipment" means goods other than inventory, farm products, or consumer goods.
- (34) "Farm products" means goods, other than standing timber, with respect to which the debtor is engaged in a farming operation and which are:
  - a. Crops grown, growing, or to be grown, including:
    - 1. Crops produced on trees, vines, and bushes; and
    - 2. Aquatic goods produced in aquacultural operations;
  - b. Livestock, born or unborn, including aquatic goods produced in aquacultural operations;
  - c. Supplies used or produced in a farming operation; or
  - d. Products of crops or livestock in their unmanufactured states.
- (35) "Farming operation" means raising, cultivating, propagating, fattening, grazing, or any other farming, livestock, or aquacultural operation.
- (36) "File number" means the number assigned to an initial financing statement pursuant to G.S. 25-9-519(a).
- (37) "Filing office" means an office designated in G.S. 25-9-501 as the place to file a financing statement.
- (38) "Filing-office rule" means a rule adopted pursuant to G.S. 25-9-526.
- (39) "Financing statement" means a record or records composed of an initial financing statement and any filed record relating to the initial financing statement.
- (40) "Fixture filing" means the filing of a financing statement covering goods that are or are to become fixtures and satisfying G.S. 25-9-502(a) and (b). The term includes the filing of a financing statement covering goods of a transmitting utility which are or are to become fixtures.
- (41) "Fixtures" means goods that have become so related to particular real property that an interest in them arises under real property law.
- (42) "General intangible" means any personal property, including things in action, other than accounts, chattel paper, commercial tort claims, deposit accounts, documents, goods, instruments, investment property, letter-of-credit rights, letters of credit, money, and oil, gas, or other minerals before extraction. The term includes payment intangibles and software.
- (43) Repealed by Session Laws 2006-112, s. 21, effective October 1, 2006.
- (44) "Goods" means all things that are movable when a security interest attaches. The term includes (i) fixtures, (ii) standing timber that is to be cut and removed under a conveyance or contract for sale, (iii) the unborn young of animals, (iv) crops grown, growing, or to be grown, even if the crops are produced on trees, vines, or bushes, and (v) manufactured homes. The term also includes a computer program embedded in goods and any supporting information provided in connection with a transaction relating to the program if (i) the



program is associated with the goods in such a manner that it customarily is considered part of the goods, or (ii) by becoming the owner of the goods, a person acquires a right to use the program in connection with the goods. The term does not include a computer program embedded in goods that consist solely of the medium in which the program is embedded. The term also does not include accounts, chattel paper, commercial tort claims, deposit accounts, documents, general intangibles, instruments, investment property, letter-of-credit rights, letters of credit, money, or oil, gas, or other minerals before extraction.

- (45) "Governmental unit" means a subdivision, agency, department, county, parish, municipality, or other unit of the government of the United States, a state, or a foreign country. The term includes an organization having a separate corporate existence if the organization (i) is eligible to issue debt on which interest is exempt from income taxation under the laws of the United States, or (ii) was created to facilitate the issuance of notes, bonds, other evidences of indebtedness or payment obligations for borrowed money by, or in conjunction with, installment or lease purchase financings for, this State or any county, municipality, or other agency or political subdivision thereof as evidenced by the documents creating the organization.
- (46) "Health-care-insurance receivable" means an interest in or claim under a policy of insurance which is a right to payment of a monetary obligation for health-care goods or services provided.
- (47) "Instrument" means a negotiable instrument or any other writing that evidences a right to the payment of a monetary obligation, is not itself a security agreement or lease, and is of a type that in ordinary course of business is transferred by delivery with any necessary indorsement or assignment. The term does not include (i) investment property, (ii) letters of credit, or (iii) writings that evidence a right to payment arising out of the use of a credit or charge card or information contained on or for use with the card.
- (48) "Inventory" means goods, other than farm products, which:
  - a. Are leased by a person as lessor;
  - b. Are held by a person for sale or lease or to be furnished under a contract of service;
  - c. Are furnished by a person under a contract of service; or
  - d. Consist of raw materials, work in process, or materials used or consumed in a business.
- (49) "Investment property" means a security, whether certificated or uncertificated, security entitlement, securities account, commodity contract, or commodity account.
- (50) "Jurisdiction of organization", with respect to a registered organization, means the jurisdiction under whose law the organization is organized.
- (51) "Letter-of-credit right" means a right to payment or performance under a letter of credit, whether or not the beneficiary has demanded or is at the time entitled to demand payment or performance. The term does not include the right of a beneficiary to demand payment or performance under a letter of credit.
- (52) "Lien creditor" means:
  - a. A creditor that has acquired a lien on the property involved by attachment, levy, or the like;
  - b. An assignee for benefit of creditors from the time of assignment;
  - c. A trustee in bankruptcy from the date of the filing of the petition;or

- d. A receiver in equity from the time of appointment.
- (53) "Manufactured home" means a structure, transportable in one or more sections, which, in the traveling mode, is eight body feet or more in width or 40 body feet or more in length, or, when erected on site, is 320 or more square feet, and which is built on a permanent chassis and designed to be used as a dwelling with or without a permanent foundation when connected to the required utilities, and includes the plumbing, heating, air-conditioning, and electrical systems contained therein. The term includes any structure that meets all of the requirements of this subdivision except the size requirements and with respect to which the manufacturer voluntarily files a certification required by the United States Secretary of Housing and Urban Development and complies with the standards established under Title 42 of the United States Code.
- (54) "Manufactured-home transaction" means a secured transaction:
- a. That creates a purchase-money security interest in a manufactured home, other than a manufactured home held as inventory; or
  - b. In which a manufactured home, other than a manufactured home held as inventory, is the primary collateral.
- (55) "Mortgage" means a consensual interest in real property, including fixtures, which secures payment or performance of an obligation.
- (56) "New debtor" means a person that becomes bound as debtor under G.S. 25-9-203(d) by a security agreement previously entered into by another person.
- (57) "New value" means (i) money, (ii) money's worth in property, services, or new credit, or (iii) release by a transferee of an interest in property previously transferred to the transferee. The term does not include an obligation substituted for another obligation.
- (58) "Noncash proceeds" means proceeds other than cash proceeds.
- (59) "Obligor" means a person that, with respect to an obligation secured by a security interest in or an agricultural lien on the collateral, (i) owes payment or other performance of the obligation, (ii) has provided property other than the collateral to secure payment or other performance of the obligation, or (iii) is otherwise accountable in whole or in part for payment or other performance of the obligation. The term does not include issuers or nominated persons under a letter of credit.
- (60) "Original debtor", except as used in G.S. 25-9-310(c), means a person that, as debtor, entered into a security agreement to which a new debtor has become bound under G.S. 25-9-203(d).
- (61) "Payment intangible" means a general intangible under which the account debtor's principal obligation is a monetary obligation.
- (62) "Person related to", with respect to an individual, means:
- a. The spouse of the individual;
  - b. A brother, brother-in-law, sister, or sister-in-law of the individual;
  - c. An ancestor or lineal descendant of the individual or the individual's spouse; or
  - d. Any other relative, by blood or marriage, of the individual or the individual's spouse who shares the same home with the individual.
- (63) "Person related to", with respect to an organization, means:
- a. A person directly or indirectly controlling, controlled by, or under common control with the organization;
  - b. An officer or director of, or a person performing similar functions with respect to, the organization;
  - c. An officer or director of, or a person performing similar functions with respect to, a person described in sub-subdivision a. of this subdivision;



- d. The spouse of an individual described in sub-subdivision a., b., or c. of this subdivision; or
  - e. An individual who is related by blood or marriage to an individual described in sub-subdivision a., b., c., or d. of this subdivision and shares the same home with the individual.
- (64) "Proceeds", except as used in G.S. 25-9-609(b), means the following property:
- a. Whatever is acquired upon the sale, lease, license, exchange, or other disposition of collateral;
  - b. Whatever is collected on, or distributed on account of, collateral;
  - c. Rights arising out of collateral;
  - d. To the extent of the value of collateral, claims arising out of the loss, nonconformity, or interference with the use of, defects or infringement of rights in, or damage to, the collateral; or
  - e. To the extent of the value of collateral and to the extent payable to the debtor or the secured party, insurance payable by reason of the loss or nonconformity of, defects or infringement of rights in, or damage to, the collateral.
- (65) "Production-money crops" means crops that secure a production-money obligation incurred with respect to the production of those crops.
- (66) "Production-money obligation" means an obligation of an obligor incurred for new value given to enable the debtor to produce crops if the value is in fact used for the production of the crops.
- (67) "Production of crops" includes tilling and otherwise preparing land for growing, planting, cultivating, fertilizing, irrigating, harvesting, gathering, and curing crops, and protecting them from damage or disease.
- (68) "Promissory note" means an instrument that evidences a promise to pay a monetary obligation, does not evidence an order to pay, and does not contain an acknowledgment by a bank that the bank has received for deposit a sum of money or funds.
- (69) "Proposal" means a record authenticated by a secured party which includes the terms on which the secured party is willing to accept collateral in full or partial satisfaction of the obligation it secures pursuant to G.S. 25-9-620, 25-9-621, and 25-9-622.
- (70) "Public-finance transaction" means a secured transaction in connection with which:
- a. Debt securities are issued;
  - b. All or a portion of the securities issued have an initial stated maturity of at least 20 years; and
  - c. The debtor, obligor, secured party, account debtor or other person obligated on collateral, assignor or assignee of a secured obligation, or assignor or assignee of a security interest is a state or a governmental unit of a state.
- (71) "Pursuant to commitment", with respect to an advance made or other value given by a secured party, means pursuant to the secured party's obligation, whether or not a subsequent event of default or other event not within the secured party's control has relieved or may relieve the secured party from its obligation.
- (72) "Record", except as used in "for record", "of record", "record or legal title", and "record owner", means information that is inscribed on a tangible medium or that is stored in an electronic or other medium and is retrievable in perceivable form.
- (73) "Registered organization" means an organization organized solely under the law of a single state or the United States and as to which



the state or the United States must maintain a public record showing the organization to have been organized.

- (74) "Secondary obligor" means an obligor to the extent that:
- a. The obligor's obligation is secondary; or
  - b. The obligor has a right of recourse with respect to an obligation secured by collateral against the debtor, another obligor, or property of either.
- (75) "Secured party" means:
- a. A person in whose favor a security interest is created or provided for under a security agreement, whether or not any obligation to be secured is outstanding;
  - b. A person that holds an agricultural lien;
  - c. A consignor;
  - d. A person to which accounts, chattel paper, payment intangibles, or promissory notes have been sold;
  - e. A trustee, indenture trustee, agent, collateral agent, or other representative in whose favor a security interest or agricultural lien is created or provided for; or
  - f. A person that holds a security interest arising under G.S. 25-2-401, 25-2-505, 25-2-711(3), 25-2A-508(5), 25-4-208, or 25-5-118.
- (76) "Security agreement" means an agreement that creates or provides for a security interest.
- (77) "Send", in connection with a record or notification, means:
- a. To deposit in the mail, deliver for transmission, or transmit by any other usual means of communication, with postage or cost of transmission provided for, addressed to any address reasonable under the circumstances; or
  - b. To cause the record or notification to be received within the time that it would have been received if properly sent under subdivision a. of this subdivision.
- (78) "Software" means a computer program and any supporting information provided in connection with a transaction relating to the program. The term does not include a computer program that is included in the definition of goods.
- (79) "State" means a state of the United States, the District of Columbia, Puerto Rico, the United States Virgin Islands, or any territory or insular possession subject to the jurisdiction of the United States.
- (80) "Supporting obligation" means a letter-of-credit right or secondary obligation that supports the payment or performance of an account, chattel paper, a document, a general intangible, an instrument, or investment property.
- (81) "Tangible chattel paper" means chattel paper evidenced by a record or records consisting of information that is inscribed on a tangible medium.
- (82) "Termination statement" means an amendment of a financing statement which:
- a. Identifies, by its file number, the initial financing statement to which it relates; and
  - b. Indicates either that it is a termination statement or that the identified financing statement is no longer effective.
- (83) "Transmitting utility" means a person primarily engaged in the business of:
- a. Operating a railroad, subway, street railway, or trolley bus;
  - b. Transmitting communications electrically, electromagnetically, or by light;
  - c. Transmitting goods by pipeline or sewer; or

d. Transmitting or producing and transmitting electricity, steam, gas, or water.

(b) Definitions in other articles. — “Control” as provided in G.S. 25-7-106 and the following definitions in other Articles of this Chapter apply to this Article:

“Applicant”	G.S. 25-5-102.
“Beneficiary”	G.S. 25-5-102.
“Broker”	G.S. 25-8-102.
“Certificated security”	G.S. 25-8-102.
“Check”	G.S. 25-3-104.
“Clearing corporation”	G.S. 25-8-102.
“Contract for sale”	G.S. 25-2-106.
“Customer”	G.S. 25-4-104.
“Entitlement holder”	G.S. 25-8-102.
“Financial asset”	G.S. 25-8-102.
“Holder in due course”	G.S. 25-3-302.
“Issuer” (with respect to a letter of credit or letter-of-credit right)	G.S. 25-5-102.
“Issuer” (with respect to a security)	G.S. 25-8-201.
“Issuer” (with respect to documents of title)	G.S. 25-7-102.
“Lease”	G.S. 25-2A-103.
“Lease agreement”	G.S. 25-2A-103.
“Lease contract”	G.S. 25-2A-103.
“Leasehold interest”	G.S. 25-2A-103.
“Lessee”	G.S. 25-2A-103.
“Lessee in ordinary course of business”	G.S. 25-2A-103.
“Lessor”	G.S. 25-2A-103.
“Lessor’s residual interest”	G.S. 25-2A-103.
“Letter of credit”	G.S. 25-5-102.
“Merchant”	G.S. 25-2-104.
“Negotiable instrument”	G.S. 25-3-104.
“Nominated person”	G.S. 25-5-102.
“Note”	G.S. 25-3-104.
“Proceeds of a letter of credit”	G.S. 25-5-114.
“Prove”	G.S. 25-3-103.
“Sale”	G.S. 25-2-106.
“Securities account”	G.S. 25-8-501.
“Securities intermediary”	G.S. 25-8-102.
“Security”	G.S. 25-8-102.
“Security certificate”	G.S. 25-8-102.
“Security entitlement”	G.S. 25-8-102.
“Uncertificated security”	G.S. 25-8-102.

(c) Article 1 definitions and principles. — Article 1 of this Chapter contains general definitions and principles of construction and interpretation applicable throughout this Article. (1965, c. 700, s. 1; 1967, c. 562, s. 1; 1975, c. 862, s. 7; 1989 (Reg. Sess., 1990), c. 1024, s. 8(g); 1997-181, s. 3; 1997-456, s. 4; 1999-73, s. 6; 2000-169, s. 1; 2001-218, s. 1; 2006-112, ss. 21, 44.)

**Editor’s Note.** — Session Laws 2006-112, s. 59, provides: “Subparts A and B of Part II of this act apply to a document of title that is issued or a bailment that arises on or after the effective date of this act. Subparts A and B of Part II of this act do not apply to a document of title that is issued or a bailment that arises before the effective date of this act even if the

document of title or bailment would be subject to this act if the document of title had been issued or bailment had arisen on or after the effective date of this act. Subparts A and B of Part II of this act do not apply to a right of action that has accrued before the effective date of this act.”

Session Laws 2006-112, s. 60, provides: “A

document of title issued or a bailment that arises before the effective date of this act and the rights, obligations, and interests flowing from that document or bailment are governed by any statute amended or repealed by this act as if amendment or repeal had not occurred and may be terminated, completed, consummated, or enforced under that statute.”

**Effect of Amendments.** — Session Laws 2006-112, ss. 21 and 44, effective October 1,

2006, repealed subdivision (a)(43), which read: “‘Good faith’ means honesty in fact and the observance of reasonable commercial standards of fair dealing.”; substituted “G.S. 25-7-201(b)” for “G.S. 25-7-201(2)” in subdivision (a)(30); in subsection (b), added “‘Control’ as provided in G.S. 25-7-106 and” at the beginning of the introductory language and inserted “‘Issuer’ (with respect to documents of title) G.S. 25-7-102.” in the list of definitions in other articles.

## CASE NOTES

**Applied in** *In re Caple*, — Bankr. —, 2005 Bankr. LEXIS 1094 (Bankr. M.D.N.C. Apr. 4, 2005).

## PART 2.

### EFFECTIVENESS OF SECURITY AGREEMENT; ATTACHMENT OF SECURITY INTEREST; RIGHTS OF PARTIES TO SECURITY AGREEMENT.

#### SUBPART 1. Effectiveness and Attachment.

#### § 25-9-203. Attachment and enforceability of security interest; proceeds; supporting obligations; formal requisites.

(a) Attachment. — A security interest attaches to collateral when it becomes enforceable against the debtor with respect to the collateral, unless an agreement expressly postpones the time of attachment.

(b) Enforceability. — Except as otherwise provided in subsections (c) through (i) of this section, a security interest is enforceable against the debtor and third parties with respect to the collateral only if:

- (1) Value has been given;
- (2) The debtor has rights in the collateral or the power to transfer rights in the collateral to a secured party; and
- (3) One of the following conditions is met:
  - a. The debtor has authenticated a security agreement that provides a description of the collateral and, if the security interest covers timber to be cut, a description of the land concerned;
  - b. The collateral is not a certificated security and is in the possession of the secured party under G.S. 25-9-313 pursuant to the debtor's security agreement;
  - c. The collateral is a certificated security in registered form and the security certificate has been delivered to the secured party under G.S. 25-8-301 pursuant to the debtor's security agreement; or
  - d. The collateral is deposit accounts, electronic chattel paper, investment property, letter-of-credit rights, or electronic documents, and the secured party has control under G.S. 25-7-106, 25-9-104, 25-9-105, 25-9-106, or 25-9-107 pursuant to the debtor's security agreement.

(c) Other UCC provisions. — Subsection (b) of this section is subject to G.S. 25-4-208 on the security interest of a collecting bank, G.S. 25-5-118 on the security interest of a letter-of-credit issuer or nominated person, G.S. 25-9-110



on a security interest arising under Article 2 or 2A of this Chapter, and G.S. 25-9-206 on security interests in investment property.

(d) When person becomes bound by another person's security agreement. — A person becomes bound as debtor by a security agreement entered into by another person if, by operation of law other than this Article or by contract:

- (1) The security agreement becomes effective to create a security interest in the person's property; or
- (2) The person becomes generally obligated for the obligations of the other person, including the obligation secured under the security agreement, and acquires or succeeds to all or substantially all of the assets of the other person.

(e) Effect of new debtor becoming bound. — If a new debtor becomes bound as debtor by a security agreement entered into by another person:

- (1) The agreement satisfies subdivision (b)(3) of this section with respect to existing or after-acquired property of the new debtor to the extent the property is described in the agreement; and
- (2) Another agreement is not necessary to make a security interest in the property enforceable.

(f) Proceeds and supporting obligations. — The attachment of a security interest in collateral gives the secured party the rights to proceeds provided by G.S. 25-9-315 and is also attachment of a security interest in a supporting obligation for the collateral.

(g) Lien securing right to payment. — The attachment of a security interest in a right to payment or performance secured by a security interest or other lien on personal or real property is also attachment of a security interest in the security interest, mortgage, or other lien.

(h) Security entitlement carried in securities account. — The attachment of a security interest in a securities account is also attachment of a security interest in the security entitlements carried in the securities account.

(i) Commodity contracts carried in commodity account. — The attachment of a security interest in a commodity account is also attachment of a security interest in the commodity contracts carried in the commodity account. (1997-181, s. 5; 2000-169, s. 1; 2006-112, s. 45.)

**Editor's Note.** — Session Laws 2006-112, s. 59, provides: "Subparts A and B of Part II of this act apply to a document of title that is issued or a bailment that arises on or after the effective date of this act. Subparts A and B of Part II of this act do not apply to a document of title that is issued or a bailment that arises before the effective date of this act even if the document of title or bailment would be subject to this act if the document of title had been issued or bailment had arisen on or after the effective date of this act. Subparts A and B of Part II of this act do not apply to a right of action that has accrued before the effective date of this act."

Session Laws 2006-112, s. 60, provides: "A document of title issued or a bailment that arises before the effective date of this act and the rights, obligations, and interests flowing from that document or bailment are governed by any statute amended or repealed by this act as if amendment or repeal had not occurred and may be terminated, completed, consummated, or enforced under that statute."

**Effect of Amendments.** — Session Laws 2006-112, s. 45, effective October 1, 2006, in subdivision (b)(3)d., deleted "or" preceding "letter-of-credit," inserted "or electronic documents," and "25-7-106."

## CASE NOTES

**Extending "Value."** — Where a finance company refused to finance a vehicle because debtors failed to qualify, the finance company had no lien to assign to the creditor that ultimately extended financing and recorded its lien post-petition; the creditor's reliance on G.S.

25-1-201(44) was misplaced because there were numerous conditions that had to be satisfied before the finance company became bound to extend credit, none of which were ever satisfied. In re Josephs, — Bankr. —, 2005 Bankr. LEXIS 1421 (Bankr. M.D.N.C. July 15, 2005).

## SUBPART 2. Rights and Duties.

**§ 25-9-207. Rights and duties of secured party having possession or control of collateral.**

(a) Duty of care when secured party in possession. — Except as otherwise provided in subsection (d) of this section, a secured party shall use reasonable care in the custody and preservation of collateral in the secured party's possession. In the case of chattel paper or an instrument, reasonable care includes taking necessary steps to preserve rights against prior parties unless otherwise agreed.

(b) Expenses, risks, duties, and rights when secured party in possession. — Except as otherwise provided in subsection (d) of this section, if a secured party has possession of collateral:

- (1) Reasonable expenses, including the cost of insurance and payment of taxes or other charges, incurred in the custody, preservation, use, or operation of the collateral are chargeable to the debtor and are secured by the collateral;
- (2) The risk of accidental loss or damage is on the debtor to the extent of a deficiency in any effective insurance coverage;
- (3) The secured party shall keep the collateral identifiable, but fungible collateral may be commingled; and
- (4) The secured party may use or operate the collateral:
  - a. For the purpose of preserving the collateral or its value;
  - b. As permitted by an order of a court having competent jurisdiction; or
  - c. Except in the case of consumer goods, in the manner and to the extent agreed by the debtor.

(c) Rights and duties when secured party in possession or control. — Except as otherwise provided in subsection (d) of this section, a secured party having possession of collateral or control of collateral under G.S. 25-7-106, 25-9-104, 25-9-105, 25-9-106, or 25-9-107:

- (1) May hold as additional security any proceeds, except money or funds, received from the collateral;
- (2) Shall apply money or funds received from the collateral to reduce the secured obligation, unless remitted to the debtor; and
- (3) May create a security interest in the collateral.

(d) Buyer of certain rights to payment. — If the secured party is a buyer of accounts, chattel paper, payment intangibles, or promissory notes or a consignor:

- (1) Subsection (a) of this section does not apply unless the secured party is entitled under an agreement:
  - a. To charge back uncollected collateral; or
  - b. Otherwise to full or limited recourse against the debtor or a secondary obligor based on the nonpayment or other default of an account debtor or other obligor on the collateral; and
- (2) Subsections (b) and (c) of this section do not apply. (1965, c. 700, s. 1; 1975, c. 862, s. 7; 2000-169, s. 1; 2006-112, s. 46.)

**Editor's Note.** — Session Laws 2006-112, s. 59, provides: "Subparts A and B of Part II of this act apply to a document of title that is issued or a bailment that arises on or after the effective date of this act. Subparts A and B of Part II of this act do not apply to a document of

title that is issued or a bailment that arises before the effective date of this act even if the document of title or bailment would be subject to this act if the document of title had been issued or bailment had arisen on or after the effective date of this act. Subparts A and B of



Part II of this act do not apply to a right of action that has accrued before the effective date of this act.”

Session Laws 2006-112, s. 60, provides: “A document of title issued or a bailment that arises before the effective date of this act and the rights, obligations, and interests flowing from that document or bailment are governed

by any statute amended or repealed by this act as if amendment or repeal had not occurred and may be terminated, completed, consummated, or enforced under that statute.”

**Effect of Amendments.** — Session Laws 2006-112, s. 46, effective October 1, 2006, inserted “25-7-106” in the introductory language of subsection (c).

## CASE NOTES

**Ownership of Repossessed Collateral in Bankruptcy.** — Until a creditor disposes of the repossessed property, the debtor remains the legal and equitable owner, subject only to the creditor’s debt collection remedies, which are suspended by 11 U.S.C.S. § 362(a) when a bankruptcy petition is filed; where a Chapter

13 debtor’s vehicle was repossessed prior to debtor filing his bankruptcy petition, debtor retained ownership of the repossessed vehicle and the vehicle automatically became part of the bankruptcy estate when debtor filed his petition. In re Caple, — Bankr. —, 2005 Bankr. LEXIS 1094 (Bankr. M.D.N.C. Apr. 4, 2005).

## § 25-9-208. Additional duties of secured party having control of collateral.

(a) Applicability of section. — This section applies to cases in which there is no outstanding secured obligation and the secured party is not committed to make advances, incur obligations, or otherwise give value.

(b) Duties of secured party after receiving demand from debtor. — Within 10 days after receiving an authenticated demand by the debtor:

- (1) A secured party having control of a deposit account under 25-9-104(a)(2) shall send to the bank with which the deposit account is maintained an authenticated statement that releases the bank from any further obligation to comply with instructions originated by the secured party;
- (2) A secured party having control of a deposit account under G.S. 25-9-104(a)(3) shall:
  - a. Pay the debtor the balance on deposit in the deposit account; or
  - b. Transfer the balance on deposit into a deposit account in the debtor’s name;
- (3) A secured party, other than a buyer, having control of electronic chattel paper under G.S. 25-9-105 shall:
  - a. Communicate the authoritative copy of the electronic chattel paper to the debtor or its designated custodian;
  - b. If the debtor designates a custodian that is the designated custodian with which the authoritative copy of the electronic chattel paper is maintained for the secured party, communicate to the custodian an authenticated record releasing the designated custodian from any further obligation to comply with instructions originated by the secured party and instructing the custodian to comply with instructions originated by the debtor; and
  - c. Take appropriate action to enable the debtor or its designated custodian to make copies of or revisions to the authoritative copy which add or change an identified assignee of the authoritative copy without the consent of the secured party;
- (4) A secured party having control of investment property under G.S. 25-8-106(d)(2) or G.S. 25-9-106(b) shall send to the securities intermediary or commodity intermediary with which the security entitlement or commodity contract is maintained an authenticated record that releases the securities intermediary or commodity intermediary



from any further obligation to comply with entitlement orders or directions originated by the secured party;

- (5) A secured party having control of a letter-of-credit right under G.S. 25-9-107 shall send to each person having an unfulfilled obligation to pay or deliver proceeds of the letter of credit to the secured party an authenticated release from any further obligation to pay or deliver proceeds of the letter of credit to the secured party; and
- (6) A secured party having control of an electronic document shall:
  - a. Give control of the electronic document to the debtor or its designated custodian;
  - b. If the debtor designates a custodian that is the designated custodian with which the authoritative copy of the electronic document is maintained for the secured party, communicate to the custodian an authenticated record releasing the designated custodian from any further obligation to comply with instructions originated by the secured party and instructing the custodian to comply with instructions originated by the debtor; and
  - c. Take appropriate action to enable the debtor or its designated custodian to make copies of or revisions to the authoritative copy which add or change an identified assignee of the authoritative copy without the consent of the secured party. (2000-169, s. 1; 2006-112, s. 47.)

**Editor's Note.** — Session Laws 2006-112, s. 59, provides: "Subparts A and B of Part II of this act apply to a document of title that is issued or a bailment that arises on or after the effective date of this act. Subparts A and B of Part II of this act do not apply to a document of title that is issued or a bailment that arises before the effective date of this act even if the document of title or bailment would be subject to this act if the document of title had been issued or bailment had arisen on or after the effective date of this act. Subparts A and B of Part II of this act do not apply to a right of action that has accrued before the effective date of this act."

Session Laws 2006-112, s. 60, provides: "A document of title issued or a bailment that arises before the effective date of this act and the rights, obligations, and interests flowing from that document or bailment are governed by any statute amended or repealed by this act as if amendment or repeal had not occurred and may be terminated, completed, consummated, or enforced under that statute."

**Effect of Amendments.** — Session Laws 2006-112, s. 47, effective October 1, 2006, added subdivision (b)(6); and made minor stylistic changes.

## PART 3.

### PERFECTION AND PRIORITY.

#### SUBPART 1. Law Governing Perfection and Priority.

### § 25-9-301. Law governing perfection and priority of security interests.

Except as otherwise provided in G.S. 25-9-303 through G.S. 25-9-306, the following rules determine the law governing perfection, the effect of perfection or nonperfection, and the priority of a security interest in collateral:

- (1) Except as otherwise provided in this section, while a debtor is located in a jurisdiction, the local law of that jurisdiction governs perfection, the effect of perfection or nonperfection, and the priority of a security interest in collateral.

- (2) While collateral is located in a jurisdiction, the local law of that jurisdiction governs perfection, the effect of perfection or nonperfection, and the priority of a possessory security interest in that collateral.
- (3) Except as otherwise provided in paragraph (4) of this section, while tangible negotiable documents, goods, instruments, money, or tangible chattel paper is located in a jurisdiction, the local law of that jurisdiction governs:
  - a. Perfection of a security interest in the goods by filing a fixture filing;
  - b. Perfection of a security interest in timber to be cut; and
  - c. The effect of perfection or nonperfection and the priority of a nonpossessory security interest in the collateral.
- (4) The local law of the jurisdiction in which the wellhead or minehead is located governs perfection, the effect of perfection or nonperfection, and the priority of a security interest in as-extracted collateral. (1945, c. 196, s. 2; 1957, c. 564; 1965, c. 700, s. 1; 1967, c. 562, s. 1; 1975, c. 862, s. 7; 1989 (Reg. Sess., 1990), c. 1024, s. 8(e), (f); 1997-181, s. 2; 1999-73, s. 4(a), (b); 2000-169, s. 1; 2006-112, s. 48.)

**Editor's Note.** — Session Laws 2006-112, s. 59, provides: "Subparts A and B of Part II of this act apply to a document of title that is issued or a bailment that arises on or after the effective date of this act. Subparts A and B of Part II of this act do not apply to a document of title that is issued or a bailment that arises before the effective date of this act even if the document of title or bailment would be subject to this act if the document of title had been issued or bailment had arisen on or after the effective date of this act. Subparts A and B of Part II of this act do not apply to a right of action that has accrued before the effective date of this act."

Session Laws 2006-112, s. 60, provides: "A document of title issued or a bailment that arises before the effective date of this act and the rights, obligations, and interests flowing from that document or bailment are governed by any statute amended or repealed by this act as if amendment or repeal had not occurred and may be terminated, completed, consummated, or enforced under that statute."

**Effect of Amendments.** — Session Laws 2006-112, s. 48, effective October 1, 2006, inserted "tangible" preceding "negotiable documents" in the introductory language of subdivision (3).

## SUBPART 2. Perfection.

### § 25-9-310. When filing required to perfect security interest or agricultural lien; security interests and agricultural liens to which filing provisions do not apply.

(a) General rule: perfection by filing. — Except as otherwise provided in subsection (b) of this section and G.S. 25-9-312(b), a financing statement must be filed to perfect all security interests and agricultural liens.

(b) Exceptions: filing not necessary. — The filing of a financing statement is not necessary to perfect a security interest:

- (1) That is perfected under G.S. 25-9-308(d), (e), (f), or (g);
- (2) That is perfected under G.S. 25-9-309 when it attaches;
- (3) In property subject to a statute, regulation, or treaty described in G.S. 25-9-311(a);
- (4) In goods in possession of a bailee which is perfected under G.S. 25-9-312(d)(1) or (2);
- (5) In certificated securities, documents, goods, or instruments which is perfected without filing, control, or possession under G.S. 25-9-312(e), (f), or (g);



- (6) In collateral in the secured party's possession under G.S. 25-9-313;
- (7) In a certificated security which is perfected by delivery of the security certificate to the secured party under G.S. 25-9-313;
- (8) In deposit accounts, electronic chattel paper, electronic documents, investment property, or letter-of-credit rights which is perfected by control under G.S. 25-9-314;
- (9) In proceeds which is perfected under G.S. 25-9-315; or
- (10) That is perfected under G.S. 25-9-316.

(c) Assignment of perfected security interest. — If a secured party assigns a perfected security interest or agricultural lien, a filing under this Article is not required to continue the perfected status of the security interest against creditors of and transferees from the original debtor. (1866-7, s. 1; 1872-3, c. 133, s. 1; Code, s. 1799; 1893, c. 9; Rev., s. 2052; C.S., s. 2480; 1925, c. 302, s. 1; 1927, c. 22; 1935, c. 205; 1945, c. 182, s. 3; c. 196, s. 2; 1955, c. 816; 1957, cc. 564, 999; 1961, c. 574; 1965, c. 700, s. 1; 1967, c. 562, s. 1; 1975, c. 862, s. 7; 1977, c. 103; 1989 (Reg. Sess., 1990), c. 1024, s. 8(i); 1997-181, s. 92000-169, s. 1; 2001-218, s. 3; 2001-487, s. 57; 2006-112, s. 49.)

**Editor's Note.** — Session Laws 2006-112, s. 59, provides: "Subparts A and B of Part II of this act apply to a document of title that is issued or a bailment that arises on or after the effective date of this act. Subparts A and B of Part II of this act do not apply to a document of title that is issued or a bailment that arises before the effective date of this act even if the document of title or bailment would be subject to this act if the document of title had been issued or bailment had arisen on or after the effective date of this act. Subparts A and B of Part II of this act do not apply to a right of action that has accrued before the effective date of this act."

Session Laws 2006-112, s. 60, provides: "A document of title issued or a bailment that arises before the effective date of this act and the rights, obligations, and interests flowing from that document or bailment are governed by any statute amended or repealed by this act as if amendment or repeal had not occurred and may be terminated, completed, consummated, or enforced under that statute."

**Effect of Amendments.** — Session Laws 2006-112, s. 49, effective October 1, 2006, inserted "control," in subdivision (b)(5); inserted "electronic documents," in subdivision (b)(8); and inserted "G.S." in subdivision (b)(10).

## **§ 25-9-312. Perfection of security interests in chattel paper, deposit accounts, documents, goods covered by documents, instruments, investment property, letter-of-credit rights, and money; perfection by permissive filing; temporary perfection without filing or transfer of possession.**

(a) Perfection by filing permitted. — A security interest in chattel paper, negotiable documents, instruments, or investment property may be perfected by filing.

(b) Control or possession of certain collateral. — Except as otherwise provided in G.S. 25-9-315(c) and (d) for proceeds:

- (1) A security interest in a deposit account may be perfected only by control under G.S. 25-9-314;
- (2) And except as otherwise provided in G.S. 25-9-308(d), a security interest in a letter-of-credit right may be perfected only by control under G.S. 25-9-314; and
- (3) A security interest in money may be perfected only by the secured party's taking possession under G.S. 25-9-313.

(c) Goods covered by negotiable document. — While goods are in the possession of a bailee that has issued a negotiable document covering the goods:



- (1) A security interest in the goods may be perfected by perfecting a security interest in the document; and
  - (2) A security interest perfected in the document has priority over any security interest that becomes perfected in the goods by another method during that time.
- (d) Goods covered by nonnegotiable document. — While goods are in the possession of a bailee that has issued a nonnegotiable document covering the goods, a security interest in the goods may be perfected by:
- (1) Issuance of a document in the name of the secured party;
  - (2) The bailee's receipt of notification of the secured party's interest; or
  - (3) Filing as to the goods.
- (e) Temporary perfection: new value. — A security interest in certificated securities, negotiable documents, or instruments is perfected without filing or the taking of possession or control for a period of 20 days from the time it attaches to the extent that it arises for new value given under an authenticated security agreement.
- (f) Temporary perfection: goods or documents made available to debtor. — A perfected security interest in a negotiable document or goods in possession of a bailee, other than one that has issued a negotiable document for the goods, remains perfected for 20 days without filing if the secured party makes available to the debtor the goods or documents representing the goods for the purpose of:
- (1) Ultimate sale or exchange; or
  - (2) Loading, unloading, storing, shipping, transshipping, manufacturing, processing, or otherwise dealing with them in a manner preliminary to their sale or exchange.
- (g) Temporary perfection: delivery of security certificate or instrument to debtor. — A perfected security interest in a certificated security or instrument remains perfected for 20 days without filing if the secured party delivers the security certificate or instrument to the debtor for the purpose of:
- (1) Ultimate sale or exchange; or
  - (2) Presentation, collection, enforcement, renewal, or registration of transfer.
- (h) Expiration of temporary perfection. — After the 20-day period specified in subsection (e), (f), or (g) of this section expires, perfection depends upon compliance with this Article. (1997-181, s. 5; 2000-169, s. 1; 2006-112, s. 50.)

**Editor's Note.** — Session Laws 2006-112, s. 59, provides: "Subparts A and B of Part II of this act apply to a document of title that is issued or a bailment that arises on or after the effective date of this act. Subparts A and B of Part II of this act do not apply to a document of title that is issued or a bailment that arises before the effective date of this act even if the document of title or bailment would be subject to this act if the document of title had been issued or bailment had arisen on or after the effective date of this act. Subparts A and B of Part II of this act do not apply to a right of action that has accrued before the effective date of this act."

Session Laws 2006-112, s. 60, provides: "A document of title issued or a bailment that arises before the effective date of this act and the rights, obligations, and interests flowing from that document or bailment are governed by any statute amended or repealed by this act as if amendment or repeal had not occurred and may be terminated, completed, consummated, or enforced under that statute."

**Effect of Amendments.** — Session Laws 2006-112, s. 50, effective October 1, 2006, inserted "or control" in subsection (e).

## § 25-9-313. When possession by or delivery to secured party perfects security interest without filing.

- (a) Perfection by possession or delivery. — Except as otherwise provided in

subsection (b) of this section, a secured party may perfect a security interest in tangible negotiable documents, goods, instruments, money, or tangible chattel paper by taking possession of the collateral. A secured party may perfect a security interest in certificated securities by taking delivery of the certificated securities under G.S. 25-8-301.

(b) Goods covered by certificate of title. — With respect to goods covered by a certificate of title issued by this State, a secured party may perfect a security interest in the goods by taking possession of the goods only in the circumstances described in G.S. 25-9-316(d).

(c) Collateral in possession of person other than debtor. — With respect to collateral other than certificated securities and goods covered by a document, a secured party takes possession of collateral in the possession of a person other than the debtor, the secured party, or a lessee of the collateral from the debtor in the ordinary course of the debtor's business, when:

- (1) The person in possession authenticates a record acknowledging that it holds possession of the collateral for the secured party's benefit; or
- (2) The person takes possession of the collateral after having authenticated a record acknowledging that it will hold possession of collateral for the secured party's benefit.

(d) Time of perfection by possession; continuation of perfection. — If perfection of a security interest depends upon possession of the collateral by a secured party, perfection occurs no earlier than the time the secured party takes possession and continues only while the secured party retains possession.

(e) Time of perfection by delivery; continuation of perfection. — A security interest in a certificated security in registered form is perfected by delivery when delivery of the certificated security occurs under G.S. 25-8-301 and remains perfected by delivery until the debtor obtains possession of the security certificate.

(f) Acknowledgment not required. — A person in possession of collateral is not required to acknowledge that it holds possession for a secured party's benefit.

(g) Effectiveness of acknowledgment; no duties or confirmation. — If a person acknowledges that it holds possession for the secured party's benefit:

- (1) The acknowledgment is effective under subsection (c) of this section or G.S. 25-8-301(a), even if the acknowledgment violates the rights of a debtor; and
- (2) Unless the person otherwise agrees or law other than this Article otherwise provides, the person does not owe any duty to the secured party and is not required to confirm the acknowledgment to another person.

(h) Secured party's delivery to person other than debtor. — A secured party having possession of collateral does not relinquish possession by delivering the collateral to a person other than the debtor or a lessee of the collateral from the debtor in the ordinary course of the debtor's business if the person was instructed before the delivery or is instructed contemporaneously with the delivery:

- (1) To hold possession of the collateral for the secured party's benefit; or
- (2) To redeliver the collateral to the secured party.

(i) Effect of delivery under subsection (h); no duties or confirmation. — A secured party does not relinquish possession, even if a delivery under subsection (h) of this section violates the rights of a debtor. A person to which collateral is delivered under subsection (h) of this section does not owe any duty to the secured party and is not required to confirm the delivery to another person unless the person otherwise agrees or law other than this Article otherwise provides. (1997-181, s. 5; 2000-169, s. 1; 2006-112, s. 51.)



**Editor's Note.** — Session Laws 2006-112, s. 59, provides: "Subparts A and B of Part II of this act apply to a document of title that is issued or a bailment that arises on or after the effective date of this act. Subparts A and B of Part II of this act do not apply to a document of title that is issued or a bailment that arises before the effective date of this act even if the document of title or bailment would be subject to this act if the document of title had been issued or bailment had arisen on or after the effective date of this act. Subparts A and B of Part II of this act do not apply to a right of action that has accrued before the effective date of this act."

Session Laws 2006-112, s. 60, provides: "A document of title issued or a bailment that arises before the effective date of this act and the rights, obligations, and interests flowing from that document or bailment are governed by any statute amended or repealed by this act as if amendment or repeal had not occurred and may be terminated, completed, consummated, or enforced under that statute."

**Effect of Amendments.** — Session Laws 2006-112, s. 51, effective October 1, 2006, inserted "tangible" preceding "negotiable documents" in the first sentence of subsection (a).

## § 25-9-314. Perfection by control.

(a) Perfection by control. — A security interest in investment property, deposit accounts, letter-of-credit rights, electronic chattel paper, or electronic documents may be perfected by control of the collateral under G.S. 25-7-106, 25-9-104, 25-9-105, 25-9-106, or 25-9-107.

(b) Specified collateral: time of perfection by control; continuation of perfection. — A security interest in deposit accounts, electronic chattel paper, letter-of-credit rights, or electronic documents is perfected by control under G.S. 25-7-106, 25-9-104, 25-9-105, or 25-9-107 when the secured party obtains control and remains perfected by control only while the secured party retains control.

(c) Investment property: time of perfection by control; continuation of perfection. — A security interest in investment property is perfected by control under G.S. 25-9-106 from the time the secured party obtains control and remains perfected by control until:

- (1) The secured party does not have control; and
- (2) One of the following occurs:
  - a. If the collateral is a certificated security, the debtor has or acquires possession of the security certificate;
  - b. If the collateral is an uncertificated security, the issuer has registered or registers the debtor as the registered owner; or
  - c. If the collateral is a security entitlement, the debtor is or becomes the entitlement holder. (1997-181, s. 5; 2000-169, s. 1; 2006-112, s. 52.)

**Editor's Note.** — Session Laws 2006-112, s. 59, provides: "Subparts A and B of Part II of this act apply to a document of title that is issued or a bailment that arises on or after the effective date of this act. Subparts A and B of Part II of this act do not apply to a document of title that is issued or a bailment that arises before the effective date of this act even if the document of title or bailment would be subject to this act if the document of title had been issued or bailment had arisen on or after the effective date of this act. Subparts A and B of Part II of this act do not apply to a right of action that has accrued before the effective date of this act."

Session Laws 2006-112, s. 60, provides: "A

document of title issued or a bailment that arises before the effective date of this act and the rights, obligations, and interests flowing from that document or bailment are governed by any statute amended or repealed by this act as if amendment or repeal had not occurred and may be terminated, completed, consummated, or enforced under that statute."

**Effect of Amendments.** — Session Laws 2006-112, s. 52, effective October 1, 2006, in subsection (a), deleted "or" preceding "electronic chattel paper", and inserted "or electronic documents" and "25-7-106"; and in subsection (b), deleted "or" preceding "letter-of-credit," and inserted "or electronic documents" and "25-7-106."



## SUBPART 3. Priority.

**§ 25-9-317. Interests that take priority over or take free of security interest or agricultural lien.**

(a) Conflicting security interests and rights of lien creditors. — A security interest or agricultural lien is subordinate to the rights of:

- (1) A person entitled to priority under G.S. 25-9-322; and
- (2) Except as otherwise provided in subsection (e) of this section, a person that becomes a lien creditor before the earlier of the time:
  - a. The security interest or agricultural lien is perfected; or
  - b. One of the conditions specified in G.S. 25-9-203(b)(3) is met and a financing statement covering the collateral is filed.

(b) Buyers that receive delivery. — Except as otherwise provided in subsection (e) of this section, a buyer, other than a secured party, of tangible chattel paper, tangible documents, goods, instruments, or a security certificate takes free of a security interest or agricultural lien if the buyer gives value and receives delivery of the collateral without knowledge of the security interest or agricultural lien and before it is perfected.

(c) Lessees that receive delivery. — Except as otherwise provided in subsection (e) of this section, a lessee of goods takes free of a security interest or agricultural lien if the lessee gives value and receives delivery of the collateral without knowledge of the security interest or agricultural lien and before it is perfected.

(d) Licensees and buyers of certain collateral. — A licensee of a general intangible or a buyer, other than a secured party, of accounts, electronic chattel paper, electronic documents, general intangibles, or investment property other than a certificated security takes free of a security interest if the licensee or buyer gives value without knowledge of the security interest and before it is perfected.

(e) Purchase-money security interest. — Except as otherwise provided in G.S. 25-9-320 and G.S. 25-9-321, if a person files a financing statement with respect to a purchase-money security interest before or within 20 days after the debtor receives delivery of the collateral, the security interest takes priority over the rights of a buyer, lessee, or lien creditor which arise between the time the security interest attaches and the time of filing. (1945, c. 182, s. 4; c. 196, s. 4; 1955, c. 386, s. 2; 1961, c. 574; 1965, c. 700, s. 1; 1975, c. 862, s. 7; 1979, c. 404, s. 1; 1997-181, s. 8; 2000-169, s. 1; 2006-112, s. 53.)

**Editor's Note.** — Session Laws 2006-112, s. 59, provides: "Subparts A and B of Part II of this act apply to a document of title that is issued or a bailment that arises on or after the effective date of this act. Subparts A and B of Part II of this act do not apply to a document of title that is issued or a bailment that arises before the effective date of this act even if the document of title or bailment would be subject to this act if the document of title had been issued or bailment had arisen on or after the effective date of this act. Subparts A and B of Part II of this act do not apply to a right of action that has accrued before the effective date of this act."

Session Laws 2006-112, s. 60, provides: "A document of title issued or a bailment that arises before the effective date of this act and the rights, obligations, and interests flowing from that document or bailment are governed by any statute amended or repealed by this act as if amendment or repeal had not occurred and may be terminated, completed, consummated, or enforced under that statute."

**Effect of Amendments.** — Session Laws 2006-112, s. 53, effective October 1, 2006, inserted "tangible" preceding "documents," in subsection (b); and inserted "electronic documents," in subsection (d).

## § 25-9-338. Priority of security interest or agricultural lien perfected by filed financing statement providing certain incorrect information.

If a security interest or agricultural lien is perfected by a filed financing statement providing information described in G.S. 25-9-516(b)(5) which is incorrect at the time the financing statement is filed:

- (1) The security interest or agricultural lien is subordinate to a conflicting perfected security interest in the collateral to the extent that the holder of the conflicting security interest gives value in reasonable reliance upon the incorrect information; and
- (2) A purchaser, other than a secured party, of the collateral takes free of the security interest or agricultural lien to the extent that, in reasonable reliance upon the incorrect information, the purchaser gives value and, in the case of tangible chattel paper, tangible documents, goods, instruments, or a security certificate, receives delivery of the collateral. (2000-169, s. 1; 2006-112, s. 54.)

**Editor's Note.** — Session Laws 2006-112, s. 59, provides: “Subparts A and B of Part II of this act apply to a document of title that is issued or a bailment that arises on or after the effective date of this act. Subparts A and B of Part II of this act do not apply to a document of title that is issued or a bailment that arises before the effective date of this act even if the document of title or bailment would be subject to this act if the document of title had been issued or bailment had arisen on or after the effective date of this act. Subparts A and B of Part II of this act do not apply to a right of action that has accrued before the effective date of this act.”

Session Laws 2006-112, s. 60, provides: “A document of title issued or a bailment that arises before the effective date of this act and the rights, obligations, and interests flowing from that document or bailment are governed by any statute amended or repealed by this act as if amendment or repeal had not occurred and may be terminated, completed, consummated, or enforced under that statute.”

**Effect of Amendments.** — Session Laws 2006-112, s. 54, effective October 1, 2006, inserted “tangible” two times in subdivision (2).

## PART 5

### FILING.

#### SUBPART 1. Filing Office; Contents and Effectiveness of Financing Statement.

## § 25-9-502. Contents of financing statement; record of mortgage as financing statement; time of filing financing statement.

### CASE NOTES

**Applied** in *Miller v. Van Dorn Demag Corp.* Bankr. —, 2005 Bankr. LEXIS 1091 (Bankr. (In re Asheboro Precision Plastics, Inc.), — M.D.N.C. Mar. 1, 2005).

## § 25-9-503. Name of debtor and secured party.

### CASE NOTES

**Trade Name Use Misleading.** — Under revised UCC Article 9 and the underlying policy of simplifying financing statement searches, the creditor's use of the purported trade name,

in place of debtor's legal name, rendered the financing statement seriously misleading and hence ineffective. As a consequence, the creditor's security interest could be avoided by the

Chapter 7 trustee. *Miller v. Van Dorn Demag Corp.* (In re Asheboro Precision Plastics, Inc.), — Bankr. —, 2005 Bankr. LEXIS 1091 (Bankr. M.D.N.C. Mar. 1, 2005).

## § 25-9-506. Effect of errors or omissions.

### CASE NOTES

**Applied** in *Miller v. Van Dorn Demag Corp.* Bankr. —, 2005 Bankr. LEXIS 1091 (Bankr. (In re Asheboro Precision Plastics, Inc.), — M.D.N.C. Mar. 1, 2005).

## PART 6.

### DEFAULT.

#### SUBPART 1. Default and Enforcement of Security Interest.

## § 25-9-601. Rights after default; judicial enforcement; consignor or buyer of accounts, chattel paper, payment intangibles, or promissory notes.

(a) Rights of secured party after default. — After default, a secured party has the rights provided in this Part and, except as otherwise provided in G.S. 25-9-602, those provided by agreement of the parties. A secured party:

- (1) May reduce a claim to judgment, foreclose, or otherwise enforce the claim, security interest, or agricultural lien by any available judicial procedure; and
- (2) If the collateral is documents, may proceed either as to the documents or as to the goods they cover.

(b) Rights and duties of secured party in possession or control. — A secured party in possession of collateral or control of collateral under G.S. 25-7-106, 25-9-104, 25-9-105, 25-9-106, or 25-9-107 has the rights and duties provided in G.S. 25-9-207.

(c) Rights cumulative; simultaneous exercise. — The rights under subsections (a) and (b) of this section are cumulative and may be exercised simultaneously.

(d) Rights of debtor and obligor. — Except as otherwise provided in subsection (g) of this section and G.S. 25-9-605, after default, a debtor and an obligor have the rights provided in this Part and by agreement of the parties.

(e) Lien of levy after judgment. — If a secured party has reduced its claim to judgment, the lien of any levy that may be made upon the collateral by virtue of an execution based upon the judgment relates back to the earliest of:

- (1) The date of perfection of the security interest or agricultural lien in the collateral;
- (2) The date of filing a financing statement covering the collateral; or
- (3) Any date specified in a statute under which the agricultural lien was created.

(f) Execution sale. — A sale pursuant to an execution is a foreclosure of the security interest or agricultural lien by judicial procedure within the meaning of this section. A secured party may purchase at the sale and thereafter hold the collateral free of any other requirements of this Article.

(g) Consignor or buyer of certain rights to payment. — Except as otherwise provided in G.S. 25-9-607(c), this Part imposes no duties upon a secured party



that is a consignor or is a buyer of accounts, chattel paper, payment intangibles, or promissory notes. (1866-7, c. 1, s. 2; 1872-3, c. 133, s. 2; 1883, c. 88; Code, s. 1800; 1893, c. 9; Rev., s. 2054; C.S., s. 2488; 1961, c. 574; 1965, c. 700, s. 1; 1975, c. 862, s. 7; 2000-169, s. 1; 2006-112, s. 55.)

**Editor's Note.** — Session Laws 2006-112, s. 59, provides: "Subparts A and B of Part II of this act apply to a document of title that is issued or a bailment that arises on or after the effective date of this act. Subparts A and B of Part II of this act do not apply to a document of title that is issued or a bailment that arises before the effective date of this act even if the document of title or bailment would be subject to this act if the document of title had been issued or bailment had arisen on or after the effective date of this act. Subparts A and B of Part II of this act do not apply to a right of action that has accrued before the effective date of this act."

Session Laws 2006-112, s. 60, provides: "A document of title issued or a bailment that arises before the effective date of this act and the rights, obligations, and interests flowing from that document or bailment are governed by any statute amended or repealed by this act as if amendment or repeal had not occurred and may be terminated, completed, consummated, or enforced under that statute."

**Effect of Amendments.** — Session Laws 2006-112, s. 55, effective October 1, 2006, inserted "25-7-106" in subsection (b).

#### CASE NOTES

**Applied in** *In re Caple*, — Bankr. —, 2005 Bankr. LEXIS 1094 (Bankr. M.D.N.C. Apr. 4, 2005).

### § 25-9-607. Collection and enforcement by secured party.

#### CASE NOTES

**Applied in** *In re Caple*, — Bankr. —, 2005 Bankr. LEXIS 1094 (Bankr. M.D.N.C. Apr. 4, 2005).

### § 25-9-609. Secured party's right to take possession after default.

#### CASE NOTES

**Ownership of Repossessed Collateral in Bankruptcy.** — Until a creditor disposes of the repossessed property, the debtor remains the legal and equitable owner, subject only to the creditor's debt collection remedies, which are suspended by 11 U.S.C.S. § 362(a) when a bankruptcy petition is filed; where a Chapter

13 debtor's vehicle was repossessed prior to debtor filing his bankruptcy petition, debtor retained ownership of the repossessed vehicle and the vehicle automatically became part of the bankruptcy estate when debtor filed his petition. *In re Caple*, — Bankr. —, 2005 Bankr. LEXIS 1094 (Bankr. M.D.N.C. Apr. 4, 2005).

### § 25-9-610. Disposition of collateral after default.

#### CASE NOTES

**Applied in** *In re Caple*, — Bankr. —, 2005 Bankr. LEXIS 1094 (Bankr. M.D.N.C. Apr. 4, 2005).

**§ 25-9-614. Contents and form of notification before disposition of collateral: consumer-goods transaction.**

CASE NOTES

**Applied** in *In re Caple*, — Bankr. —, 2005 Bankr. LEXIS 1094 (Bankr. M.D.N.C. Apr. 4, 2005).

**§ 25-9-615. Application of proceeds of disposition; liability for deficiency and right to surplus.**

CASE NOTES

**Applied** in *In re Caple*, — Bankr. —, 2005 Bankr. LEXIS 1094 (Bankr. M.D.N.C. Apr. 4, 2005).

**§ 25-9-619. Transfer of record or legal title.**

CASE NOTES

**Applied** in *In re Caple*, — Bankr. —, 2005 Bankr. LEXIS 1094 (Bankr. M.D.N.C. Apr. 4, 2005).

**§ 25-9-620. Acceptance of collateral in full or partial satisfaction of obligation; compulsory disposition of collateral.**

CASE NOTES

**Applied** in *In re Caple*, — Bankr. —, 2005 Bankr. LEXIS 1094 (Bankr. M.D.N.C. Apr. 4, 2005).

**§ 25-9-622. Effect of acceptance of collateral.**

CASE NOTES

**Cited** in *In re Caple*, — Bankr. —, 2005 Bankr. LEXIS 1094 (Bankr. M.D.N.C. Apr. 4, 2005).

**§ 25-9-623. Right to redeem collateral.**

CASE NOTES

**Applied** in *In re Caple*, — Bankr. —, 2005 Bankr. LEXIS 1094 (Bankr. M.D.N.C. Apr. 4, 2005).

## PART 7

## TRANSITION.

**§ 25-9-701. Effective date.**

## CASE NOTES

**Applied** in *Miller v. Van Dorn Demag Corp.* Bankr. —, 2005 Bankr. LEXIS 1091 (Bankr. (In re Asheboro Precision Plastics, Inc.), — M.D.N.C. Mar. 1, 2005).

**§ 25-9-705. Effectiveness of action taken before effective date.**

(a) Pre-effective-date action; one-year perfection period unless reperfected. — If action, other than the filing of a financing statement, is taken before July 1, 2001 and the action would have resulted in priority of a security interest over the rights of a person that becomes a lien creditor had the security interest become enforceable before July 1, 2001, the action is effective to perfect a security interest that attaches under this act within one year after July 1, 2001. An attached security interest becomes unperfected one year after July 1, 2001 unless the security interest becomes a perfected security interest under this act before the expiration of that period.

(b) Pre-effective-date filing. — The filing of a financing statement before July 1, 2001 is effective to perfect a security interest to the extent the filing would satisfy the applicable requirements for perfection under this act.

(c) Pre-effective-date filing in jurisdiction formerly governing perfection. — This act does not render ineffective an effective financing statement that, before July 1, 2001, is filed and satisfies the applicable requirements for perfection under the law of the jurisdiction governing perfection as provided in G.S. 25-9-103 of former Article 9. However, except as otherwise provided in subsections (d), (e), and (g) of this section and G.S. 25-9-706, the financing statement ceases to be effective at the earlier of:

(1) The time the financing statement would have ceased to be effective under the law of the jurisdiction in which it is filed; or

(2) June 30, 2006.

(d) Continuation statement. — The filing of a continuation statement after July 1, 2001 does not continue the effectiveness of the financing statement filed before July 1, 2001. However, upon the timely filing of a continuation statement after July 1, 2001 and in accordance with the law of the jurisdiction governing perfection as provided in Part 3 of this Article, the effectiveness of a financing statement filed in the same office in that jurisdiction before July 1, 2001 continues for the period provided by the law of that jurisdiction.

(e) Application of subdivision (c)(2) to transmitting utility financing statement. — Subdivision (c)(2) of this section applies to a financing statement that, before July 1, 2001, is filed against a transmitting utility and satisfies the applicable requirements for perfection under the law of the jurisdiction governing perfection as provided in G.S. 25-9-103 of former Article 9 only to the extent that Part 3 of this Article provides that the law of a jurisdiction other than the jurisdiction in which the financing statement is filed governs perfection of a security interest in collateral covered by the financing statement.

(f) Application of Part 5. — A financing statement that includes a financing statement filed before July 1, 2001 and a continuation statement filed after



July 1, 2001 is effective only to the extent that it satisfies the requirements of Part 5 of this Article for an initial financing statement.

(g) Inapplicability of subdivision (c)(2) to certain financing statements. — With respect to an effective financing statement that:

- (1) Before July 1, 2001, was filed and satisfied the applicable requirements for perfection under the law of the jurisdiction governing perfection as provided in G.S. 25-9-103 of former Article 9,
- (2) Would satisfy the applicable requirements for perfection under this act, and
- (3) Was properly continued before July 1, 2001, such that the effectiveness of the financing statement would lapse after June 30, 2006, but before January 1, 2007, but for subdivision (c)(2) of this section,

subdivision (c)(2) of this section shall not apply to the financing statement and the filing of a continuation statement with respect to the financing statement is timely if the filing of the continuation statement occurs before the financing statement ceases to be effective and not before the earlier of (i) December 30, 2005, or (ii) six months before the effectiveness of the financing statement would lapse. (2000-169, s. 1; 2001-487, s. 15; 2006-11, s. 1.)

#### NORTH CAROLINA COMMENT (2006)

S.L. 2006-11 amended this section by adding subsection (g), which is intended to address certain interpretive issues concerning the application of this section to a narrow class of “affected” financing statements. The “affected” financing statements are those financing statements that (i) were properly filed in this State before July 1, 2001, (ii) satisfied the applicable requirements of filing and perfection under former Article 9, (iii) also satisfy the applicable requirements of filing and perfection under this Article, (iv) were properly continued in this State before July 1, 2001, (a “same state” continuation), and (v) would lapse after June 30, 2006, but prior to January 1, 2007.

Under subsection (c), a financing statement that was filed under former Article 9 and that satisfied the requirements for perfection under former Article 9 ceases to be effective at the earlier of (i) the time the financing statement would have ceased to be effective under the law of the jurisdiction in which it is filed (i.e. its normal lapse date) or (ii) June 30, 2006. This would cause all “affected” financing statements to become ineffective on June 30, 2006, regardless of their actual lapse date. For example, an “affected” financing statement that would otherwise cease to be effective under the laws of this State on November 1, 2006, would actually cease to be effective on June 30, 2006. This result would be obtained unless subsection (b) applied to override subsection (c). Although it first appears that subsection (b) would validate

a pre-effective-date filing under this Article, the Official Comment to subsection (b) indicates that the subsection deals with a different set of circumstances that do not include “same state” continuations. Therefore, it is unclear whether subsection (b) applies to an “affected” financing statement. This uncertainty, in turn, leads to further uncertainty regarding the manner of application to “affected” financing statements of the six-month window within which a continuation statement may be filed under G.S. 25-9-515(d). Is the correct measurement of this window the six-month period immediately prior to the November 1, 2006, lapse date or the six-month period immediately preceding June 30, 2006?

New subsection (g) is intended to resolve any interpretive ambiguity. The subsection is intended to (i) apply only to “affected” financing statements, (ii) make it clearer that subdivision (c)(2) does not apply to “affected” financing statements, (iii) assure effectiveness not only of continuation statements filed after the effective date of subsection (g), but also those filed on and after December 30, 2005, and prior to the effective date of subsection (g), and (iv) avoid the necessity of making a determination whether or not subsection (b) applies to “same state” continuations.

Subsection (g) is not intended to address any other interpretive issue and nor does it render ineffective a continuation statement that was filed and effective before the effective date of subsection (g).

**Editor’s Note.** — Session Laws 2006-11, s. 2, provides: “Nothing in this act renders ineffective a continuation statement that was filed

and effective before the effective date of this act.”

Session Laws 2006-226, s. 33, amended Ses-

sion Laws 2006-11 by enacting a new section of that act to read: "Section 2.1. The Revisor of Statutes shall cause to be printed along with G.S. 25-9-705, as amended by this act, all explanatory comments of the drafters of this

act as the Revisor deems appropriate."

**Effect of Amendments.** — Session Laws 2006-11, s. 1, effective June 14, 2006, in subsection (c), substituted "(d), (e), and (g)" for "(d) and (e)"; and added subsection (g).

## ARTICLE 10.

### *Effective Date and Repealer.*

**§ 25-10-104:** Repealed by Session Laws 2006-112, s. 56, effective October 1, 2006.

**Editor's Note.** — Session Laws 2006-112, s. 59, provides: "Subparts A and B of Part II of this act apply to a document of title that is issued or a bailment that arises on or after the effective date of this act. Subparts A and B of Part II of this act do not apply to a document of title that is issued or a bailment that arises before the effective date of this act even if the document of title or bailment would be subject to this act if the document of title had been issued or bailment had arisen on or after the effective date of this act. Subparts A and B of

Part II of this act do not apply to a right of action that has accrued before the effective date of this act."

Session Laws 2006-112, s. 60, provides: "A document of title issued or a bailment that arises before the effective date of this act and the rights, obligations, and interests flowing from that document or bailment are governed by any statute amended or repealed by this act as if amendment or repeal had not occurred and may be terminated, completed, consummated, or enforced under that statute."

## Chapter 27.

### Warehouse Receipts.

#### Article 5.

##### Criminal Offenses.

Sec.  
27-54 through 27-59. [Repealed.]

#### ARTICLE 5.

##### *Criminal Offenses.*

**§§ 27-54 through 27-59:** Repealed by Session Laws 2006-112, s. 58(a), effective October 1, 2006.

**Editor's Note.** — Session Laws 2006-112, s. 58(b), provides: "Prosecutions for offenses committed before the effective date of this act are not abated or affected by this act, and the statutes that would be applicable but for this act remain applicable to those prosecutions."

Session Laws 2006-112, s. 60, provides: "A document of title issued or a bailment that

arises before the effective date of this act and the rights, obligations, and interests flowing from that document or bailment are governed by any statute amended or repealed by this act as if amendment or repeal had not occurred and may be terminated, completed, consummated, or enforced under that statute."



Chapter 28A.  
Administration of Decedents' Estates.

Article 18.

Actions and Proceedings.

Sec.

28A-18-2. Death by wrongful act of another;  
recovery not assets.

ARTICLE 2.

*Jurisdiction for Probate of Wills and Administration of Estates  
of Decedents.*

§ 28A-2-1. Clerk of superior court.

CASE NOTES

I. General Consideration.

I. GENERAL CONSIDERATION.

**Dispute Over Settlement Agreement Not An Estate Matter.** — When petitioner on appeal from an order of the clerk of superior court attacked a prior court decision, there was no merit to her claim that the prior decision was void for lack of subject matter jurisdiction; the trial court had not been addressing an estate matter under G.S. 28A-2-1 but determin-

ing whether there were issues of fact about the terms of a settlement agreement following a mediation; it had jurisdiction under G.S. 7A-240 to do this, as it later had jurisdiction to enforce a settlement agreement reached by the parties. In re Estate of Whitaker, — N.C. App. —, 633 S.E.2d 849, 2006 N.C. App. LEXIS 1902 (2006).

ARTICLE 18.

*Actions and Proceedings.*

§ 28A-18-1. Survival of actions to and against personal representative.

CASE NOTES

I. General Consideration.

II. Revival and Survival of Actions.

I. GENERAL CONSIDERATION.

**Substitution Order Ineffective As To Personal Representative Not Yet Appointed.** — Where order directing the substitution of a yet-to-be-appointed personal representative for deceased defendant did not comply with G.S. 28A-18-1 or G.S. 1A-1, Rule 25, the order could not operate retroactively to substitute him as defendant once the personal representative was appointed, and the trial

court erred in granting plaintiffs' summary judgment motion because the personal representative did not receive timely notice of the motion under G.S. 1A-1, Rule 56. Dixon v. Hill, 174 N.C. App. 252, 620 S.E.2d 715, 2005 N.C. App. LEXIS 2393 (2005).

**Summary Judgment for Deceased Defendant Ineffective Where Motion to Substitute Personal Representative Had Never Been Ruled Upon.** — After defendant doctor died, the medical malpractice action sur-

vived only against the personal representative or collector of the estate pursuant to G.S. 28A-18-1(a), and thus where the trial court never ruled upon the motion under G.S. 1A-1, Rule 25(a) to substitute the executrix of the estate the trial court's summary judgment order with respect to the doctor had no effect. *Purvis v. Moses H. Cone Mem'l Hosp. Serv. Corp.*, — N.C. App. —, 624 S.E.2d 380, 2006 N.C. App. LEXIS 128 (2006).

**Jury Issue Raised.** — Personal representative's wrongful death and survivorship claims could be brought in the same suit and separate issues should have been presented to the jury on whether a nursing home's negligence caused the decedent's pre-death injuries and wrongful death; the nursing home's claim that a personal representative was required to delineate which of the decedent's pressure sores caused his death and which sores caused him pain and suffering prior to his death was rejected as if the jury determined that the decedent died of Alzheimer's disease, rather than an infection from the pressure sores, it could still reasonably determine that the nursing home's negligence caused the pressure sores and that any or all of those sores caused the decedent pain and suffering prior to his death. *Alston v. Britthaven, Inc.*, — N.C. App. —, 628 S.E.2d 824, 2006 N.C. App. LEXIS 943 (2006).

**Alternative Claims for Wrongful Death and Survivorship.** — Wrongful death and survivorship claims may be brought as alternative claims for the same negligent acts. *Alston v. Britthaven, Inc.*, — N.C. App. —, 628 S.E.2d 824, 2006 N.C. App. LEXIS 943 (2006).

## II. REVIVAL AND SURVIVAL OF ACTIONS.

**Annulment Action Survived Decedent's Death.** — Where an executrix had filed a case on a decedent's behalf as his guardian ad litem, seeking an annulment of the decedent's marriage while the decedent was alive, and where substantial property rights hinged on the validity of the marriage, the action did not abate on the decedent's death and the executrix was

entitled to pursue it. *Clark v. Foust-Graham*, 171 N.C. App. 707, 615 S.E.2d 398, 2005 N.C. App. LEXIS 1365 (2005).

### **Action for Negligent Injury.** —

Personal representative was entitled to proceed on both a survivorship claim and a wrongful death claim where he alleged that a nursing home's negligence resulted not only in the decedent's death, but also in injury, pain and suffering, and medical expenses prior to his death. *Alston v. Britthaven, Inc.*, — N.C. App. —, 628 S.E.2d 824, 2006 N.C. App. LEXIS 943 (2006).

Trial court should have submitted survivorship issues to the jury as a personal representative presented sufficient evidence of the decedent's pre-death injuries, including evidence related to the questions of preventability of the decedent's pressure sores, the treatment of those wounds, and whether and to what degree the wounds caused the decedent pain; the personal representative presented substantial evidence, notwithstanding the nursing home's contrary evidence, to allow the jury to conclude that the nursing home negligently failed to prevent the decedent's pressure sores and that those pressure sores caused the decedent pain and suffering prior to his death. *Alston v. Britthaven, Inc.*, — N.C. App. —, 628 S.E.2d 824, 2006 N.C. App. LEXIS 943 (2006).

**Survivorship Claim Sufficiently Pled.** — Personal representative sufficiently pled a survivorship claim for a decedent's pre-death injuries where he made allegations primarily directed to the injuries sustained by, and damages caused to, the decedent in counts separate from a count in which he requested the damages listed in G.S. 28A-18-2 and several of the damages pled were not damages recoverable under G.S. 28A-18-2; because the damages were not lumped together, they did not appear to relate to a single claim, but related to separate claims for damages sustained by the decedent due to the nursing home's negligent actions during his lifetime and the negligence allegedly causing his death. *Alston v. Britthaven, Inc.*, — N.C. App. —, 628 S.E.2d 824, 2006 N.C. App. LEXIS 943 (2006).

## § 28A-18-2. Death by wrongful act of another; recovery not assets.

(a) When the death of a person is caused by a wrongful act, neglect or default of another, such as would, if the injured person had lived, have entitled him to an action for damages therefor, the person or corporation that would have been so liable, and his or their personal representatives or collectors, shall be liable to an action for damages, to be brought by the personal representative or collector of the decedent; and this notwithstanding the death, and although the wrongful act, neglect or default, causing the death, amounts in law to a felony. The personal representative or collector of the decedent who

pursues an action under this section may pay from the assets of the estate the reasonable and necessary expenses, not including attorneys' fees, incurred in pursuing the action. At the termination of the action, any amount recovered shall be applied first to the reimbursement of the estate for the expenses incurred in pursuing the action, then to the payment of attorneys' fees, and shall then be distributed as provided in this section. The amount recovered in such action is not liable to be applied as assets, in the payment of debts or legacies, except as to burial expenses of the deceased, and reasonable hospital and medical expenses not exceeding four thousand five hundred dollars (\$4,500) incident to the injury resulting in death, except that the amount applied for hospital and medical expenses shall not exceed fifty percent (50%) of the amount of damages recovered after deducting attorneys' fees, but shall be disposed of as provided in the Intestate Succession Act. The limitations on recovery for hospital and medical expenses under this subsection do not apply to subrogation rights exercised pursuant to G.S. 135-40.13A. All claims filed for such services shall be approved by the clerk of the superior court and any party adversely affected by any decision of said clerk as to said claim may appeal to the superior court in term time.

(b) Damages recoverable for death by wrongful act include:

- (1) Expenses for care, treatment and hospitalization incident to the injury resulting in death;
- (2) Compensation for pain and suffering of the decedent;
- (3) The reasonable funeral expenses of the decedent;
- (4) The present monetary value of the decedent to the persons entitled to receive the damages recovered, including but not limited to compensation for the loss of the reasonably expected;
  - a. Net income of the decedent,
  - b. Services, protection, care and assistance of the decedent, whether voluntary or obligatory, to the persons entitled to the damages recovered,
  - c. Society, companionship, comfort, guidance, kindly offices and advice of the decedent to the persons entitled to the damages recovered;
- (5) Such punitive damages as the decedent could have recovered pursuant to Chapter 1D of the General Statutes had he survived, and punitive damages for wrongfully causing the death of the decedent through malice or willful or wanton conduct, as defined in G.S. 1D-5;
- (6) Nominal damages when the jury so finds.

(c) All evidence which reasonably tends to establish any of the elements of damages included in subsection (b), or otherwise reasonably tends to establish the present monetary value of the decedent to the persons entitled to receive the damages recovered, is admissible in an action for damages for death by wrongful act.

(d) In all actions brought under this section the dying declarations of the deceased shall be admissible as provided for in G.S. 8-51.1. (R.C., c. 1, s. 10; c. 46, ss. 8, 9; 1868-9, c. 113, ss. 70-72, 115; Code, ss. 1498-1500; Rev., ss. 59, 60; 1919, c. 29; C.S., ss. 160, 161; 1933, c. 113; 1951, c. 246, s. 1; 1959, c. 879, s. 9; c. 1136; 1969, c. 215; 1973, c. 464, s. 2; c. 1329, s. 3; 1981, c. 468; 1985, c. 625; 1993, c. 299, s. 1; 1995, c. 514, s. 2; 1997-456, s. 7; 2006-264, s. 66(b).)

**Effect of Amendments.** — Session Laws 2006-264, s. 66(b), effective August 27, 2006, and applicable to payments made by the Plan after July 20, 2004, for which reimbursement is

sought on or after August 27, 2006, and also applicable to wrongful deaths occurring on or after August 27, 2006, inserted the next-to-last sentence of subsection (a).



## CASE NOTES

- I. General Consideration.
- II. Limitation of the Action.
- IV. Distribution of Recovery.

## I. GENERAL CONSIDERATION.

**Jury Issues Raised.** — Personal representative's wrongful death and survivorship claims could be brought in the same suit and separate issues should have been presented to the jury on whether a nursing home's negligence caused the decedent's pre-death injuries and wrongful death; the nursing home's claim that a personal representative was required to delineate which of the decedent's pressure sores caused his death and which sores caused him pain and suffering prior to his death was rejected as if the jury determined that the decedent died of Alzheimer's disease, rather than from an infection from the pressure sores, it could still reasonably determine that the nursing home's negligence caused the pressure sores and that any or all of those sores caused the decedent pain and suffering prior to his death. *Alston v. Britthaven, Inc.*, — N.C. App. —, 628 S.E.2d 824, 2006 N.C. App. LEXIS 943 (2006).

**Alternative Survivorship and Wrongful Death Claims.** — Wrongful death and survivorship claims may be brought as alternative claims for the same negligent acts. *Alston v. Britthaven, Inc.*, — N.C. App. —, 628 S.E.2d 824, 2006 N.C. App. LEXIS 943 (2006).

**Survivorship and Wrongful Death Actions Properly Alleged.** — Personal representative was entitled to proceed on both a survivorship claim and a wrongful death claim where he alleged that a nursing home's negligence resulted not only in the decedent's death, but also in injury, pain and suffering, and medical expenses prior to his death. *Alston v.*

*Britthaven, Inc.*, — N.C. App. —, 628 S.E.2d 824, 2006 N.C. App. LEXIS 943 (2006).

**Cited in** *In re J.A.A.*, — N.C. App. —, 623 S.E.2d 45, 2005 N.C. App. LEXIS 2706 (2005); *Beck v. Beck*, — N.C. App. —, 624 S.E.2d 411, 2006 N.C. App. LEXIS 178 (2006).

## II. LIMITATION OF THE ACTION.

**Wrongful death suit was stayed pending binding arbitration** because plaintiff, as administrator of a decedent's estate, failed to establish any contract defenses that would have otherwise invalidated the arbitration agreement entered into by the decedent regarding her medical treatment for benign liver tumors; because decedent's ability to recover was limited in form to arbitration by her execution of the agreement with defendants, her estate was equally bound by the arbitration agreement. *Wilkerson v. Nelson*, 395 F. Supp. 2d 281, 2005 U.S. Dist. LEXIS 11212 (M.D.N.C. 2005).

## IV. DISTRIBUTION OF RECOVERY.

**Intestate Succession Act as Modified by Chapter 31A Intended.** —

North Carolina's wrongful death statute mandates that wrongful death proceeds be distributed as provided in the Intestate Succession Act, G.S. 29-1 et seq., and they are therefore subject to G.S. 31A-2, under which an abandoning parent is precluded from sharing in such proceeds arising from the death of his or her child. *In re Estate of Lunsford*, 359 N.C. 382, 610 S.E.2d 366, 2005 N.C. LEXIS 358 (2005).

**Chapter 29.**  
**Intestate Succession.**

ARTICLE 2.

*Shares of Persons Who Take upon Intestacy.*

**§ 29-15. Shares of others than surviving spouse.**

CASE NOTES

**Cited** in In re Estate of Lunsford, 359 N.C. 45, 2005 N.C. App. LEXIS 2706 (2005); In re 382, 610 S.E.2d 366, 2005 N.C. LEXIS 358 C.C., 173 N.C. App. 375, 618 S.E.2d 813, 2005 (2005); In re J.A.A., — N.C. App. —, 623 S.E.2d N.C. App. LEXIS 2017 (2005).

ARTICLE 8.

*Election to Take Life Interest in Lieu of Intestate Share.*

**§ 29-30. Election of surviving spouse to take life interest in lieu of intestate share provided.**

CASE NOTES

I. General Consideration.

**I. GENERAL CONSIDERATION.**

**Purpose.** —

Trial court erred in admitting the testimony of the brother's wife about conversations she had with decedent, and about conversations she overheard between decedent and the brother; since the wife was an interested party

because she stood to inherit the property the brother was seeking if his specific performance action to enforce decedent's contract to make a will in the brother's favor was resolved in the brother's favor, she was barred from testifying about what a dead man had said in that regard. Taylor v. Abernethy, 174 N.C. App. 93, 620 S.E.2d 242, 2005 N.C. App. LEXIS 2281 (2005).

## Chapter 31.

### Wills.

#### ARTICLE 1.

#### *Execution of Will.*

### § 31-3.1. Will invalid unless statutory requirements complied with.

#### CASE NOTES

#### **Question of Fact on Testamentary Formalities Precluded Summary Judgment.**

— Material issue of fact existed regarding whether a testator complied with the will formalities required by G.S. 31-3.3 where the evidence tended to show that the testator did not sign the will in the presence of one of the

witnesses; that evidence raised material questions of fact on whether the will complied with the testamentary formalities of G.S. 31-1 and G.S. 31-3.3, so summary judgment in favor of the propounder of the will was improper. In re Will of Priddy, 171 N.C. App. 395, 614 S.E.2d 454, 2005 N.C. App. LEXIS 1213 (2005).

### § 31-3.3. Attested written will.

#### CASE NOTES

#### III. Attestation by Witnesses.

#### **III. ATTESTATION BY WITNESSES.**

#### **Attestation in Presence of Testator Is Essential. —**

Material issue of fact existed regarding whether a testator complied with the will formalities required by G.S. 31-3.3 where the evidence tended to show that the testator did

not sign the will in the presence of one of the witnesses; that evidence raised material questions of fact on whether the will complied with the testamentary formalities of G.S. 31-1 and G.S. 31-3.3, so summary judgment in favor of the propounder of the will was improper. In re Will of Priddy, 171 N.C. App. 395, 614 S.E.2d 454, 2005 N.C. App. LEXIS 1213 (2005).

#### ARTICLE 2.

#### *Revocation of Will.*

### § 31-5.1. Revocation of written will.

#### CASE NOTES

#### II. Subsequent Will or Codicil.

#### **II. SUBSEQUENT WILL OR CODICIL.**

**Presumption Overcome by Evidence. —** Caveators presented sufficient evidence to overcome the presumption that a testator destroyed his 2002 will with the intent to revoke it, and a

directed verdict against the caveators was error; inter alia, the testator's attorney testified that testator never mentioned a desire to change the 2002 will, and there was also evidence that someone moved the testator's 1995 will after his death. In re Will of McFayden, —



N.C. App. —, 632 S.E.2d 520, 2006 N.C. App. LEXIS 1635 (2006).

§ 31-5.4. Revocation by divorce or annulment; revival.

CASE NOTES

**Former Spouse Denied A Testate Disposition.** — Where decedent failed to provide in his will that, even if he divorced the former spouse, she would remain a beneficiary, under G.S. 31-5.4 the former spouse was denied any

testate disposition, despite the former spouse's designation as a beneficiary in the decedent's pre-divorce will. *Gibboney v. Wachovia Bank, N.A.*, — N.C. App. —, 622 S.E.2d 162, 2005 N.C. App. LEXIS 2587 (2005).

ARTICLE 5.

*Probate of Will.*

§ 31-19. Probate conclusive until vacated; substitution of consolidated bank as executor or trustee under will.

CASE NOTES

**Inadequacy of Relief Through Caveat Proceeding Entitled Decedent's Step-grandchildren to Proceed on Tort Claim.** — Superior court erroneously dismissed a claim filed by two of decedent's step-grandchildren that defendants, two of the decedent's other step-grandchildren, maliciously caused their step-grandmother to execute a will that left them only nominal bequests, as: (1) the

movant step-grandchildren would not be able to obtain adequate relief through a caveat proceeding; and (2) it did not appear that the step-grandchildren could not prove a set of facts supporting their claim which would entitle them to relief. *Murrow v. Henson*, 172 N.C. App. 792, 616 S.E.2d 664, 2005 N.C. App. LEXIS 1809 (2005).

ARTICLE 6.

*Caveat to Will.*

§ 31-32. When and by whom caveat filed.

CASE NOTES

II. Interested Persons.

II. INTERESTED PERSONS.

**Inadequacy of Relief Through Caveat Proceeding Entitled Decedent's Step-grandchildren to Proceed on Tort Claim.** — Superior court erroneously dismissed a claim filed by two of decedent's step-grandchildren that defendants, two of the decedent's other step-grandchildren, maliciously caused their step-grandmother to execute a will that

left them only nominal bequests, as: (1) the movant step-grandchildren would not be able to obtain adequate relief through a caveat proceeding; and (2) it did not appear that the step-grandchildren could not prove a set of facts supporting their claim which would entitle them to relief. *Murrow v. Henson*, 172 N.C. App. 792, 616 S.E.2d 664, 2005 N.C. App. LEXIS 1809 (2005).

ARTICLE 7.

*Construction of Will.*

§ 31-42. Failure of devises by lapse or otherwise; renunciation.

CASE NOTES

I. General Consideration.

I. GENERAL CONSIDERATION.

**Estate Passed into Intestacy Where Devise to Predeceased Spouse Lapsed and Will Had No Residuary.** — Since the decedent's husband predeceased the decedent, the will's devise to the husband lapsed, and since he was neither a grandparent of nor a descen-

dant of a grandparent of the decedent, and had no issue, G.S. 31-42(b) controlled; where a condition precedent to a beneficiary taking under the decedent's will did not occur and the will had no residuary clause, the estate passed by intestacy. *Grant v. Cass*, 173 N.C. App. 745, 620 S.E.2d 299, 2005 N.C. App. LEXIS 2255 (2005).

## Chapter 31A.

### Acts Barring Property Rights.

#### Article 3.

#### Willful and Unlawful Killing of Decedent.

Sec.

31A-3. Definitions.

Sec.

31A-12.1. Remedies to be exclusive.

#### ARTICLE 2.

#### *Parents.*

### § 31A-2. Acts barring rights of parents.

#### CASE NOTES

#### **Applicability to Estate of Adult Child. —**

Legislative intent behind G.S. 31A-2, precluding an abandoning parent from inheriting from an abandoned child, is both to discourage parents from shirking their responsibility of support to their children and to prevent an abandoning parent from reaping an undeserved bonanza, and the general assembly demonstrated its unwillingness to allow an abandoning parent to take from an abandoned adult child as the result of a mechanical application of the rules of intestate succession. In *re Estate of Lunsford*, 359 N.C. 382, 610 S.E.2d 366, 2005 N.C. LEXIS 358 (2005).

#### **Abandoning Parent Does Not Share Death Benefits under § 97-38. —**

Operative language in G.S. 31A-2, precluding an abandoning parent from inheriting from an abandoned child, is nearly identical to that in G.S. 97-40, precluding the receipt of workers' compensation benefits by an abandoning parent due to the death of an abandoned child, as both statutes provide that a parent who has abandoned the "care and maintenance" of a child loses the right to receive a specified benefit upon the child's death, and both provide an exception when the parent has resumed the "care and maintenance" of the child at least one year prior to the child's death or majority. In *re Estate of Lunsford*, 359 N.C. 382, 610 S.E.2d 366, 2005 N.C. LEXIS 358 (2005).

#### **Construction of Exception. —**

Exception in G.S. 31A-2(2) to precluding an abandoning parent from inheriting from an abandoned child essentially states that a parent should not be denied the right to participate in intestate succession if he limits his role in his child's life to the parameters set out by a court, at least when the abandoning parent complies with the express terms of a court order requir-

ing contribution to the support of the child, so an exception to the general rule of disinheritance is justified under such circumstances, because the legislative intent underlying G.S. 31A-2 is not effectuated by the disinheritance of a non-custodial parent who provides the court-ordered level of material support; put simply, a parent who limits his role in his child's life to the parameters set out by a court has not shirked his responsibility to that child, so, construing G.S. 31A-2(2) to apply it only to a parent who was ordered to provide support effectuates the legislative intent behind that exception. In *re Estate of Lunsford*, 359 N.C. 382, 610 S.E.2d 366, 2005 N.C. LEXIS 358 (2005).

If a parent voluntarily provides adequate "care and maintenance" to a child, for purposes of G.S. 31A-2, that parent cannot be said to have abandoned the child in the first instance, and, as an exception to the general rule of disinheritance, G.S. 31A-2(2) comes into play only when a parent has failed to provide care and support of his or her own volition, so the exception provides that a parent should not be penalized for his or her failure to exceed the terms of a judicial child support order, and the statute should not be applied to the disadvantage of a parent who voluntarily provides adequate care and support. In *re Estate of Lunsford*, 359 N.C. 382, 610 S.E.2d 366, 2005 N.C. LEXIS 358 (2005).

When a father was not ordered to pay support for his child, when custody of the child was awarded to the child's mother, and the father did not voluntarily provide an adequate level of support for the child during the 17 years following the mother's and father's divorce, when the child died, the father was precluded from sharing in the proceeds of the child's estate because



he wilfully abandoned her, and the exception to such preclusion in G.S. 31A-2(2), which applied to non-custodial parents who complied with court orders to support a child, did not apply to him because he was not ordered to pay support for the child, and he did not voluntarily provide an adequate amount of such support. In re Estate of Lunsford, 359 N.C. 382, 610 S.E.2d 366, 2005 N.C. LEXIS 358 (2005).

**Exception in Subsection 2 Applied. —**

G.S. 31A-2(2) provides that an abandoning parent may inherit from an abandoned child if the parent has substantially complied with all orders of the court requiring contribution to the support of the child, so, by its express language, this statutory exception to the preclusion of an abandoning parent's inheritance from an abandoned child may not be invoked where a court

order has not "required" the payment of child support. In re Estate of Lunsford, 359 N.C. 382, 610 S.E.2d 366, 2005 N.C. LEXIS 358 (2005).

**Abandonment Found. —**

Trial court's findings of fact supported its conclusion that a father wilfully abandoned the care and maintenance of his child, under G.S. 31A-2, because, even assuming the child and her mother refused to accept the father's occasional offers of financial assistance, the trial court could reasonably find that the father's sporadic contacts with his daughter over 17 years did not show the degree of "presence," "love," "care," and "opportunity to display filial affection" that defined non-abandoning parents. In re Estate of Lunsford, 359 N.C. 382, 610 S.E.2d 366, 2005 N.C. LEXIS 358 (2005).

## ARTICLE 3.

### *Willful and Unlawful Killing of Decedent.*

#### § 31A-3. Definitions.

As used in this Article, unless the context otherwise requires, the term —

- (1) "Decedent" means the person whose life is taken by the slayer as defined in subdivision (3) of this section.
- (2) "Property" means any real or personal property and any right or interest therein.
- (3) "Slayer" means any of the following:
  - a. A person who, by a court of competent jurisdiction, is convicted as a principal or accessory before the fact of the willful and unlawful killing of another person.
  - b. A person who has entered a plea of guilty in open court as a principal or accessory before the fact of the willful and unlawful killing of another person.
  - c. A person who, upon indictment or information as a principal or accessory before the fact of the willful and unlawful killing of another person, has tendered a plea of nolo contendere which was accepted by the court and judgment entered thereon.
  - d. A person who is found by a preponderance of the evidence in a civil action brought within two years after the death of the decedent to have willfully and unlawfully killed the decedent or procured the killing of the decedent. If a criminal proceeding is brought against the person to establish the person's guilt as a principal or accessory before the fact of the willful and unlawful killing of the decedent within two years after the death of the decedent, the civil action may be brought within 90 days after a final determination is made by a court of competent jurisdiction in that criminal proceeding or within the original two years after the death of the decedent, whichever is later. The burden of proof in the civil action is on the party seeking to establish that the killing was willful and unlawful for the purposes of this Article.
  - e. A juvenile who is adjudicated delinquent by reason of committing an act that, if committed by an adult, would make the adult a principal or accessory before the fact of the willful and unlawful killing of another person.

The term “slayer” does not include a person who is found not guilty by reason of insanity of being a principal or accessory before the fact of the willful and unlawful killing of another person. (1961, c. 210, s. 1; 2006-107, s. 1.)

**Effect of Amendments.** — Session Laws 2006-107, s.1, effective July 13, 2006, and applicable to property passing from decedents dying on or after that date, in subdivision (1), added “of this section” at the end; in subdivision

(3), added “any of the following” at the end of the introductory language; rewrote subdivision (1)d; added subdivision (1)e; and made minor stylistic and punctuation changes throughout the section.

CASE NOTES

**Applied** in *Atwater v. Nortel Networks, Inc.*, 388 F. Supp. 2d 610, 2005 U.S. Dist. LEXIS 29823 (M.D.N.C. Sept. 6, 2005).

§ 31A-12.1. Remedies to be exclusive.

This Article wholly supplants the common law rule preventing a person whose culpable negligence causes the death of a decedent from succeeding to any property passing by reason of the death of the decedent. (2006-107, s. 2.)

**Editor’s Note.** — Session Laws 2006-107, s. 3, made this section effective July 13, 2006, and

applicable to property passing from decedents dying on or after that date.

## Chapter 32.

### Fiduciaries.

#### Article 6.

##### Compensation of Trustees and Other Fiduciaries.

Sec.

32-55. Notice.

32-57. Judicial review; payment of compensation and other payments with court order.

#### Article 7.

##### Investment and Deposit of Trust Funds.

Sec.

32-71. Investment; prudent person rule.

#### ARTICLE 6.

##### *Compensation of Trustees and Other Fiduciaries.*

### § 32-55. Notice.

(a) The trustee shall give written notice to all beneficiaries of each proposed payment of compensation if the annual amount of compensation exceeds four-tenths of one percent ( $\frac{4}{10}$  of 1%) of the principal value of the assets of the trust on the last day of the trust accounting year. The notice shall contain a statement that the beneficiaries have 20 days from when notice is given to file a proceeding for review of the reasonableness of the compensation with the clerk of superior court in accordance with Article 2 of Chapter 36C of the General Statutes.

(b) In lieu of giving written notice of each proposed payment of compensation under subsection (a) of this section, the trustee may give written notice to all beneficiaries of the amount of compensation to be paid to the trustee on a periodic basis or of the method of computation of the compensation. The trustee shall not be required to give additional notice to the beneficiaries unless the amount to be paid to the trustee on a periodic basis or the method of computation of the compensation changes.

(c) If a beneficiary is under a legal disability, notice shall be deemed to be given to the beneficiary only if notice is given to the representative of the beneficiary. If the trustee is the representative of the beneficiary, no notice shall be deemed to have been given to the beneficiary.

(d) The written notice required under this section shall be deemed to be given as follows: (i) when personally delivered by hand to the person, (ii) when transmitted by facsimile or e-mail with confirmation of transmission, (iii) when placed in the hands of a nationally recognized courier service for delivery, (iv) when received by the person if sent by registered or certified United States mail, return receipt requested, (v) three days after depositing the same in a regularly maintained receptacle for the deposit of United States mail if sent by regular United States mail. Notices delivered by any other means shall be deemed to be delivered, given, and received for all purposes as of the date of the actual receipt. (2004-139, s. 2; 2006-259, s. 13(m).)

**Editor's Note.** — Session Laws 2006-259, s. 13(s), provides: "This section becomes effective October 1, 2006, and applies to (i) all trusts created before, on, or after that date; (ii) all judicial proceedings concerning trusts commenced on or after that date; and (iii) all

judicial proceedings concerning trusts commenced before that date unless the court finds that application of a particular provision of this act would substantially interfere with the effective conduct of the judicial proceedings or prejudice the rights of the parties, in which case the



law as it existed on September 30, 2006, shall apply.”

**Effect of Amendments.** — Session Laws 2006-259, s. 13(m), effective October 1, 2006,

substituted “Article 2 of Chapter 36C” for “Article 3 of Chapter 36A” in subsection (a). See Editor’s note for applicability.

## § 32-57. Judicial review; payment of compensation and other payments with court order.

(a) The trustee or any beneficiary may initiate a proceeding under Article 2 of Chapter 36C of the General Statutes for review of the reasonableness of any compensation or expense reimbursement and for the approval or denial of the payment of compensation or expense reimbursement. A beneficiary may initiate a proceeding even though the 20-day period referred to in G.S. 32-56(2) has expired.

(b) In connection with reviewing the reasonableness of any compensation or expense reimbursement, the clerk of superior court may order the trustee to make appropriate refunds if the clerk determines upon review that a trustee has received excessive compensation or expense reimbursement. (2004-139, s. 2; 2006-259, s. 13(n).)

**Editor’s Note.** — Session Laws 2006-259, s. 13(s), provides: “This section becomes effective October 1, 2006, and applies to (i) all trusts created before, on, or after that date; (ii) all judicial proceedings concerning trusts commenced on or after that date; and (iii) all judicial proceedings concerning trusts commenced before that date unless the court finds that application of a particular provision of this act would substantially interfere with the effective

conduct of the judicial proceedings or prejudice the rights of the parties, in which case the law as it existed on September 30, 2006, shall apply.”

**Effect of Amendments.** — Session Laws 2006-259, s. 13(n), effective October 1, 2006, substituted “Article 2 of Chapter 36C” for “Article 3 of Chapter 36A” in subsection (a). See Editor’s note for applicability.

## ARTICLE 7.

### *Investment and Deposit of Trust Funds.*

## § 32-71. Investment; prudent person rule.

(a) In acquiring, investing, reinvesting, exchanging, retaining, selling, and managing property for the benefit of another, a fiduciary shall observe the standard of judgment and care under the circumstances then prevailing, which an ordinarily prudent person of discretion and intelligence, who is a fiduciary of the property of others, would observe as such fiduciary; and if the fiduciary has special skills or is named a fiduciary on the basis of representations of special skills or expertise, he is under a duty to use those skills. This subsection and subsection (b) of this section do not apply to trusts governed by Article 9 of Chapter 36C of the General Statutes.

(b) Within the limitations of the foregoing standard, a fiduciary is authorized to acquire and retain every kind of property and every kind of investment, including specifically, but without in any way limiting the generality of the foregoing, bonds, debentures, and other corporate or governmental obligations; stocks, preferred or common; real estate mortgages; shares in building and loan associations or savings and loan associations; annual premium or single premium life, endowment, or annuity contracts; and securities of any management type investment company or investment trust registered under the Federal Investment Company Act of 1940, as from time to time amended.

(c) Notwithstanding the provisions of subsections (a) and (b) of this section and Article 9 of Chapter 36C of the General Statutes, the duties of a trustee

with respect to acquiring or retaining a contract of insurance upon the life of the settlor, or the lives of the settlor and the settlor's spouse, do not include a duty (i) to determine whether any such contract is or remains a proper investment; (ii) to exercise policy options available under any such contract; or (iii) to diversify any such contract. A trustee is not liable to the beneficiaries of the trust or to any other party for any loss arising from the absence of those duties upon the trustee.

(d) The trustee of a trust described under subsection (c) of this section established prior to October 1, 1995, shall notify the settlor in writing that, unless the settlor provides written notice to the contrary to the trustee within 60 days of the trustee's notice, the provisions of subsection (c) of this section shall apply to the trust. Subsection (c) of this section shall not apply if, within 60 days of the trustee's notice, the settlor notifies the trustee that subsection (c) of this section shall not apply. (1870-1, c. 197; Code, s. 1594; 1885, c. 389; 1889, c. 470; Rev., ss. 1792, 1793; 1917, c. 6, s. 9; c. 67, s. 1; c. 152, s. 7; c. 191, s. 1; c. 269, s. 5; C.S., ss. 4018, 4018(a), 4019; Ex. Sess. 1921, c. 63; 1931, c. 257; 1933, c. 549, s. 1; 1935, c. 449; 1937, c. 14; 1943, c. 96; c. 473, ss. 1-3; 1945, c. 713; 1953, c. 620; 1959, c. 364, s. 2; c. 1015, s. 2; 1969, c. 861; 1971, c. 528, s. 34; c. 864, s. 17; 1973, c. 239, s. 1; 1975, cc. 40, 319; 1977, c. 502, s. 2; 1995, c. 153, s. 1; 1999-215, s. 2; 2005-192, s. 1; 2006-259, s. 13(o).)

**Editor's Note. —**

Session Laws 2006-259, s. 13(s), provides: "This section becomes effective October 1, 2006, and applies to (i) all trusts created before, on, or after that date; (ii) all judicial proceedings concerning trusts commenced on or after that date; and (iii) all judicial proceedings concerning trusts commenced before that date unless the court finds that application of a particular provision of this act would substantially inter-

fere with the effective conduct of the judicial proceedings or prejudice the rights of the parties, in which case the law as it existed on September 30, 2006, shall apply."

**Effect of Amendments. —** Session Laws 2006-259, s. 13(o), effective October 1, 2006, substituted "Article 9 of Chapter 36C of the General Statutes" for "Article 15 of this Chapter" in subsections (a) and (c). See Editor's note for applicability.

**Chapter 32A.**  
**Powers of Attorney.**

**Article 3.**

**Health Care Powers of Attorney.**

Sec.

32A-16. Definitions.

32A-20. Effectiveness and duration; revocation.

Sec.

32A-25. Statutory form health care power of attorney.

**Article 5.**

**Enforcement of Power of Attorney.**

32A-42. Protection for third parties.

**ARTICLE 3.**

*Health Care Powers of Attorney.*

**§ 32A-16. Definitions.**

As used in this Article, unless the context clearly requires otherwise, the following terms have the meanings specified:

- (1) "Disposition of remains" means the decision to bury or cremate human remains as defined in G.S. 90-210.121(17).
- (1a) "Health care" means any care, treatment, service, or procedure to maintain, diagnose, treat, or provide for the principal's physical or mental health or personal care and comfort including, life-sustaining procedures. "Health care" includes mental health treatment as defined in subdivision (8) of this section.
- (2) "Health care agent" means the person appointed as a health care attorney-in-fact.
- (3) "Health care power of attorney" means a written instrument, signed in the presence of two qualified witnesses, and acknowledged before a notary public, pursuant to which an attorney-in-fact or agent is appointed to act for the principal in matters relating to the health care of the principal, and which substantially meets the requirements of this Article.
- (4) "Life-sustaining procedures" are those forms of care or treatment which only serve to artificially prolong the dying process and may include mechanical ventilation, dialysis, antibiotics, artificial nutrition and hydration, and other forms of treatment which sustain, restore or supplant vital bodily functions, but do not include care necessary to provide comfort or to alleviate pain.
- (5) "Principal" means the person making the health care power of attorney.
- (6) "Qualified witness" means a witness in whose presence the principal has executed the health care power of attorney, who believes the principal to be of sound mind, and who states that he (i) is not related within the third degree to the principal nor to the principal's spouse, (ii) does not know nor have a reasonable expectation that he would be entitled to any portion of the estate of the principal upon the principal's death under any existing will or codicil of the principal or under the Intestate Succession Act as it then provides, (iii) is not the attending physician or mental health treatment provider of the principal, nor an employee of the attending physician or mental health treatment provider, nor an employee of a health facility in which the principal is a patient, nor an employee of a nursing home or any group-care home in which the principal resides, and (iv) does not



have a claim against any portion of the estate of the principal at the time of the principal's execution of the health care power of attorney.

- (7) "Advance instruction for mental health treatment" or "advance instruction" means a written instrument as defined in G.S. 122C-72(1) pursuant to which the principal makes a declaration of instructions, information, and preferences regarding mental health treatment.
- (8) "Mental health treatment" means the process of providing for the physical, emotional, psychological, and social needs of the principal for the principal's mental illness. "Mental health treatment" includes, but is not limited to, electroconvulsive treatment, treatment of mental illness with psychotropic medication, and admission to and retention in a facility for care or treatment of mental illness. (1991, c. 639, s. 1; 1998-198, s. 1; 1998-217, s. 53; 2005-351, s. 1; 2006-226, s. 32.)

**Effect of Amendments.** — Session Laws 2005-351, s. 1, as amended by Session Laws 2006-226, s. 32, effective October 1, 2005, and applicable to powers of attorney created on,

before, or after that date, added present subdivision (1) and redesignated former subdivision (1) as subdivision (1a).

## § 32A-20. Effectiveness and duration; revocation.

(a) A health care power of attorney shall become effective when and if the physician or physicians or, in the case of mental health treatment, physician or eligible psychologist as defined in G.S. 122C-3(13d), designated by the principal determine in writing that the principal lacks sufficient understanding or capacity to make or communicate decisions relating to the health care of the principal, and shall continue in effect during the incapacity of the principal. The determination shall be made by the principal's attending physician or eligible psychologist if the physician or physicians or eligible psychologist designated by the principal is unavailable or is otherwise unable or unwilling to make this determination or if the principal failed to designate a physician or physicians or eligible psychologist to make this determination. A health care power of attorney may include a provision that, if the principal does not designate a physician for reasons based on his religious or moral beliefs as specified in the health care power of attorney, a person designated by the principal in the health care power of attorney may certify in writing, acknowledged before a notary public, that the principal lacks sufficient understanding or capacity to make or communicate decisions relating to his health care. The person so designated must be a competent person 18 years of age or older, not engaged in providing health care to the principal for remuneration, and must be a person other than the health care agent.

(b) Except for purposes of exercising authority granted by a health care power of attorney with respect to anatomical gifts, autopsy, or disposition of remains as provided in G.S. 32A-19(b), a health care power of attorney is revoked by the death of the principal. A health care power of attorney may be revoked by the principal at any time, so long as the principal is capable of making and communicating health care decisions. The principal may exercise this right of revocation by executing and acknowledging an instrument of revocation, by executing and acknowledging a subsequent health care power of attorney, or in any other manner by which the principal is able to communicate an intent to revoke. This revocation becomes effective only upon communication by the principal to each health care agent named in the revoked health care power of attorney and to the principal's attending physician or eligible psychologist.

(c) The authority of a health care agent who is the spouse of the principal shall be revoked upon the entry by a court of a decree of divorce or separation

between the principal and the health care agent; provided that if the health care power of attorney designates a successor health care agent, the successor shall serve as the health care agent, and the health care power of attorney shall not be revoked. (1991, c. 639, s. 1; 1993, c. 523, s. 2; 1998-198, s. 1; 1998-217, s. 53; 2005-351, s. 2; 2006-226, s. 32.)

**Effect of Amendments.** — Session Laws 2005-351, s. 2, as amended by Session Laws 2006-226, s. 32, effective October 1, 2005, and applicable to powers of attorney created on, before, or after that date, added the exception at the beginning of subsection (b).

§ 32A-25. Statutory form health care power of attorney.

The use of the following form in the creation of a health care power of attorney is lawful and, when used, it shall meet the requirements of and be construed in accordance with the provisions of this Article:

(Notice: This document gives the person you designate your health care agent broad powers to make health care decisions, including mental health treatment decisions, for you. Except to the extent that you express specific limitations or restrictions on the authority of your health care agent, this power includes the power to consent to your doctor not giving treatment or stopping treatment necessary to keep you alive, admit you to a facility, and administer certain treatments and medications. This power exists only as to those health care decisions for which you are unable to give informed consent.

This form does not impose a duty on your health care agent to exercise granted powers, but when a power is exercised, your health care agent will have to use due care to act in your best interests and in accordance with this document. For mental health treatment decisions, your health care agent will act according to how the health care agent believes you would act if you were making the decision. Because the powers granted by this document are broad and sweeping, you should discuss your wishes concerning life-sustaining procedures, mental health treatment, and other health care decisions with your health care agent.

Use of this form in the creation of a health care power of attorney is lawful and is authorized pursuant to North Carolina law. However, use of this form is an optional and nonexclusive method for creating a health care power of attorney and North Carolina law does not bar the use of any other or different form of power of attorney for health care that meets the statutory requirements.)

1. Designation of health care agent.

I, \_\_\_\_\_, being of sound mind, hereby appoint  
Name: \_\_\_\_\_  
Home Address: \_\_\_\_\_  
Home Telephone Number \_\_\_\_\_ Work Telephone Number \_\_\_\_\_  
as my health care attorney-in-fact (herein referred to as my “health care agent”) to act for me and in my name (in any way I could act in person) to make health care decisions for me as authorized in this document.

If the person named as my health care agent is not reasonably available or is unable or unwilling to act as my agent, then I appoint the following persons (each to act alone and successively, in the order named), to serve in that capacity: (Optional)

A. Name: \_\_\_\_\_  
Home Address: \_\_\_\_\_  
Home Telephone Number \_\_\_\_\_ Work Telephone Number \_\_\_\_\_

B. Name: \_\_\_\_\_  
Home Address: \_\_\_\_\_



Home Telephone Number \_\_\_\_\_ Work Telephone Number \_\_\_\_\_

Each successor health care agent designated shall be vested with the same power and duties as if originally named as my health care agent.

2. Effectiveness of appointment.

(Notice: This health care power of attorney may be revoked by you at any time in any manner by which you are able to communicate your intent to revoke to your health care agent and your attending physician.)

Absent revocation, the authority granted in this document shall become effective when and if the physician or physicians designated below determine that I lack sufficient understanding or capacity to make or communicate decisions relating to my health care and will continue in effect during my incapacity, until my death, except if I authorize my health care agent to exercise my rights with respect to anatomical gifts, autopsy, or disposition of my remains, this authority will continue after my death to the extent necessary to exercise the authority granted in this document for these purposes.

This determination shall be made by the following physician or physicians. For decisions related to mental health treatment, this determination shall be made by the following physician or eligible psychologist. (You may include here a designation of your choice, including your attending physician or eligible psychologist, or any other physician or eligible psychologist. You may also name two or more physicians or eligible psychologists, if desired, both of whom must make this determination before the authority granted to the health care agent becomes effective.):

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3. General statement of authority granted.

Except as indicated in section 4 below, I hereby grant to my health care agent named above full power and authority to make health care decisions, including mental health treatment decisions, on my behalf, including, but not limited to, the following:

- A. To request, review, and receive any information, verbal or written, regarding my physical or mental health, including, but not limited to, medical and hospital records, and to consent to the disclosure of this information.
- B. To employ or discharge my health care providers.
- C. To consent to and authorize my admission to and discharge from a hospital, nursing or convalescent home, or other institution.
- D. To consent to and authorize my admission to and retention in a facility for the care or treatment of mental illness.
- E. To consent to and authorize the administration of medications for mental health treatment and electroconvulsive treatment (ECT) commonly referred to as "shock treatment".
- F. To give consent for, to withdraw consent for, or to withhold consent for, X ray, anesthesia, medication, surgery, and all other diagnostic and treatment procedures ordered by or under the authorization of a licensed physician, dentist, or podiatrist. This authorization specifically includes the power to consent to measures for relief of pain.
- G. To authorize the withholding or withdrawal of life-sustaining procedures when and if my physician determines that I am terminally ill, permanently in a coma, suffer severe dementia, or am in a persistent vegetative state. Life-sustaining procedures are those forms of medical care that only serve to artificially prolong the dying process and



may include mechanical ventilation, dialysis, antibiotics, artificial nutrition and hydration, and other forms of medical treatment which sustain, restore or supplant vital bodily functions. Life-sustaining procedures do not include care necessary to provide comfort or alleviate pain.

I DESIRE THAT MY LIFE NOT BE PROLONGED BY LIFE-SUSTAINING PROCEDURES IF I AM TERMINALLY ILL, PERMANENTLY IN A COMA, SUFFER SEVERE DEMENTIA, OR AM IN A PERSISTENT VEGETATIVE STATE.

- H. To exercise any right I may have to make a disposition of any part or all of my body for medical purposes; to authorize an autopsy; to make an anatomical gift of my organs or body, or part thereof, and to direct the disposition of my remains.
- I. To take any lawful actions that may be necessary to carry out these decisions, including the granting of releases of liability to medical providers.

4. Special provisions and limitations.

(Notice: The above grant of power is intended to be as broad as possible so that your health care agent will have authority to make any decisions you could make to obtain or terminate any type of health care. If you wish to limit the scope of your health care agent's powers, you may do so in this section.)

- A. In exercising the authority to make health care decisions on my behalf, the authority of my health care agent is subject to the following special provisions and limitations (Here you may include any specific limitations you deem appropriate such as: your own definition of when life-sustaining treatment should be withheld or discontinued, or instructions to refuse any specific types of treatment that are inconsistent with your religious beliefs, or unacceptable to you for any other reason.):

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- B. In exercising the authority to make mental health decisions on my behalf, the authority of my health care agent is subject to the following special provisions and limitations. (Here you may include any specific limitations you deem appropriate such as: limiting the grant of authority to make only mental health treatment decisions, your own instructions regarding the administration or withholding of psychotropic medications and electroconvulsive treatment (ECT), instructions regarding your admission to and retention in a health care facility for mental health treatment, or instructions to refuse any specific types of treatment that are unacceptable to you):

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- C. (Notice: This health care power of attorney may incorporate or be combined with an advance instruction for mental health treatment, executed in accordance with Part 2 of Article 3 of Chapter 122C of the General Statutes, which you may use to state your instructions regarding mental health treatment in the event you lack sufficient understanding or capacity to make or communicate mental health treatment decisions. Because your health care agent's decisions about decisions must be consistent with any statements you have expressed in an advance instruction, you should indicate here whether you have executed an advance instruction for mental health treatment.):

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- D. In exercising the authority to make decisions regarding autopsy, anatomical gifts and disposition of remains on my behalf, the authority of my health care agent is subject to the following special provisions and limitations. (Here you may include any specific limitations you deem appropriate such as: limiting the grant of authority and the scope of authority, instructions regarding gifts of the body or body part, or instructions regarding burial or cremation):
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5. Guardianship provision.

If it becomes necessary for a court to appoint a guardian of my person, I nominate my health care agent acting under this document to be the guardian of my person, to serve without bond or security. The guardian shall act consistently with G.S. 35A-1201(a)(5).

6. Reliance of third parties on health care agent.

- A. No person who relies in good faith upon the authority of or any representations by my health care agent shall be liable to me, my estate, my heirs, successors, assigns, or personal representatives, for actions or omissions by my health care agent.
- B. The powers conferred on my health care agent by this document may be exercised by my health care agent alone, and my health care agent's signature or act under the authority granted in this document may be accepted by persons as fully authorized by me and with the same force and effect as if I were personally present, competent, and acting on my own behalf. All acts performed in good faith by my health care agent pursuant to this power of attorney are done with my consent and shall have the same validity and effect as if I were present and exercised the powers myself, and shall inure to the benefit of and bind me, my estate, my heirs, successors, assigns, and personal representatives. The authority of my health care agent pursuant to this power of attorney shall be superior to and binding upon my family, relatives, friends, and others.

7. Miscellaneous provisions.

- A. I revoke any prior health care power of attorney.
- B. My health care agent shall be entitled to sign, execute, deliver, and acknowledge any contract or other document that may be necessary, desirable, convenient, or proper in order to exercise and carry out any of the powers described in this document and to incur reasonable costs on my behalf incident to the exercise of these powers; provided, however, that except as shall be necessary in order to exercise the powers described in this document relating to my health care, my health care agent shall not have any authority over my property or financial affairs.
- C. My health care agent and my health care agent's estate, heirs, successors, and assigns are hereby released and forever discharged by me, my estate, my heirs, successors, and assigns and personal representatives from all liability and from all claims or demands of all kinds arising out of the acts or omissions of my health care agent pursuant to this document, except for willful misconduct or gross negligence.
- D. No act or omission of my health care agent, or of any other person, institution, or facility acting in good faith in reliance on the authority



of my health care agent pursuant to this health care power of attorney shall be considered suicide, nor the cause of my death for any civil or criminal purposes, nor shall it be considered unprofessional conduct or as lack of professional competence. Any person, institution, or facility against whom criminal or civil liability is asserted because of conduct authorized by this health care power of attorney may interpose this document as a defense.

8. Signature of principal.

By signing here, I indicate that I am mentally alert and competent, fully informed as to the contents of this document, and understand the full import of this grant of powers to my health care agent.

\_\_\_\_\_  
Signature of Principal

(SEAL)

\_\_\_\_\_  
Date

9. Signatures of Witnesses.

I hereby state that the Principal, \_\_\_\_\_, being of sound mind, signed the foregoing health care power of attorney in my presence, and that I am not related to the principal by blood or marriage, and I would not be entitled to any portion of the estate of the principal under any existing will or codicil of the principal or as an heir under the Intestate Succession Act, if the principal died on this date without a will. I also state that I am not the principal's attending physician, nor an employee of the principal's attending physician, nor an employee of the health facility in which the principal is a patient, nor an employee of a nursing home or any group care home where the principal resides. I further state that I do not have any claim against the principal.

Witness: \_\_\_\_\_ Date: \_\_\_\_\_

Witness: \_\_\_\_\_ Date: \_\_\_\_\_

STATE OF NORTH CAROLINA  
COUNTY OF \_\_\_\_\_

CERTIFICATE

I, \_\_\_\_\_, a Notary Public for \_\_\_\_\_ County, North Carolina, hereby certify that \_\_\_\_\_ appeared before me and swore to me and to the witnesses in my presence that this instrument is a health care power of attorney, and that he/she willingly and voluntarily made and executed it as his/her free act and deed for the purposes expressed in it.

I further certify that \_\_\_\_\_ and \_\_\_\_\_, witnesses, appeared before me and swore that they witnessed \_\_\_\_\_ sign the attached health care power of attorney, believing him/her to be of sound mind; and also swore that at the time they witnessed the signing (i) they were not related within the third degree to him/her or his/her spouse, and (ii) they did not know nor have a reasonable expectation that they would be entitled to any portion of his/her estate upon his/her death under any will or codicil thereto then existing or under the Intestate Succession Act as it provided at that time, and (iii) they were not a physician attending him/her, nor an employee of an attending physician, nor an employee of a health facility in which he/she was a patient, nor an employee of a nursing home or any group-care home in which he/she resided, and (iv) they did not have a claim against him/her. I further certify that I am satisfied as to the genuineness and due execution of the instrument.

This the \_\_\_\_\_ day of \_\_\_\_\_, \_\_\_\_\_

\_\_\_\_\_  
Notary Public



## My Commission Expires:

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(A copy of this form should be given to your health care agent and any alternate named in this power of attorney, and to your physician and family members.)

(1991, c. 639, s. 1; 1993, c. 523, s. 3; 1998-198, s. 1; 1998-217, s. 53; 2005-351, s. 3; 2006-226, s. 32.)

**Effect of Amendments.** — Session Laws 2005-351, s. 3, as amended by Session Laws 2006-226, s. 32, effective October 1, 2005, and applicable to powers of attorney created on, before, or after that date, in paragraph 2. of the form, divided the former paragraph into two paragraphs, and added the exception at the end

of the first paragraph; in paragraph 3. of the form, in sub-paragraph H, deleted “to donate my organs” following “purposes,” inserted “to make an anatomical gift of my organs or body, or part thereof,” and made minor punctuation changes; and in paragraph 4. of the form, added sub-paragraph D.

## ARTICLE 5.

### *Enforcement of Power of Attorney.*

### § 32A-42. Protection for third parties.

(a) A person is not required to honor the attorney-in-fact’s authority or to conduct business with the attorney-in-fact if the person is not otherwise required to conduct business with the principal in the same circumstances.

(b) Without limiting the generality of subsection (a) of this section, nothing in this Article requires a person to do any of the following:

- (1) Engage in any transaction with an attorney-in-fact if the attorney-in-fact has previously breached any agreement with the person, whether in an individual or fiduciary capacity.
- (2) Open an account for a principal at the request of an attorney-in-fact if the principal is not currently a customer of the person.
- (3) Make a loan to the principal at the request of the attorney-in-fact.

(c) A person who is presented with a power of attorney shall not be deemed to have unreasonably refused to accept the power of attorney solely on the basis of failure to accept the power of attorney within seven business days.

(d) A person who has reasonable cause to question the authenticity or validity of a power of attorney may refuse to accept the authority granted by that document.

(e) A person who promptly requests, and does not within a reasonable time receive, an affidavit as described in G.S. 32A-40(b), is not deemed under G.S. 32A-41 to have unreasonably refused to accept a power of attorney.

(f) The principal, the attorney-in-fact, or a person presented with a power of attorney may initiate a special proceeding in accordance with the procedures of Article 33 of Chapter 1 of the General Statutes to request a determination of the validity of the power of attorney. If the decision in that special proceeding is that reasonable cause to refuse to accept the power of attorney existed, and that the attorney-in-fact willfully misrepresented the authenticity or validity of the power of attorney, the attorney-in-fact, and not the principal, is liable for reasonable attorneys’ fees and costs incurred in that action.

(g) Nothing in this Article requires a person who accepts a power of attorney to permit an attorney-in-fact to conduct business not authorized by the terms of the power of attorney, or otherwise not permitted by applicable statute or regulation.

(h) Nothing in this Article amends or modifies the rights of banks and other depository institutions to terminate any deposit account in accordance with applicable law. (2005-178, s. 1; 2006-264, s. 39(a).)

**Effect of Amendments.** — Session Laws 2006-264, s. 39(a), effective October 1, 2005, and applicable to powers of attorney created

before, on, or after date, added “or otherwise not permitted by applicable statute or regulation” at the end of subsection (g).

## Chapter 35A.

### Incompetency and Guardianship.

#### SUBCHAPTER I. PROCEEDINGS TO DETERMINE INCOMPETENCE.

##### ARTICLE 1.

##### *Determination of Incompetence.*

### § 35A-1101. Definitions.

#### CASE NOTES

##### **Chapter Sets Out Sole Procedure for Determining Incompetency. —**

G.S. 35A-1102 has been amended to provide that nothing in G.S. 35A-1101 shall interfere with the authority of a judge to appoint a guardian ad litem for a party to litigation under G.S. 1A-1, N.C. R. Civ. P. 17(b), and G.S. 35A-1101 et seq. sets forth the procedure for determining incompetency, which a trial judge must comply with when conducting a competency hearing under G.S. 1A-1, N.C. R. Civ. P. 17. In re J.A.A., — N.C. App. —, 623 S.E.2d 45, 2005 N.C. App. LEXIS 2706 (2005).

G.S. 7B-1101.1 requires that a guardian ad litem be appointed in accordance with the provisions of G.S. 1A-1, N.C. R. Civ. P. 17 to represent a parent, meaning that where an allegation is made that parental rights should be terminated, a trial court is required to conduct a hearing to determine whether a guardian ad litem should be appointed to represent the parent, and an allegation under G.S. 7B-1111(a)(6) serves as a triggering mechanism, alerting the trial court that it should conduct a hearing to determine whether a guardian ad litem should be appointed; at the hearing, the trial court must determine whether the parents are incompetent within the meaning of G.S. 35A-1101, such that the individual would be

unable to aid in their defense at the termination of parental rights proceeding, and the trial court should always keep in mind that the appointment of a guardian ad litem will divest the parent of their fundamental right to conduct his or her litigation according to their own judgment and inclination. In re J.A.A., — N.C. App. —, 623 S.E.2d 45, 2005 N.C. App. LEXIS 2706 (2005).

##### **Appointment of Guardian Ad Litem. —**

Trial court terminated a mother's parental rights based on: (1) neglect; (2) wilfully leaving the children in foster care for more than 12 months without showing reasonable progress; (3) wilfully failing to provide financial support to the children; and (4) abandonment of the children for at least six months immediately preceding the filing of the petition for termination of parental rights; the mother did not request that a guardian ad litem (GAL) be appointed. Also, the petition for termination of her parental rights did not allege the mother's incapability to parent the children, and no allegations were asserted, and no showing was made that the mother was incompetent; thus, the trial court was not required to appoint a GAL to the mother under either G.S. 7B-1101 and 35A-1101, or G.S. 1A-1-17. In re D.H., — N.C. App. —, 629 S.E.2d 920, 2006 N.C. App. LEXIS 1195 (2006).

### § 35A-1102. Scope of law; exclusive procedure.

#### CASE NOTES

##### **Chapter Sets Out Sole Procedure for Determining Incompetency. —**

G.S. 35A-1102 has been amended to provide that nothing in G.S. 35A-1101 shall interfere with the authority of a judge to appoint a

guardian ad litem for a party to litigation under G.S. 1A-1, N.C. R. Civ. P. 17(b), and G.S. 35A-1101 et seq. sets forth the procedure for determining incompetency, which a trial judge must comply with when conducting a competency



hearing under G.S. 1A-1, N.C. R. Civ. P. 17. In  
re J.A.A., — N.C. App. —, 623 S.E.2d 45, 2005  
N.C. App. LEXIS 2706 (2005).

## SUBCHAPTER II. GUARDIAN AND WARD.

### ARTICLE 8.

#### *Powers and Duties of Guardian of the Person.*

### § 35A-1241. Powers and duties of guardian of the person.

#### CASE NOTES

**Cited in** In re L.A.B., — N.C. App. —, 631  
S.E.2d 61, 2006 N.C. App. LEXIS 1409 (2006).

## Chapter 36C.

### North Carolina Uniform Trust Code.

#### Article 2.

##### Judicial Proceedings.

Sec.

36C-2-206. Representation of parties.

#### Article 4.

##### Creation, Validity, Modification, and Termination of Trust.

36C-4-408. Trust for care of animal.

36C-4-410. Modification or termination of trust; proceedings for approval or disapproval.

36C-4-411. Modification or termination of noncharitable irrevocable trust by consent.

36C-4-412. Modification or termination because of unanticipated circumstances or inability to administer trust effectively.

36C-4-414. Modification or termination of un-economic trust.

Sec.

36C-4-416. Modification to achieve settlor's tax objectives.

36C-4-417. Combination and division of trusts.

36C-4-419. Effect of inalienable interest on modification or termination.

#### Article 7.

##### Office of Trustee.

36C-7-701. Accepting or declining trusteeship.

#### Article 8.

##### Duties and Powers of Trustee.

36C-8-815. General powers of trustee.

#### Article 11.

##### Miscellaneous Provisions.

36C-11-1104, 36C-11-1105. [Reserved.]

36C-11-1106. Application to existing relationships.

### ARTICLE 2.

#### *Judicial Proceedings.*

#### § 36C-2-206. Representation of parties.

(a) Notwithstanding any other applicable rule of the Rules of Civil Procedure or provision of Chapter 1 of the General Statutes, in any trust proceeding, whether brought before the clerk of superior court or in the superior court division of the General Court of Justice, the parties shall be represented as provided in Article 3 of this Chapter.

(b) In the case of any party represented by another as provided in subsection (a) of this section, service of process shall be made by serving such representative. (2005-192, s. 2; 2006-259, s. 13(a).)

**Editor's Note.** — Session Laws 2006-259, s. 13(s), provides: "This section becomes effective October 1, 2006, and applies to (i) all trusts created before, on, or after that date; (ii) all judicial proceedings concerning trusts commenced on or after that date; and (iii) all judicial proceedings concerning trusts commenced before that date unless the court finds that application of a particular provision of this

act would substantially interfere with the effective conduct of the judicial proceedings or prejudice the rights of the parties, in which case the law as it existed on September 30, 2006, shall apply."

**Effect of Amendments.** — Session Laws 2006-259, s. 13(a), effective October 1, 2006, rewrote the section. See Editor's note for applicability.

### ARTICLE 4.

#### *Creation, Validity, Modification, and Termination of Trust.*

#### § 36C-4-408. Trust for care of animal.

(a) Subject to this section, a trust for the care of one or more designated domestic or pet animals alive at the time of creation of the trust is valid.

(b) Except as expressly provided otherwise in the trust instrument, no portion of the principal or income may be converted to the use of the trustee or to any use other than for the benefit of the designated animal or animals.

(c) The trust terminates at the death of the animal or last surviving animal. Upon termination, the trustee shall transfer the unexpended trust property in the following order:

- (1) As directed in the trust instrument.
- (2) If the trust was created in a preresiduary clause in the settlor's will or in a codicil to the settlor's will, under the residuary clause in the settlor's will.
- (3) If no taker is produced by the application of subdivision (1) or (2) of this subsection, to the settlor, if then living, otherwise to the settlor's heirs determined as of the date of the settlor's death under Chapter 29 of the General Statutes.

(d) The intended use of the principal or income can be enforced by a person designated for that purpose in the trust instrument or, if none, by a person appointed by the clerk of superior court having jurisdiction over the trust upon application to the clerk of superior court by a person.

(e) Except as ordered by the clerk of superior court or required by the trust instrument, no filing, report, registration, periodic accounting, separate maintenance of funds, appointment, bond, or fee is required by reason of the existence of the fiduciary relationship of the trustee.

(f) A governing instrument shall be liberally construed to bring the transfer within this section, to presume against the merely precatory or honorary nature of the disposition, and to carry out the general intent of the settlor. Extrinsic evidence is admissible in determining the settlor's intent.

(g) The clerk of superior court may reduce the amount of the property transferred, if the clerk of superior court determines that the amount substantially exceeds the amount required for the intended use. The amount of the reduction, if any, passes as unexpended trust property under subsection (c) of this section.

(h) If no trustee is designated or if no designated trustee agrees to serve or is able to serve, the clerk of superior court must name a trustee. The clerk of superior court may order the transfer of the property to another trustee, if required to assure that the intended use is carried out and if no successor trustee is designated in the trust instrument or if no designated successor trustee agrees to serve or is able to serve. The clerk of superior court may also make other orders and determinations as are advisable to carry out the intent of the settlor and the purpose of this section. (1995, c. 225, s. 1; 2005-192, s. 2; 2006-259, s. 13(b).)

**Editor's Note.** — Session Laws 2006-259, s. 13(s), provides: "This section becomes effective October 1, 2006, and applies to (i) all trusts created before, on, or after that date; (ii) all judicial proceedings concerning trusts commenced on or after that date; and (iii) all judicial proceedings concerning trusts commenced before that date unless the court finds that application of a particular provision of this act would substantially interfere with the effective conduct of the judicial proceedings or prejudice the rights of the parties, in which case the

law as it existed on September 30, 2006, shall apply."

**Effect of Amendments.** — Session Laws 2006-259, s. 13(b), effective October 1, 2006, substituted "settlor" for "transferor" throughout the section; in subdivision (c)(3), substituted "the settlor, if then living, otherwise to the settlor's heirs" for "the transferor or the transferor's heirs"; and in subsection (d), substituted "over the trust" for "over the decedent's estate"; and made minor punctuation changes. See Editor's note for applicability.

## § 36C-4-410. Modification or termination of trust; proceedings for approval or disapproval.

(a) In addition to the methods of termination prescribed by G.S. 36C-4-411



through G.S. 36C-4-414, a trust terminates to the extent that the trust is revoked or expires under its terms, no purpose of the trust remains to be achieved, or the purposes of the trust have become unlawful, contrary to public policy, or impossible to achieve.

(b) A trustee or beneficiary may commence a proceeding to approve or disapprove a proposed modification or termination under G.S. 36C-4-411 through G.S. 36C-4-416, or trust combination or division under G.S. 36C-4-417. A settlor may commence a proceeding to approve or disapprove a proposed modification or termination under G.S. 36C-4-411. The settlor of a charitable trust may maintain a proceeding to modify the trust under G.S. 36C-4-413. A trustee is a necessary party to any proceeding under this section.

(c) Repealed by Session Laws 2006-259, s. 13(c), effective October 1, 2006. (2005-192, s. 2; 2006-259, s. 13(c).)

**Editor’s Note.** — Session Laws 2006-259, s. 13(r), provides: “The Revisor of Statutes is authorized to cause to be printed any amendments to the explanatory comments of the drafters of S.L. 2005-192 that are prepared by the drafters of this section, as the Revisor deems appropriate.”

Session Laws 2006-259, s. 13(s), provides: “This section becomes effective October 1, 2006, and applies to (i) all trusts created before, on, or after that date; (ii) all judicial proceedings concerning trusts commenced on or after that date; and (iii) all judicial proceedings concern-

ing trusts commenced before that date unless the court finds that application of a particular provision of this act would substantially interfere with the effective conduct of the judicial proceedings or prejudice the rights of the parties, in which case the law as it existed on September 30, 2006, shall apply.”

**Effect of Amendments.** — Session Laws 2006-259, s. 13(c), effective October 1, 2006, repealed subsection (c), which read: “Jurisdiction of a proceeding brought under this section is as provided in G.S. 36C-2-203.” See Editor’s note for applicability.

**SUPPLEMENTAL NORTH CAROLINA COMMENT (2006)**

Effective October 1, 2006, this section is amended to delete the provisions of subsection

(c) which are unnecessary in light of other provisions of Article 36C regarding jurisdiction.

**§ 36C-4-411. Modification or termination of noncharitable irrevocable trust by consent.**

(a) A noncharitable irrevocable trust may be modified or terminated upon consent of the settlor and all beneficiaries, even if the modification or termination is inconsistent with a material purpose of the trust. A settlor’s power to consent to a trust’s modification or termination may be exercised by an agent under a power of attorney only to the extent expressly authorized by the power of attorney or the terms of the trust; by the settlor’s general guardian or the guardian of the estate with the approval of the court supervising the guardianship if an agent is not so authorized; or by the settlor’s guardian of the person with the approval of the court supervising the guardianship if an agent is not so authorized and a general guardian or guardian of the estate has not been appointed.

(b) A noncharitable irrevocable trust may be terminated upon consent of all of the beneficiaries if the court concludes that continuance of the trust is not necessary to achieve any material purpose of the trust. A noncharitable irrevocable trust may be modified upon consent of all of the beneficiaries, if the court concludes that modification is consistent with a material purpose of the trust.

(c) Where the beneficiaries of an irrevocable trust seek to compel a termination of the trust and the continuance of the trust is necessary to carry out a material purpose of the trust, or where the beneficiaries seek to compel a modification of the trust in a manner that is inconsistent with its material

purpose, the trust may be modified or terminated, in the discretion of the court, only if the court determines that the reason for modifying or terminating the trust under the circumstances substantially outweighs the interest in accomplishing a material purpose of the trust.

(d) If not all of the beneficiaries consent to a proposed modification or termination of the trust under subsection (a), (b), or (c) of this section, the modification or termination may be approved by the court if the court is satisfied that:

- (1) If all of the beneficiaries had consented, the trust could have been modified or terminated under this section; and
- (2) The interests of a beneficiary who does not consent will be adequately protected.

(e) Repealed by Session Laws 2006-259, s. 13(d), effective October 1, 2006. (2005-192, s. 2; 2006-259, s. 13(d).)

**Editor's Note.** — Session Laws 2006-259, s. 13(r), provides: “The Revisor of Statutes is authorized to cause to be printed any amendments to the explanatory comments of the drafters of S.L. 2005-192 that are prepared by the drafters of this section, as the Revisor deems appropriate.”

Session Laws 2006-259, s. 13(s), provides: “This section becomes effective October 1, 2006, and applies to (i) all trusts created before, on, or after that date; (ii) all judicial proceedings concerning trusts commenced on or after that date; and (iii) all judicial proceedings concern-

ing trusts commenced before that date unless the court finds that application of a particular provision of this act would substantially interfere with the effective conduct of the judicial proceedings or prejudice the rights of the parties, in which case the law as it existed on September 30, 2006, shall apply.”

**Effect of Amendments.** — Session Laws 2006-259, s. 13(d), effective October 1, 2006, repealed subsection (e), which read: “Jurisdiction of a proceeding brought under this section shall be as provided in G.S. 36C-2-203.” See Editor's note for applicability.

#### SUPPLEMENTAL NORTH CAROLINA COMMENT (2006)

Effective October 1, 2006, this section is amended to delete the provisions of subsection

(e) which are unnecessary in light of other provisions of Article 36C regarding jurisdiction.

### § 36C-4-412. Modification or termination because of unanticipated circumstances or inability to administer trust effectively.

(a) The court may modify the administrative or dispositive terms of a trust or terminate the trust if, because of circumstances not anticipated by the settlor, modification or termination will further the purposes of the trust. To the extent practicable, the modification must be made in accordance with the settlor's probable intention.

(b) The court may modify the administrative terms of a trust if continuation of the trust on its existing terms would be impracticable or wasteful or impair the trust's administration.

(c) Repealed by Session Laws 2006-259, s. 13(e), effective October 1, 2006. (2005-192, s. 2; 2006-259, s. 13(e).)

**Editor's Note.** — Session Laws 2006-259, s. 13(r), provides: “The Revisor of Statutes is authorized to cause to be printed any amendments to the explanatory comments of the drafters of S.L. 2005-192 that are prepared by the drafters of this section, as the Revisor deems appropriate.”

Session Laws 2006-259, s. 13(s), provides: “This section becomes effective October 1, 2006,

and applies to (i) all trusts created before, on, or after that date; (ii) all judicial proceedings concerning trusts commenced on or after that date; and (iii) all judicial proceedings concerning trusts commenced before that date unless the court finds that application of a particular provision of this act would substantially interfere with the effective conduct of the judicial proceedings or prejudice the rights of the par-



ties, in which case the law as it existed on September 30, 2006, shall apply.”

**Effect of Amendments.** — Session Laws 2006-259, s. 13(e), effective October 1, 2006,

repealed subsection (c), which read: “Jurisdiction of a proceeding brought under this section shall be as provided in G.S. 36C-2-203.” See Editor’s note for applicability.

#### SUPPLEMENTAL NORTH CAROLINA COMMENT (2006)

Effective October 1, 2006, this section is amended to delete the provisions of subsection

(c) which are unnecessary in light of other provisions of Article 36C regarding jurisdiction.

### § 36C-4-414. Modification or termination of uneconomic trust.

(a) After notice to the qualified beneficiaries, the trustee of a trust consisting of trust property having a total value of less than fifty thousand dollars (\$50,000) may terminate the trust if the trustee concludes that the value of the trust property is insufficient to justify the cost of administration. The trustee may enter into an agreement or make other provisions that the trustee deems necessary or appropriate to protect the interests of the beneficiaries and to carry out the intent and purpose of the trust. This subsection shall not apply where the instrument creating the trust, by specific reference to this section, or to former G.S. 36A-125.6, provides that it shall not apply. The trustee shall not be liable for that termination and distribution notwithstanding the existence or potential existence of other beneficiaries who are not sui juris. Any beneficiary receiving a distribution from a trust terminated under this section shall incur no liability and shall not be required to account to anyone for such distribution.

(b) The court may modify or terminate a trust or remove the trustee and appoint a different trustee if the court determines that the value of the trust property is insufficient to justify the cost of administration.

(c) This section does not apply to an easement for conservation or preservation.

(d) Repealed by Session Laws 2006-259, s. 13(f), effective October 1, 2006. (2005-192, s. 2; 2006-259, s. 13(f).)

**Editor’s Note.** — Session Laws 2006-259, s. 13(r), provides: “The Revisor of Statutes is authorized to cause to be printed any amendments to the explanatory comments of the drafters of S.L. 2005-192 that are prepared by the drafters of this section, as the Revisor deems appropriate.”

Session Laws 2006-259, s. 13(s), provides: “This section becomes effective October 1, 2006, and applies to (i) all trusts created before, on, or after that date; (ii) all judicial proceedings concerning trusts commenced on or after that date; and (iii) all judicial proceedings concern-

ing trusts commenced before that date unless the court finds that application of a particular provision of this act would substantially interfere with the effective conduct of the judicial proceedings or prejudice the rights of the parties, in which case the law as it existed on September 30, 2006, shall apply.”

**Effect of Amendments.** — Session Laws 2006-259, s. 13(f), effective October 1, 2006, repealed subsection (d), which read: “Jurisdiction of a proceeding brought under this section is as provided in G.S. 36C-2-203.” See Editor’s note for applicability.

#### SUPPLEMENTAL NORTH CAROLINA COMMENT (2006)

Effective October 1, 2006, this section is amended to delete the provisions of subsection

(d) which are unnecessary in light of other provisions of Article 36C regarding jurisdiction.

### § 36C-4-416. Modification to achieve settlor’s tax objectives.

To achieve a settlor’s tax objectives, the court may modify the terms of a trust



in a manner that is not contrary to the settlor's probable intention. The court may provide that the modification has retroactive effect. (2005-192, s. 2; 2006-259, s. 13(g).)

**Editor's Note.** — Session Laws 2006-259, s. 13(r), provides: "The Revisor of Statutes is authorized to cause to be printed any amendments to the explanatory comments of the drafters of S.L. 2005-192 that are prepared by the drafters of this section, as the Revisor deems appropriate."

Session Laws 2006-259, s. 13(s), provides: "This section becomes effective October 1, 2006, and applies to (i) all trusts created before, on, or after that date; (ii) all judicial proceedings concerning trusts commenced on or after that date; and (iii) all judicial proceedings concern-

ing trusts commenced before that date unless the court finds that application of a particular provision of this act would substantially interfere with the effective conduct of the judicial proceedings or prejudice the rights of the parties, in which case the law as it existed on September 30, 2006, shall apply."

**Effect of Amendments.** — Session Laws 2006-259, s. 13(g), effective October 1, 2006, deleted the last sentence, which read: "Jurisdiction of a proceeding brought under this section shall be as provided in G.S. 36C-2-203." See Editor's note for applicability.

#### SUPPLEMENTAL NORTH CAROLINA COMMENT (2006)

Effective October 1, 2006, this section is amended to delete the provisions of the third sentence which are unnecessary in light of

other provisions of Article 36C regarding jurisdiction.

### § 36C-4-417. Combination and division of trusts.

(a) Unless otherwise provided in the trust instrument, a trustee may do any of the following:

- (1) Consolidate the assets of more than one trust and administer the assets as one trust under the terms of one of the trusts if the terms of the trusts are substantially similar and the beneficiaries of the trusts are identical.
- (2) Divide one trust into two or more separate trusts if the new trusts provide in the aggregate for the same succession of interests and beneficiaries as are provided in the original trust.

(b) In dividing a trust into two or more separate trusts, a trustee shall accomplish the division by severing the trusts on a fractional basis and funding the separate trusts either (i) with a pro rata portion of each asset held by the undivided trust; or (ii) on a non-pro rata basis based on either the fair market value of the assets on the date of funding or in a manner that fairly reflects the net appreciation or depreciation in the value of the assets measured from the valuation date to the date of funding.

(c) In any case where two separate identical trusts are created under this section, one of which is fully exempt from the federal generation-skipping transfer tax and one of which is fully subject to that tax, the trustee may thereafter, to the extent possible consistent with the terms of the trust, determine the value of any mandatory or discretionary distributions to trust beneficiaries on the basis of the combined value of both trusts, but may satisfy those distributions by a method other than pro rata from the separate trusts in a manner designed to minimize the current and potential generation-skipping transfer tax. (2005-192, s. 2; 2006-259, s. 13(h).)

**Editor's Note.** — Session Laws 2006-259, s. 13(r), provides: "The Revisor of Statutes is authorized to cause to be printed any amendments to the explanatory comments of the drafters of S.L. 2005-192 that are prepared by

the drafters of this section, as the Revisor deems appropriate."

Session Laws 2006-259, s. 13(s), provides: "This section becomes effective October 1, 2006, and applies to (i) all trusts created before, on, or

after that date; (ii) all judicial proceedings concerning trusts commenced on or after that date; and (iii) all judicial proceedings concerning trusts commenced before that date unless the court finds that application of a particular provision of this act would substantially interfere with the effective conduct of the judicial proceedings or prejudice the rights of the parties, in which case the law as it existed on

September 30, 2006, shall apply.”

**Effect of Amendments.** — Session Laws 2006-259, s. 13(h), effective October 1, 2006, in subsection (a), substituted “a trustee may do any of the following:” for “after notice to the qualified beneficiaries, a trustee may:” in the introductory language; and deleted “or” at the end of subdivision (a)(1). See Editor’s note for applicability.

#### SUPPLEMENTAL NORTH CAROLINA COMMENT (2006)

Effective October 1, 2006, subsection (a) is amended to delete the requirement that notice of a consolidation of trusts or division of a trust

be given to qualified beneficiaries of the trust being consolidated or divided.

### § 36C-4-419. Effect of inalienable interest on modification or termination.

The court, in exercising its discretion to modify or terminate an irrevocable trust under G.S. 36C-4-411, 36C-4-412, or 36C-4-414 shall consider provisions making the interest of a beneficiary inalienable, including those described in Article 5, but the court is not precluded from the exercise of that discretion solely because of such provisions. (2005-192, s. 2; 2006-259, s. 13(i).)

**Editor’s Note.** — Session Laws 2006-259, s. 13(s), provides: “This section becomes effective October 1, 2006, and applies to (i) all trusts created before, on, or after that date; (ii) all judicial proceedings concerning trusts commenced on or after that date; and (iii) all judicial proceedings concerning trusts commenced before that date unless the court finds that application of a particular provision of this

act would substantially interfere with the effective conduct of the judicial proceedings or prejudice the rights of the parties, in which case the law as it existed on September 30, 2006, shall apply.”

**Effect of Amendments.** — Session Laws 2006-259, s. 13(i), effective October 1, 2006, substituted “36C-4-414” for “36C-4-413.” See Editor’s note for applicability.

## ARTICLE 7.

### *Office of Trustee.*

### § 36C-7-701. Accepting or declining trusteeship.

(a) Except as otherwise provided in subsection (c) of this section, a person designated as trustee accepts the trusteeship:

- (1) By substantially complying with a method of acceptance provided in the terms of the trust; or
- (2) If the terms of the trust do not provide a method or the method provided in the terms is not expressly made exclusive, by accepting delivery of the trust property, exercising powers or performing duties as trustee, or otherwise indicating acceptance of the trusteeship.

(b) A person designated as trustee who has not yet accepted the trusteeship may reject the trusteeship. A designated trustee who does not accept the trusteeship within 120 days after written notice to accept the trusteeship is provided is considered to have rejected the trusteeship.

(c) A person designated as trustee, without accepting the trusteeship, may:

- (1) Act to preserve the trust property if, within a reasonable time after acting, the person sends a rejection of the trusteeship to the settlor or, if the settlor is dead or lacks capacity, to a qualified beneficiary; and

- (2) Inspect or investigate trust property to determine potential liability under environmental or other law or for any other purpose. (2005-192, s. 2; 2006-259, s. 13(j).)

**Editor's Note.** —

Session Laws 2006-259, s. 13(r), provides: "The Revisor of Statutes is authorized to cause to be printed any amendments to the explanatory comments of the drafters of S.L. 2005-192 that are prepared by the drafters of this section, as the Revisor deems appropriate."

Session Laws 2006-259, s. 13(s), provides: "This section becomes effective October 1, 2006, and applies to (i) all trusts created before, on, or after that date; (ii) all judicial proceedings concerning trusts commenced on or after that date; and (iii) all judicial proceedings concerning trusts commenced before that date unless

the court finds that application of a particular provision of this act would substantially interfere with the effective conduct of the judicial proceedings or prejudice the rights of the parties, in which case the law as it existed on September 30, 2006, shall apply."

**Effect of Amendments.** — Session Laws 2006-259, s. 13(j), effective October 1, 2006, substituted "120 days after written notice to accept the trusteeship is provided" for "a reasonable time, after receiving written notice of the trusteeship" in subsection (b). See Editor's note for applicability.

#### SUPPLEMENTAL NORTH CAROLINA COMMENT (2006)

Effective October 1, 2006, subsection (b) is amended to provide a 120 day limitation on the time a trustee has to accept the trusteeship

without regard to whether acceptance is "within a reasonable time."

### ARTICLE 8.

#### *Duties and Powers of Trustee.*

#### § 36C-8-815. General powers of trustee.

(a) A trustee, without authorization by the court, may exercise any of the following:

- (1) Powers conferred by the terms of the trust.
- (2) Except as limited by the terms of the trust:
  - a. All powers over the trust property that an unmarried competent owner has over individually owned property;
  - b. Any other powers appropriate to achieve the proper investment, management, administration, or distribution of the trust property; and
  - c. Any other powers conferred by this Chapter.

(b) No provision of this section shall relieve a trustee of the fiduciary duties under this Article. (2005-192, s. 2; 2006-259, s. 13(k).)

**Editor's Note.** — Session Laws 2006-259, s. 13(r), provides: "The Revisor of Statutes is authorized to cause to be printed any amendments to the explanatory comments of the drafters of S.L. 2005-192 that are prepared by the drafters of this section, as the Revisor deems appropriate."

Session Laws 2006-259, s. 13(s), provides: "This section becomes effective October 1, 2006, and applies to (i) all trusts created before, on, or after that date; (ii) all judicial proceedings concerning trusts commenced on or after that date; and (iii) all judicial proceedings concern-

ing trusts commenced before that date unless the court finds that application of a particular provision of this act would substantially interfere with the effective conduct of the judicial proceedings or prejudice the rights of the parties, in which case the law as it existed on September 30, 2006, shall apply."

**Effect of Amendments.** — Session Laws 2006-259, s. 13(k), effective October 1, 2006, in subsection (a), added "any of the following" at the end of the introductory language, and made a punctuation change in subdivision (a)(1); and rewrote subsection (b), which read: "The exer-



cise of a power is subject to the fiduciary duties prescribed by this Article.” See Editor’s note for applicability.

#### SUPPLEMENTAL NORTH CAROLINA COMMENT (2006)

Effective October 1, 2006, subsection (a) is amended to clarify that a trustee may exercise any of the powers described in subsections (a)(1) and (2). In addition, subsection (b) is amended to clarify that, consistent with the

provisions of G.S. 36C-10-1012, third parties may rely upon the trustee’s exercise of power without confirming that the trustee exercised the powers in accordance with the trustee’s fiduciary duties.

### ARTICLE 11.

#### *Miscellaneous Provisions.*

§§ 36C-11-1104, 36C-11-1105: Reserved for future codification purposes.

#### § 36C-11-1106. Application to existing relationships.

(a) Except as otherwise provided in this Chapter, this Chapter applies to (i) all trusts created before, on, or after January 1, 2006; (ii) all judicial proceedings concerning trusts commenced on or after January 1, 2006; and (iii) judicial proceedings concerning trusts commenced before January 1, 2006, unless the court finds that application of a particular provision of this Chapter would substantially interfere with the effective conduct of the judicial proceedings or prejudice the rights of the parties, in which case the particular provision of this Chapter does not apply and the superseded law applies.

(b) Except as otherwise provided in this Chapter, any rule of construction or presumption provided in this Chapter applies to trust instruments executed before January 1, 2006, unless there is a clear indication of a contrary intent in the terms of the trust or unless application of that rule of construction or presumption would impair substantial rights of a beneficiary. Except as otherwise provided in this Chapter, an act done before January 1, 2006, is not affected by this Chapter. If a right is acquired, extinguished, or barred upon the expiration of a prescribed period that has commenced to run under any other statute before January 1, 2006, that statute continues to apply to the right even if it has been repealed or superseded. (2005-192, ss. 7(a), (b); 2006-226, ss. 31(a), (b).)

**Editor’s Note.** — Session Laws 2006-226, s. 31(c), provides: “The Revisor of Statutes is authorized to cause to be printed along with G.S. 36C-11-1106, as enacted by this section, all relevant portions of the Official Commentary to this section of the Uniform Trust Code and all explanatory comments of the drafters as the Revisor deems appropriate.”

**Official Comment on Effective Date and Applicability.** — The Uniform Trust Code is intended to have the widest possible effect within constitutional limitations. Specifically, the Code applies to all trusts whenever created, to judicial proceedings concerning trusts commenced on or after its effective date, and unless the court otherwise orders, to judicial proceed-

ings in progress on the effective date. In addition, any rules of construction or presumption provided in the Code apply to preexisting trusts unless there is a clear indication of a contrary intent in the trust’s terms. By applying the Code to preexisting trusts, the need to know two bodies of law will quickly lessen.

This Code cannot be fully retroactive, however. Constitutional limitations preclude retroactive application of rules of construction to alter property rights under trusts that became irrevocable prior to the effective date. Also, rights already barred by a statute of limitation or rule under former law are not revived by a possibly longer statute or more liberal rule under this Code. Nor is an act done before the

effective date of the Code affected by the Code's enactment.

The Uniform Trust Code contains an additional effective date provision. Pursuant to Section 602(a), prior law will determine whether a trust executed prior to the effective date of the Code is presumed to be revocable or irrevocable.

For a comparable uniform law effective date provision, see Uniform Probate Code Section 8 101.

**North Carolina Comment on Effective Date and Applicability.** — The drafters modified the provisions of the Uniform Trust Code relating to its application to trust instruments executed before its effective date by adding the phrase “or unless application of that rule of

construction or presumption would impair substantial rights of a beneficiary” to the end of the first sentence of the second paragraph. Although this Chapter is intended to have broad application, the drafters concluded that a rule of construction or presumption provided in this Chapter should not be applied to a trust instrument executed before the effective date of this Chapter if the application of such rule or presumption would impair the substantial rights of a beneficiary of a trust established under such a trust instrument.

**Effect of Amendments.** — Session Laws 2005-192, s. 7(a), as codified by Session Laws 2006-226, s. 31(a), effective August 10, 2006, rewrote the section.

## Chapter 37A.

### Uniform Principal and Income Act.

#### Article 2.

#### **Decedent's Estate or Terminating Income Interest.**

Sec.

37A-2-202. Distribution to residuary and remainder beneficiaries.

#### ARTICLE 2.

#### *Decedent's Estate or Terminating Income Interest.*

### **§ 37A-2-202. Distribution to residuary and remainder beneficiaries.**

(a) Each beneficiary described in G.S. 37A-2-201(4) is entitled to receive a portion of the net income equal to the beneficiary's fractional interest in undistributed principal assets, using values as of the distribution date. If a fiduciary makes more than one distribution of assets to beneficiaries to whom this section applies, each beneficiary, including one who does not receive part of the distribution, is entitled, as of each distribution date, to the net income the fiduciary has received after the date of death or terminating event or earlier distribution date but has not distributed as of the current distribution date.

(b) In determining a beneficiary's share of net income, the following rules apply:

- (1) The beneficiary is entitled to receive a portion of the net income equal to the beneficiary's fractional interest in the undistributed principal assets immediately before the distribution date, including assets that later may be sold to meet principal obligations.
- (2) The beneficiary's fractional interest in the undistributed principal assets shall be calculated without regard to property specifically given to a beneficiary and property required to pay pecuniary amounts not in trust to which G.S. 37A-2-201(3) applies.
- (3) The beneficiary's fractional interest in the undistributed principal assets shall be calculated on the basis of the aggregate value of those assets as of the distribution date without reducing the value by any unpaid principal obligation.
- (4) The distribution date for purposes of this section may be the date as of which the fiduciary calculates the value of the assets if that date is reasonably near the date on which assets are actually distributed.

(c) If a fiduciary does not distribute all of the collected but undistributed net income to each person as of a distribution date, the fiduciary shall maintain appropriate records showing the interest of each beneficiary in that net income.

(d) A fiduciary may apply the rules in this section, to the extent that the fiduciary considers it appropriate, to net gain or loss realized after the date of death or terminating event or earlier distribution date from the disposition of a principal asset if this section applies to the income from the asset. (2003-232, s. 2; 2006-259, s. 13(p).)



**Editor's Note.** — Session Laws 2006-259, s. 13(s), provides: "This section becomes effective October 1, 2006, and applies to (i) all trusts created before, on, or after that date; (ii) all judicial proceedings concerning trusts commenced on or after that date; and (iii) all judicial proceedings concerning trusts commenced before that date unless the court finds that application of a particular provision of this act would substantially interfere with the effec-

tive conduct of the judicial proceedings or prejudice the rights of the parties, in which case the law as it existed on September 30, 2006, shall apply."

**Effect of Amendments.** — Session Laws 2006-259, s. 13(p), effective October 1, 2006, added "to which G.S. 37A-2-201(3) applies" at the end of subdivision (b)(2). See Editor's note for applicability.

## Chapter 39. Conveyances.

### Article 4.

#### Voluntary Organizations and Associations.

Sec.  
39-24, 39-25. [Repealed.]  
39-26. [Recodified.]  
39-27. [Recodified.]

### Article 9.

#### Disclosure.

39-51 through 39-59. [Reserved.]

### Article 10.

#### Real Property Tax Proration.

Sec.  
39-60. Property tax proration on sale of real  
property.

## ARTICLE 2.

### *Conveyances by Husband and Wife.*

## § 39-13.3. Conveyances between husband and wife.

### CASE NOTES

**Cited** in Davis v. Davis, 360 N.C. 518, 631  
S.E.2d 114, 2006 N.C. LEXIS 593 (2006).

## ARTICLE 3A.

### *Uniform Fraudulent Transfer Act.*

## § 39-23.8. Defenses, liability, and protection of transferee.

### CASE NOTES

**Cited** in Quilling v. Cristell, — F. Supp. 2d  
—, 2006 U.S. Dist. LEXIS 8480 (W.D.N.C. Feb.  
9, 2006).

## ARTICLE 4.

### *Voluntary Organizations and Associations.*

§§ **39-24, 39-25:** Repealed by Session Laws 2006-226, s. 2(a), effective  
January 1, 2007.

§ **39-26:** Recodified as G.S. 59B-15(a) by Session Laws 2006-226, s. 2(b),  
effective January 1, 2007.

§ **39-27:** Recodified as G.S. 59B-15(b) by Session Laws 2006-226, s. 2(b),  
effective January 1, 2007.

ARTICLE 9.

*Disclosure.*

**§§ 39-51 through 39-59:** Reserved for future codification purposes.

ARTICLE 10.

*Real Property Tax Proration.*

**§ 39-60. Property tax proration on sale of real property.**

Unless otherwise provided by contract, property taxes on the real property being sold shall be prorated between the seller and buyer of the real property on a calendar-year basis. (2006-106, s. 7.)

**Editor's Note.** — Session Laws 2006-106, s. 10, made this Article effective for contracts entered into on or after October 1, 2006.



**Chapter 40A.**  
**Eminent Domain.**

**Article 1.**

Sec.

**General.**

40A-3. By whom right may be exercised.

Sec.

40A-1. Exclusive provisions.

**ARTICLE 1.**

*General.*

**§ 40A-1. Exclusive provisions.**

(a) Notwithstanding the provisions of any local act, it is the intent of the General Assembly that, effective August 15, 2006, the uses set out in G.S. 40A-3 are the exclusive uses for which the authority to exercise the power of eminent domain is granted to private condemnors, local public condemnors, and other public condemnors. Effective August 15, 2006, a local act granting the authority to exercise the power of eminent domain to a private condemnor, local public condemnor, or other public condemnor for a use or purpose other than those granted to it in G.S. 40A-3(a), (b), (b1), or (c) is not effective for that use or purpose. Provided that, any eminent domain action commenced before August 15, 2006, for a use or purpose granted in a local act, may be lawfully completed pursuant to the provisions of that local act. The provisions of this subsection shall not repeal any provision of a local act limiting the purposes for which the authority to exercise the power of eminent domain may be used.

(b) It is the intent of the General Assembly that the procedures provided by this Chapter shall be the exclusive condemnation procedures to be used in this State by all private condemnors and all local public condemnors. All other provisions in laws, charters, or local acts authorizing the use of other procedures by municipal or county governments or agencies or political subdivisions thereof, or by corporations, associations or other persons are hereby repealed effective January 1, 1982. Provided, that any condemnation proceeding initiated prior to January 1, 1982, may be lawfully completed pursuant to the provisions previously existing.

(c) This Chapter shall not repeal any provision of a local act limiting the purposes for which property may be condemned. Notwithstanding the language of G.S. 40A-3(b), this Chapter also shall not repeal any provision of a local act creating any substantive or procedural requirement or limitation on the authority of a local public condemnor to exercise the power of eminent domain outside of its boundaries. (1981, c. 919, s. 1; 2006-224, s. 1; 2006-259, s. 47.)

**Local Modification.** — For additional local modifications to this section, see the main volume.

**Effect of Amendments.** — Session Laws 2006-224, s. 1, effective August 15, 2006, added subsection (a); designated the previously existing paragraphs as subsections (b) and (c), re-

spectively; in subsection (c), in the first sentence, deleted “enlarging or” following “local act” and made a minor stylistic change.

Session Laws 2006-259, s. 47, effective August 23, 2006, substituted “August 15, 2006” for “July 1, 2006” three times in subsection (a).

**§ 40A-3. By whom right may be exercised.**

(a) Private Condemnors. — For the public use or benefit, the persons or

organizations listed below shall have the power of eminent domain and may acquire by purchase or condemnation property for the stated purposes and other works which are authorized by law.

- (1) Corporations, bodies politic or persons have the power of eminent domain for the construction of railroads, power generating facilities, substations, switching stations, microwave towers, roads, alleys, access railroads, turnpikes, street railroads, plank roads, tramroads, canals, telegraphs, telephones, electric power lines, electric lights, public water supplies, public sewerage systems, flumes, bridges, and pipelines or mains originating in North Carolina for the transportation of petroleum products, coal, gas, limestone or minerals. Land condemned for any liquid pipelines shall:
  - a. Not be less than 50 feet nor more than 100 feet in width; and
  - b. Comply with the provisions of G.S. 62-190(b).The width of land condemned for any natural gas pipelines shall not be more than 100 feet.
- (2) School committees or boards of trustees or of directors of any corporation holding title to real estate upon which any private educational institution is situated, have the power of eminent domain in order to obtain a pure and adequate water supply for such institution.
- (3) Franchised motor vehicle carriers or union bus station companies organized by authority of the Utilities Commission, have the power of eminent domain for the purpose of constructing and operating union bus stations: Provided, that this subdivision shall not apply to any city or town having a population of less than 60,000.
- (4) Any railroad company has the power of eminent domain for the purposes of: constructing union depots; maintaining, operating, improving or straightening lines or of altering its location; constructing double tracks; constructing and maintaining new yards and terminal facilities or enlarging its yard or terminal facilities; connecting two of its lines already in operation not more than six miles apart; or constructing an industrial siding.
- (5) A condemnation in fee simple by a State-owned railroad company for the purposes specified in subdivision (4) of this subsection and as provided under G.S. 124-12(2).

The width of land condemned for any single or double track railroad purpose shall be not less than 80 feet nor more than 100 feet, except where the road may run through a town, where it may be of less width, or where there may be deep cuts or high embankments, where it may be of greater width.

No rights granted or acquired under this subsection shall in any way destroy or abridge the rights of the State to regulate or control any railroad company or to regulate foreign corporations doing business in this State. Whenever it is necessary for any railroad company doing business in this State to cross the street or streets in a town or city in order to carry out the orders of the Utilities Commission, to construct an industrial siding, the power is hereby conferred upon such railroad company to occupy such street or streets of any such town or city within the State. Provided, license so to do be first obtained from the board of aldermen, board of commissioners, or other governing authorities of such town or city.

No such condemnor shall be allowed to have condemned to its use, without the consent of the owner, his burial ground, usual dwelling house and yard, kitchen and garden, unless condemnation of such property is expressly authorized by statute.

The power of eminent domain shall be exercised by private condemnors under the procedures of Article 2 of this Chapter.

(b) Local Public Condemnors — Standard Provision. — For the public use or benefit, the governing body of each municipality or county shall possess the



power of eminent domain and may acquire by purchase, gift or condemnation any property, either inside or outside its boundaries, for the following purposes.

- (1) Opening, widening, extending, or improving roads, streets, alleys, and sidewalks. The authority contained in this subsection is in addition to the authority to acquire rights-of-way for streets, sidewalks and highways under Article 9 of Chapter 136. The provisions of this subdivision (1) shall not apply to counties.
- (2) Establishing, extending, enlarging, or improving any of the public enterprises listed in G.S. 160A-311 for cities, or G.S. 153A-274 for counties.
- (3) Establishing, enlarging, or improving parks, playgrounds, and other recreational facilities.
- (4) Establishing, extending, enlarging, or improving storm sewer and drainage systems and works, or sewer and septic tank lines and systems.
- (5) Establishing, enlarging, or improving hospital facilities, cemeteries, or library facilities.
- (6) Constructing, enlarging, or improving city halls, fire stations, office buildings, courthouse jails and other buildings for use by any department, board, commission or agency.
- (7) Establishing drainage programs and programs to prevent obstructions to the natural flow of streams, creeks and natural water channels or improving drainage facilities. The authority contained in this subdivision is in addition to any authority contained in Chapter 156.
- (8) Acquiring designated historic properties, designated as such before October 1, 1989, or acquiring a designated landmark designated as such on or after October 1, 1989, for which an application has been made for a certificate of appropriateness for demolition, in pursuance of the purposes of G.S. 160A-399.3, Chapter 160A, Article 19, Part 3B, effective until October 1, 1989, or G.S. 160A-400.14, whichever is appropriate.
- (9) Opening, widening, extending, or improving public wharves.

The board of education of any municipality or county or a combined board may exercise the power of eminent domain under this Chapter for purposes authorized by Chapter 115C of the General Statutes.

The power of eminent domain shall be exercised by local public condemnors under the procedures of Article 3 of this Chapter.

(b1) Local Public Condemnors — Modified Provision for Certain Localities. — For the public use or benefit, the governing body of each municipality or county shall possess the power of eminent domain and may acquire by purchase, gift or condemnation any property or interest therein, either inside or outside its boundaries, for the following purposes.

- (1) Opening, widening, extending, or improving roads, streets, alleys, and sidewalks. The authority contained in this subsection is in addition to the authority to acquire rights-of-way for streets, sidewalks and highways under Article 9 of Chapter 136. The provisions of this subdivision (1) shall not apply to counties.
- (2) Establishing, extending, enlarging, or improving any of the public enterprises listed in G.S. 160A-311 for cities, or G.S. 153A-274 for counties.
- (3) Establishing, enlarging, or improving parks, playgrounds, and other recreational facilities.
- (4) Establishing, extending, enlarging, or improving storm sewer and drainage systems and works, or sewer and septic tank lines and systems.



- (5) Establishing, enlarging, or improving hospital facilities, cemeteries, or library facilities.
- (6) Constructing, enlarging, or improving city halls, fire stations, office buildings, courthouse jails and other buildings for use by any department, board, commission or agency.
- (7) Establishing drainage programs and programs to prevent obstructions to the natural flow of streams, creeks and natural water channels or improving drainage facilities. The authority contained in this subdivision is in addition to any authority contained in Chapter 156.
- (8) Acquiring designated historic properties, designated as such before October 1, 1989, or acquiring a designated landmark designated as such on or after October 1, 1989, for which an application has been made for a certificate of appropriateness for demolition, in pursuance of the purposes of G.S. 160A-399.3, Chapter 160A, Article 19, Part 3, effective until October 1, 1989, or G.S. 160A-400.14, whichever is appropriate.
- (9) Opening, widening, extending, or improving public wharves.
- (10) Engaging in or participating with other governmental entities in acquiring, constructing, reconstructing, extending, or otherwise building or improving beach erosion control or flood and hurricane protection works, including, but not limited to, the acquisition of any property that may be required as a source for beach renourishment.
- (11) Establishing access for the public to public trust beaches and appurtenant parking areas.

The board of education of any municipality or county or a combined board may exercise the power of eminent domain under this Chapter for purposes authorized by Chapter 115C of the General Statutes.

The power of eminent domain shall be exercised by local public condemnors under the procedures of Article 3 of this chapter.

This subsection applies only to Carteret and Dare Counties, the Towns of Atlantic Beach, Carolina Beach, Caswell Beach, Emerald Isle, Holden Beach, Indian Beach, Kill Devil Hills, Kitty Hawk, Kure Beach, Nags Head, North Topsail Beach, Oak Island, Ocean Isle Beach, Pine Knoll Shores, Sunset Beach, Surf City, Topsail Beach, and Wrightsville Beach, and the Village of Bald Head Island.

(c) Other Public Condemnors. — For the public use or benefit, the following political entities shall possess the power of eminent domain and may acquire property by purchase, gift, or condemnation for the stated purposes.

- (1) A sanitary district board established under the provisions of Part 2 of Article 2 of Chapter 130A for the purposes stated in that Part.
- (2) The board of commissioners of a mosquito control district established under the provisions of Part 2 of Article 12 of Chapter 130A for the purposes stated in that Part.
- (3) A hospital authority established under the provisions of Part B of Article 2 of Chapter 131E for the purposes stated in that Part, provided, however, that the provisions of G.S. 131E-24(c) shall continue to apply.
- (4) A watershed improvement district established under the provisions of Article 2 of Chapter 139 for the purposes stated in that Article, provided, however, that the provisions of G.S. 139-38 shall continue to apply.
- (5) A housing authority established under the provisions of Article 1 of Chapter 157 for the purposes of that Article, provided, however, that the provisions of G.S. 157-11 shall continue to apply.
- (6) A corporation as defined in G.S. 157-50 for the purposes of Article 3 of Chapter 157, provided, however, the provisions of G.S. 157-50 shall continue to apply.

- (7) A commission established under the provisions of Article 22 of Chapter 160A for the purposes of that Article.
- (8) An authority created under the provisions of Article 1 of Chapter 162A for the purposes of that Article.
- (9) A district established under the provisions of Article 4 of Chapter 162A for the purposes of that Article.
- (10) A district established under the provisions of Article 5 of Chapter 162A for the purposes of that Article.
- (11) The board of trustees of a community college established under the provisions of Article 2 of Chapter 115D for the purposes of that Article.
- (12) A district established under the provisions of Article 6 of Chapter 162A for the purposes of that Article.
- (13) A regional public transportation authority established under Article 26 of Chapter 160A of the General Statutes for the purposes of that Article.

The power of eminent domain shall be exercised by a public condemnor listed in this subsection under the procedures of Article 3 of this Chapter. (1852, c. 92, s. 1; R.C., c. 61, s. 9; 1874-5, c. 83; Code, s. 1698; Rev., s. 2575; 1907, cc. 39, 458, 783; 1911, c. 62, ss. 25, 26, 27; 1917, cc. 51, 132; C.S., s. 1706; 1923, c. 205; Ex. Sess. 1924, c. 118; 1937, c. 108, s. 1; 1939, c. 228, s. 4; 1941, c. 254; 1947, c. 806; 1951, c. 1002, ss. 1, 2; 1953, c. 1211; 1957, c. 65, s. 11; c. 1045, s. 1; 1961, c. 247; 1973, c. 507, s. 5; c. 1262, s. 86; 1977, c. 771, s. 4; 1981, c. 919, s. 1; 1983, c. 378, s. 2; 1983 (Reg. Sess., 1984), c. 1084; 1985, c. 689, s. 10; c. 696, s. 2; 1987, c. 2, s. 1; c. 564, s. 13; c. 783, s. 6; 1989, c. 706, s. 3; c. 740, s. 1.1; 2000-146, s. 8; 2001-36, ss. 1, 3; 2001-478, s. 2; 2001-487, s. 58; 2002-172, s. 4.1; 2003-282, ss. 1, 2; 2004-203, s. 32(a), (b); 2006-224, s. 2; 2006-259, s. 47.)

#### Effect of Amendments. —

Session Laws 2006-224, s. 2, effective August 15, 2006, in subsections (b) and (b1), substituted "Chapter 115C of the General Statutes" for "other statutes" in the second paragraph.

Session Laws 2006-259, s. 47, effective August 23, 2006, amended Session Laws 2006-224, s. 2, by changing the effective date from July 1, 2006, to August 15, 2006."

### CASE NOTES

#### II. Public Use.

##### II. PUBLIC USE.

**Condemnation Not Prohibited.** — Summary judgment was properly entered in a declaratory action regarding the applicability of G.S. 153A-15(b) because a condemnation action by a city in order to facilitate the construction of a water supply and distribution facility did not require any approval since the city and the land

were located in the same county; moreover, the evidence showed that the real and substantial benefits of the condemnation accrued to the city in question, and not other parties in the case that were located in different counties. *Caswell County v. Town of Yanceyville*, 170 N.C. App. 124, 611 S.E.2d 451, 2005 N.C. App. LEXIS 898 (2005).

### ARTICLE 3.

#### *Condemnation by Public Condemnors.*

### § 40A-47. Determination of issues other than damages.

#### CASE NOTES

**Cited in** *Frances L. Austin Family L.P. v. City of High Point*, — N.C. App. —, 630 S.E.2d 37, 2006 N.C. App. LEXIS 1198 (2006).

**§ 40A-51. Remedy where no declaration of taking filed;  
recording memorandum of action.**

**CASE NOTES**

**Taking Not Found.** — When a city paid consideration for a sewer line easement to plaintiffs' predecessor in title, and later abandoned the easement and left a sewer pipe in the ground in question, this did not amount to a taking. The city had paid just compensation to

the predecessor in title, and plaintiffs were entitled to nothing more. *Frances L. Austin Family L.P. v. City of High Point*, — N.C. App. —, 630 S.E.2d 37, 2006 N.C. App. LEXIS 1198 (2006).



## Chapter 41. Estates.

### Article 4.

#### The Uniform Transfer on Death (TOD) Security Registration Act.

Sec.

41-47. Protection of registering entity.

### ARTICLE 1.

#### *Survivorship Rights and Future Interests.*

### § 41-10. Titles quieted.

#### CASE NOTES

III. Pleading and Practice.

C. Jurisdiction of Courts.

#### III. PLEADING AND PRACTICE.

##### C. Jurisdiction of Courts.

##### Advisory Jurisdiction of Courts. —

Dismissal of a suit brought by a group of beachfront landowners against the State of North Carolina, the State of North Carolina Department of Environment and Natural Resources, the Coastal Resources Commission, the Division of Coastal Management, and its director, was upheld on appeal because the

landowners failed to allege in their complaint sufficient allegations to establish that the State of North Carolina asserted any claim of title to their land under G.S. 41-10.1 to have constituted a waiver of the state's sovereign immunity with regard to the landowners' suit to prevent the general public from interfering with their use of certain beach property, which the landowners claimed was deeded to them. *Fabrikant v. Currituck County*, 174 N.C. App. 30, 621 S.E.2d 19, 2005 N.C. App. LEXIS 2219 (2005).

### § 41-10.1. Trying title to land where State claims interest.

#### CASE NOTES

##### Sufficiency of Complaint. —

Dismissal of a suit brought by a group of beachfront landowners against the State of North Carolina, the State of North Carolina Department of Environment and Natural Resources, the Coastal Resources Commission, the Division of Coastal Management, and its director, was upheld on appeal because the landowners failed to allege in their complaint sufficient allegations to establish that the State

of North Carolina asserted any claim of title to their land under G.S. 41-10.1 to have constituted a waiver of the state's sovereign immunity with regard to the landowners' suit to prevent the general public from interfering with their use of certain beach property, which the landowners claimed was deeded to them. *Fabrikant v. Currituck County*, 174 N.C. App. 30, 621 S.E.2d 19, 2005 N.C. App. LEXIS 2219 (2005).

### ARTICLE 4.

#### *The Uniform Transfer on Death (TOD) Security Registration Act.*

### § 41-47. Protection of registering entity.

(a) A registering entity is not required to offer or to accept a request for security registration in beneficiary form. If a registration in beneficiary form is

offered by a registering entity, the owner requesting registration in beneficiary form assents to the protections given to the registering entity by this Article.

(b) By accepting a request for registration of a security in beneficiary form, the registering entity agrees that the registration will be implemented on death of the deceased owner as provided in this Article.

(c) A registering entity is discharged from all claims to a security by the estate, creditors, heirs, or devisees of a deceased owner if it registers a transfer of a security in accordance with G.S. 41-46 and does so in good faith reliance (i) on the registration, (ii) on this Article, and (iii) on information provided to it by affidavit of the personal representative of the deceased owner, or by the surviving beneficiary or by the surviving beneficiary's representatives, or other information available to the registering entity. The protections of this Article do not extend to a reregistration or payment made after a registering entity has received written notice, addressed to the registering entity, from any claimant to any interest in the security objecting to implementation of a registration in beneficiary form. No other notice or other information available to the registering entity affects its right to protection under this Article.

(d) The protection provided by this Article to the registering entity of a security does not affect the rights of beneficiaries in disputes between themselves and other claimants to ownership of the security transferred or its value or proceeds. (2005-411, s. 1; 2006-226, s. 11.)

**Effect of Amendments.** — Session Laws 2006-226, s. 11, effective August 10, 2006, inserted “addressed to the registering entity,” in the second sentence of subsection (c).

## Chapter 42.

### Landlord and Tenant.

#### ARTICLE 1.

#### *General Provisions.*

### § 42-4. Recovery for use and occupation.

#### CASE NOTES

#### **Period of Limitations on Action for Fair Rental Value. —**

Property owner was not entitled to 17 years of back rent from an occupier and an estate for use of his property because there was a three-

year statute of limitations under G.S. 42-4 and G.S. 1-52(2). *Perkins v. Watson*, — F. Supp. 2d —, 2005 U.S. Dist. LEXIS 11192 (M.D.N.C. June 3, 2005).

#### ARTICLE 5.

#### *Residential Rental Agreements.*

### § 42-41. Mutuality of obligations.

#### CASE NOTES

#### **Rent Abatement Allowed for Unfit Apartment. —**

Where the landlord breached the implied warranty of habitability under G.S. 42-42(a)(2), (3), the tenant was entitled to rent abatement

under G.S. 42-41, and the trial court was to calculate the damages suffered by the tenant. *Dean v. Hill*, 171 N.C. App. 479, 615 S.E.2d 699, 2005 N.C. App. LEXIS 1275 (2005).

### § 42-42. Landlord to provide fit premises.

#### CASE NOTES

#### **Breach of the Implied Warranty of Habitability. —**

Trial court should have found in favor of the tenant in the tenant's breach of the implied warranty of habitability claim, pursuant to G.S. 42-42(a)(2), (3), as the flooring was unstable and there was a large hole in the floor, a large sewage leak from the neighbor caused a noxious smell, sparks emitted from a breaker box, and these problems violated the housing code. *Dean v. Hill*, 171 N.C. App. 479, 615

S.E.2d 699, 2005 N.C. App. LEXIS 1275 (2005).

#### **Rent Abatement Allowed for Unfit Apartment. —**

Where the landlord breached the implied warranty of habitability under G.S. 42-42(a)(2), (3), the tenant was entitled to rent abatement under G.S. 42-41, and the trial court was to calculate the damages suffered by the tenant. *Dean v. Hill*, 171 N.C. App. 479, 615 S.E.2d 699, 2005 N.C. App. LEXIS 1275 (2005).

### § 42-44. General remedies, penalties, and limitations.

#### CASE NOTES

#### **Rent Money Paid by Tenants Under a Lease Belonged to the Owners. —** Rent

money paid by tenants under a lease belonged to the owners of the leased property; lawyers



who agreed to receive the rent payment on behalf of their clients, the owners, were obligated to disburse the owners' funds to them on request and to not disclose the disbursement to the tenants. Thus, the tenants' suit against the

lawyers, alleging a breach of a fiduciary obligation based on the disbursement of the rent money to the owners, was properly dismissed. *Noblot v. Timmons*, — N.C. App. —, 628 S.E.2d 413, 2006 N.C. App. LEXIS 861 (2006).

**Chapter 43.**  
**Land Registration.**

ARTICLE 1.

*Nature of Proceeding.*

**§ 43-1. Jurisdiction in superior court.**

CASE NOTES

**Arbitration of Foreclosure Actions.** — In an arbitration clause in a loan agreement, a requirement excluding from arbitration any foreclosure actions was mutual, and the clause was not unconscionable. In view of the fact that under G.S. 43-1, North Carolina superior

courts had exclusive jurisdiction to actions affecting a title to land was a good reason for excluding foreclosure actions from arbitration clauses and agreements. *Tillman v. Commer. Credit Loans, Inc.*, — N.C. App. —, 629 S.E.2d 865, 2006 N.C. App. LEXIS 1186 (2006).

# Chapter 44A.

## Statutory Liens and Charges.

### Article 1.

#### Possessory Liens on Personal Property.

Sec.

44A-2. Persons entitled to lien on personal property.

### Article 4.

#### Self-Service Storage Facilities.

44A-43. Enforcement of self-service storage facility lien.

44A-47 through 44A-49. [Reserved.]

### Article 5.

#### Aircraft Labor and Storage Liens.

Sec.

44A-50. Definitions.

44A-55. Persons entitled to a lien on an aircraft.

44A-60. Notice of lien on an aircraft.

44A-65. Notice of lien filed by the clerk of court.

44A-70. Priority of a lien on an aircraft.

44A-75. Termination of a lien on an aircraft.

44A-80. Fees.

44A-85. Enforcement of lien by sale.

44A-90. Title of purchaser.

## ARTICLE 1.

### *Possessory Liens on Personal Property.*

#### § 44A-2. Persons entitled to lien on personal property.

(a) Any person who tows, alters, repairs, stores, services, treats, or improves personal property other than a motor vehicle or an aircraft in the ordinary course of his business pursuant to an express or implied contract with an owner or legal possessor of the personal property has a lien upon the property. The amount of the lien shall be the lesser of

(1) The reasonable charges for the services and materials; or

(2) The contract price; or

(3) One hundred dollars (\$100.00) if the lienor has dealt with a legal possessor who is not an owner.

This lien shall have priority over perfected and unperfected security interests.

(b) Any person engaged in the business of operating a hotel, motel, or boardinghouse has a lien upon all baggage, vehicles and other personal property brought upon his premises by a guest or boarder who is an owner thereof to the extent of reasonable charges for the room, accommodations and other items or services furnished at the request of the guest or boarder. This lien shall not have priority over any security interest in the property which is perfected at the time the guest or boarder brings the property to said hotel, motel or boardinghouse.

(c) Any person engaged in the business of boarding animals has a lien on the animals boarded for reasonable charges for such boarding which are contracted for with an owner or legal possessor of the animal. This lien shall have priority over perfected and unperfected security interests.

(d) Any person who repairs, services, tows, or stores motor vehicles in the ordinary course of the person's business pursuant to an express or implied contract with an owner or legal possessor of the motor vehicle, except for a motor vehicle seized pursuant to G.S. 20-28.3, has a lien upon the motor vehicle for reasonable charges for such repairs, servicing, towing, storing, or for the rental of one or more substitute vehicles provided during the repair, servicing, or storage. This lien shall have priority over perfected and unperfected security interests. Payment for towing and storing a motor vehicle



seized pursuant to G.S. 20-28.3 shall be as provided for in G.S. 20-28.2 through G.S. 20-28.5.

(e) Any lessor of nonresidential demised premises has a lien on all furniture, furnishings, trade fixtures, equipment and other personal property to which the tenant has legal title and which remains on the demised premises if (i) the tenant has vacated the premises for 21 or more days after the paid rental period has expired, and (ii) the lessor has a lawful claim for damages against the tenant. If the tenant has vacated the premises for 21 or more days after the expiration of the paid rental period, or if the lessor has received a judgment for possession of the premises which is executable and the tenant has vacated the premises, then all property remaining on the premises may be removed and placed in storage. If the total value of all property remaining on the premises is less than one hundred dollars (\$100.00), then it shall be deemed abandoned five days after the tenant has vacated the premises, and the lessor may remove it and may donate it to any charitable institution or organization. Provided, the lessor shall not have a lien if there is an agreement between the lessor or his agent and the tenant that the lessor shall not have a lien. This lien shall be for the amount of any rents which were due the lessor at the time the tenant vacated the premises and for the time, up to 60 days, from the vacating of the premises to the date of sale; and for any sums necessary to repair damages to the premises caused by the tenant, normal wear and tear excepted; and for reasonable costs and expenses of sale. The lien created by this subsection shall be enforced by sale at public sale pursuant to the provisions of G.S. 44A-4(e). This lien shall not have priority over any security interest in the property which is perfected at the time the lessor acquires this lien.

(e1) This Article shall not apply to liens created by storage of personal property at a self-service storage facility.

(e2) Any lessor of a space for a manufactured home as defined in G.S. 143-143.9(6) has a lien on all furniture, furnishings, and other personal property including the manufactured home titled in the name of the tenant if (i) the manufactured home remains on the demised premises 21 days after the lessor is placed in lawful possession by writ of possession and (ii) the lessor has a lawful claim for damages against the tenant. If the lessor has received a judgment for possession of the premises which has been executed, then all property remaining on the premises may be removed and placed in storage. Prior to the expiration of the 21-day period, the landlord shall release possession of the personal property and manufactured home to the tenant during regular business hours or at a time mutually agreed upon. This lien shall be for the amount of any rents which were due the lessor at the time the tenant vacated the premises and for the time, up to 60 days, from the vacating of the premises to the date of sale; and for any sums necessary to repair damages to the premises caused by the tenant, normal wear and tear excepted; and for reasonable costs and expenses of the sale. The lien created by this subsection shall be enforced by public sale under G.S. 44A-4(e). The landlord may begin the advertisement for sale process immediately upon execution of the writ of possession by the sheriff, but may not conduct the sale until the lien has attached. This lien shall not have any priority over any security interest in the property that is perfected at the time the lessor acquires this lien. The lessor shall not have a lien under this subsection if there is an agreement between the lessor or the lessor's agent and the tenant that the lessor shall not have a lien.

(f) Any person who improves any textile goods in the ordinary course of his business pursuant to an express or implied contract with the owner or legal possessor of such goods shall have a lien upon all goods of such owner or possessor in his possession for improvement. The amount of such lien shall be for the entire unpaid contracted charges owed such person for improvement of

said goods including any amount owed for improvement of goods, the possession of which may have been relinquished, and such lien shall have priority over perfected and unperfected security interests. “Goods” as used herein includes any textile goods, yarns or products of natural or man-made fibers or combination thereof. “Improve” as used herein shall be construed to include processing, fabricating or treating by throwing, spinning, knitting, dyeing, finishing, fabricating or otherwise.

(g) Any person who fabricates, casts, or otherwise makes a mold or who uses a mold to manufacture, assemble, or otherwise make a product pursuant to an express or implied contract with the owner of such mold shall have a lien upon the mold. For a lien to arise under this subsection, there must exist written evidence that the parties understood that a lien could be applied against the mold, with the evidence being in the form either of a written contract or a separate written statement provided by the potential holder of the lien under this subsection to the owner of the mold prior to the fabrication or use of the mold. The written contract or separate written statement must describe generally the amount of the potential lien as set forth in this subsection. The amount of the lien under this subsection shall equal the total of (i) any unpaid contracted charges due from the owner of the mold for making the mold, plus (ii) any unpaid contracted charges for all products made with the mold. The lien under this subsection shall not have priority over any security interest in the mold which is perfected at the time the person acquires this lien. As used in this subsection, the word “mold” shall include a mold, die, form, or pattern. (1967, c. 1029, s. 1; 1971, cc. 261, 403; c. 544, s. 1; c. 1197; 1973, c. 1298, s. 1; 1975, c. 461; 1981, c. 566, s. 2; c. 682, s. 9; 1981 (Reg. Sess., 1982), c. 1275, s. 2; 1995, c. 460, s. 9; c. 480, s. 1; 1995 (Reg. Sess., 1996), c. 744, s. 1; 1998-182, s. 14; 1999-278, s. 5; 2006-222, s. 1.2.)

**Effect of Amendments.** — Session Laws 2006-222, s. 1.2, effective October 1, 2006, and applicable to labor, skills, or materials furnished on an aircraft, or storage provided for an

aircraft, on or after that date, inserted “or an aircraft” in the first sentence of the introductory language of subsection (a).

## ARTICLE 2.

### *Statutory Liens on Real Property.*

#### Part 2. Liens of Mechanics, Laborers, and Materialmen Dealing with One Other Than Owner.

#### § 44A-18. Grant of lien upon funds; subrogation; perfection.

#### CASE NOTES

**Adequate Lien for Subcontractors and Suppliers of Materials and Labor.** — Appellate court erred in reversing the trial court’s grant of summary judgment to the product supplier that found the product supplier was entitled to judgment in the amount specified in its notice of lien sent to the manufacturer; the state constitution and statutory law provided that a materialman was entitled to an adequate lien on the subject matter of the materials

supplied, the product supplier sent a notice of lien for a certain amount to the manufacturer after the product supplier became aware that the contractor with whom the manufacturer had contracted was having financial difficulties, and the manufacturer nevertheless paid the contractor, instead of the product supplier, shortly before the contractor went bankrupt. *O & M Indus. v. Smith Eng’g Co.*, 360 N.C. 263, 624 S.E.2d 345, 2006 N.C. LEXIS 6 (2006).

**Cited in** James River Equip., Inc v. Tharpe’s Excavating, Inc., — N.C. App. —, 634 S.E.2d 548, 2006 N.C. App. LEXIS 1897 (2006).

§ 44A-19. Notice of claim of lien upon funds.

CASE NOTES

**Sufficient Compliance.** —

Appellate court erred in reversing the trial court’s grant of summary judgment to the product supplier that found the product supplier was entitled to judgment in the amount specified in its notice of lien sent to the manufacturer; the state constitution and statutory law provided that a materialman was entitled to an adequate lien on the subject matter of the materials supplied, the product supplier sent a notice of lien for a certain amount to the man-

ufacturer after the product supplier became aware that the contractor with whom the manufacturer had contracted was having financial difficulties, the manufacturer nevertheless paid the contractor, instead of the product supplier, shortly before the contractor went bankrupt, and the manufacturer’s receipt of notice obligated it to pay the product supplier’s claimed lien amount. O & M Indus. v. Smith Eng’g Co., 360 N.C. 263, 624 S.E.2d 345, 2006 N.C. LEXIS 6 (2006).

§ 44A-20. Duties and liability of obligor.

CASE NOTES

**Receipt of Notice.** —

Appellate court erred in reversing the trial court’s grant of summary judgment to the product supplier that found the product supplier was entitled to judgment in the amount specified in its notice of lien sent to the manufacturer; the state constitution and statutory law provided that a materialman was entitled to an adequate lien on the subject matter of the materials supplied, the product supplier sent a notice of lien for a certain amount to the man-

ufacturer after the product supplier became aware that the contractor with whom the manufacturer had contracted was having financial difficulties, the manufacturer nevertheless paid the contractor, instead of the product supplier, shortly before the contractor went bankrupt, and the manufacturer’s receipt of notice obligated it to pay the product supplier’s claimed lien amount. O & M Indus. v. Smith Eng’g Co., 360 N.C. 263, 624 S.E.2d 345, 2006 N.C. LEXIS 6 (2006).

ARTICLE 3.

*Model Payment and Performance Bond.*

§ 44A-25. Definitions.

CASE NOTES

**Assignee of Subcontractor Was Also a Subcontractor.** — Assignee of a subcontractor that installed a fire protection system on a port project that the prime contractor contracted with the subcontractor to install was a second-tier subcontractor and thus a subcontractor under G.S. 44A-25(6); therefore, a supplier that

sold supplies for the project to the assignee could bring a performance bond claim when the assignee did not pay for the supplies. HSI N.C., LLC v. Diversified Fire Prot. of Wilmington, Inc., 169 N.C. App. 767, 611 S.E.2d 224, 2005 N.C. App. LEXIS 805 (2005).

§ 44A-26. Bonds required.

**Editor’s Note.** — Session Laws 2005-276, s. 28.10, as amended by Session Laws 2006-67, s.

1, provides: “(a) The Department of Transportation may implement up to two performance-



based contracts for routine maintenance and operations, exclusive of resurfacing. Selection of firms to perform this work shall be made using a best-value procurement process.

"Prior to any advertisement for a proposed project, the Department shall report to the Joint Legislative Transportation Oversight Committee on the contractor selection criteria to be used."

"(b) For contracts authorized under this section, notwithstanding G.S. 44A-26(a)(1) and (a)(2), the Department of Transportation may require the bonds issued pursuant to Article 3 of Chapter 44A of the General Statutes for public construction to be provided on a periodic basis and in the amount to cover that specific period rather than for the entire project duration."

#### CASE NOTES

**Requirement for Benefit of Laborers and Subcontractors.** — Statutory bond requirement in G.S. 44A-26(a)(2) are clearly and explicitly for the benefit of laborers and subcontractors. *James River Equip., Inc v. Tharpe's Excavating, Inc.*, — N.C. App. —, 634 S.E.2d 548, 2006 N.C. App. LEXIS 1897 (2006).

**Bond Must Be Provided for Life of Project.** — General contractor could be held liable to the supplier for failure to provide a payment bond for the life of the project because the bond requirements of G.S. 44A-26, ex-

tended throughout life of project. *James River Equip., Inc v. Tharpe's Excavating, Inc.*, — N.C. App. —, 634 S.E.2d 548, 2006 N.C. App. LEXIS 1897 (2006).

**Cited in** *James River Equip., Inc v. Mecklenburg Utils., Inc.*, — N.C. App. —, 634 S.E.2d 557, 2006 N.C. App. LEXIS 1898 (2006).

**Applied in** *HSI N.C., LLC v. Diversified Fire Prot. of Wilmington, Inc.*, 169 N.C. App. 767, 611 S.E.2d 224, 2005 N.C. App. LEXIS 805 (2005).

### § 44A-27. Actions on payment bonds; service of notice.

#### CASE NOTES

**Subcontractor's Assignee Was a Subcontractor.** — Supplier was entitled to summary judgment and an award of damages because the supplier gave a timely written notice of a performance bond claim when a subcontractor's assignee, and therefore a subcontractor as defined by G.S. 44A-25(6), failed to pay for supplies purchased from the supplier for a port project. *HSI N.C., LLC v. Diversified Fire Prot. of Wilmington, Inc.*, 169 N.C. App. 767, 611

S.E.2d 224, 2005 N.C. App. LEXIS 805 (2005).

**Failure to Mitigate.** — Supplier was not estopped from its performance bond claim for failure to mitigate by giving an earlier notification as the notice given by the supplier was timely given under the statute. *HSI N.C., LLC v. Diversified Fire Prot. of Wilmington, Inc.*, 169 N.C. App. 767, 611 S.E.2d 224, 2005 N.C. App. LEXIS 805 (2005).

### § 44A-32. Designation of official; violation a misdemeanor.

#### CASE NOTES

**No Civil Remedy Available Against Board of Education.** — Claims for failure to maintain a performance bond against the Board of Education were properly dismissed because the supplier had no civil remedy

against the Board for such a violation. *James River Equip., Inc v. Tharpe's Excavating, Inc.*, — N.C. App. —, 634 S.E.2d 548, 2006 N.C. App. LEXIS 1897 (2006).

### § 44A-33. Form.

#### CASE NOTES

**Quoted in** *James River Equip., Inc v. Tharpe's Excavating, Inc.*, — N.C. App. —, 634 S.E.2d 548, 2006 N.C. App. LEXIS 1897 (2006).

**§ 44A-35. Attorneys' fees.**

## CASE NOTES

Cited in HSI N.C., LLC v. Diversified Fire 611 S.E.2d 224, 2005 N.C. App. LEXIS 805  
Prot. of Wilmington, Inc., 169 N.C. App. 767, (2005).

## ARTICLE 4.

*Self-Service Storage Facilities.***§ 44A-43. Enforcement of self-service storage facility lien.**

(a) If the rent and other charges for which the lien is claimed under this Article remain unpaid or unsatisfied for 15 days following the maturity of the obligation to pay rent, the owner may enforce the lien by a public sale or other disposition of the property as provided in this section. The owner may bring an action to collect rent and other charges in any court of competent jurisdiction at any time following the maturity of the obligation to pay the rent.

The occupant or any other person having a security or other interest in the property stored in the self-service storage facility may bring an action to request the immediate possession of the property, at any time following the assertion of the lien by the owner. Before such possession is granted, the occupant or the person with a security or other interest in the property shall pay the amount of the lien asserted to the clerk of court in which the action is pending, or post a bond for double the amount. The clerk shall then issue an order to the owner to relinquish possession of the property to the occupant or other party.

(b) Notice and Hearing:

(1) If the property upon which the lien is claimed is a motor vehicle, the lienor, following the expiration of the 15-day period provided by subsection (a), shall give notice to the Division of Motor Vehicles that a lien is asserted and that a sale is proposed. The lienor shall remit to the Division a fee of two dollars (\$2.00); and shall also furnish the Division with the last known address of the occupant. The Division of Motor Vehicles shall issue notice by registered or certified mail, return receipt requested to the person having legal title to the vehicle, if reasonably ascertainable, and to the occupant, if different, at his last known address. The notice shall:

- a. State: (i) that a lien is being asserted against the specific vehicle by the lienor or owner of the self-service storage facility, (ii) that the lien is being asserted for rental charges at the self-service storage facility, (iii) the amount of the lien, and (iv) that the lienor intends to sell or otherwise dispose of the vehicle in satisfaction of the lien;
- b. Inform the person having legal title and the occupant of their right to a judicial hearing at which a determination will be made as to the validity of the lien prior to a sale taking place; and
- c. State that the legal title holder and the occupant have a period of 10 days from the date of receipt of the notice in which to notify the Division of Motor Vehicles by registered or certified mail, return receipt requested, that a hearing is desired to contest the sale of the vehicle pursuant to the lien.

The person with legal title or the occupant must, within 10 days of receipt of the notice from the Division of Motor Vehicles, notify the Division of his desire

to contest the sale of the vehicle pursuant to the lien, and that the Division should so notify lienor.

Failure of the person with legal title or the occupant to notify the Division that a hearing is desired shall be deemed a waiver of the right to a hearing prior to sale of the vehicle against which the lien is asserted. Upon such failure, the Division shall so notify the lienor; the lienor may proceed to enforce the lien by a public sale as provided by this section; and the Division shall transfer title to the property pursuant to such sale.

If the Division is notified within the 10-day period provided in this section that a hearing is desired prior to the sale, the lien may be enforced by a public sale as provided in this section and the Division will transfer title only pursuant to the order of a court of competent jurisdiction.

- (2) If the property upon which the lien is claimed is other than a motor vehicle, the lienor following the expiration of the 15-day period provided by subsection (a) shall issue notice to the person having a security or other interest in the property, if reasonably ascertainable, and to the occupant, if different, at his last known address by registered or certified mail, return receipt requested.

The notice shall:

- a. State: (i) that a lien is being asserted against the specific property by the lienor, (ii) that the lien is being asserted for rental charges at the self-service storage facility, (iii) the amount of the lien, and (iv) that the lienor intends to sell or otherwise dispose of the property in satisfaction of the lien;
- b. Provide a brief and general description of the personal property subject to the lien. The description shall be reasonably adequate to permit the person notified to identify it, except that any container including, but not limited to, a trunk, valise, or box that is locked, fastened, sealed, or tied in a manner which deters immediate access to its contents may be described as such without describing its contents;
- c. Inform the person with a security or other interest in the property and occupant, if different, of their right to a judicial hearing at which a determination will be made as to the validity of the lien prior to a sale taking place;
- d. State that the person with a security or other interest in the property or the occupant, if different, has a period of 10 days from the date of receipt of the notice to notify the lienor by registered, or certified mail, return receipt requested, that a hearing is desired, and that if the legal title holder or occupant wishes to contest the sale of his property pursuant to the lien he should notify the lienor that a hearing is desired.

The person with a security or other interest in the property or the occupant must, within 10 days of receipt of the notice from the lienor, notify the lienor of his desire for a hearing, and state whether or not he wishes to contest the sale of the property pursuant to the lien.

Failure of the person with a security or other interest in the property, or the occupant to notify the lienor that a hearing is desired shall be deemed a waiver of the right to a hearing prior to the sale of the property against which the lien is asserted. Upon such failure the lienor may proceed to enforce the lien by a public sale as provided by this section.

If the lienor is notified, within the 10-day period as provided by this section, that a hearing is desired prior to the sale, the lien may be enforced by a public sale as provided in this section only pursuant to the order of a court of competent jurisdiction.

(c) Public Sale. —

- (1) Not less than 20 days prior to sale by public sale the lienor:



- a. Shall cause notice to be mailed to the person having legal title to the property if reasonably ascertainable, to the occupant if different, and to each secured party or other person claiming an interest in the property who is actually known to the lienor or can be reasonably ascertained, provided that notices provided pursuant to subsection (b) hereof shall be sufficient for these purposes if such notices contain the information required by subsection (d) hereof; and
  - b. Shall advertise the sale by posting a copy of the notice of sale at the courthouse door in the county where the sale is to be held; and shall publish notice of sale once a week for two consecutive weeks in a newspaper of general circulation in the same county, the date of the last publication being not less than five days prior to the sale.
- (2) The sale must be held on a day other than Sunday and between the hours of 9:00 A.M. and 4:00 P.M.:
- a. At the self-service storage facility or at the nearest suitable place to where the property is held or stored; or
  - b. In the county where the obligation secured by the lien was contracted for.
- (3) A lienor may purchase at public sale.
- (d) Notice of Sale. — The notice of sale shall include:
- (1) The name and address of the lienor;
  - (2) A statement to the effect that various items of personal property are being sold pursuant to the assertion of a lien for rental at the self-service storage facility;
  - (3) The place, date, and time of the sale. (1981 (Reg. Sess., 1982), c. 1275, s. 1; 2006-264, s. 38.5.)

**Effect of Amendments.** — Session Laws substituted “9:00 A.M.” for “10:00 A.M.” in the 2006-264, s. 38.5, effective August 27, 2006, introductory language of subdivision (c)(2).

**§§ 44A-47 through 44A-49:** Reserved for future codification purposes.

## ARTICLE 5.

### *Aircraft Labor and Storage Liens.*

#### **§ 44A-50. Definitions.**

As used in this Article, the following terms mean:

- (1) Aircraft. — As the term is defined in G.S. 63-1(3), or any engine, part, component, or accessory, whether affixed to or separate from the aircraft.
- (2) Lienor. — A person entitled to a lien under this Article.
- (3) Owner. — As the term is defined in G.S. 44A-1(3) for an aircraft, or any person authorized by an owner, as defined in G.S. 44A-1(3), to perform, contract, or arrange for the provision of labor, skill, materials, or storage with respect to any aircraft.
- (4) Person. — Any individual, corporation, association, partnership, whether limited or general, limited liability company, or other entity. (2006-222, s. 1.1.)

**Editor’s Note.** — Session Laws 2006-222, s. 1.3, made this Article effective October 1, 2006, and applicable to labor, skills, or materials furnished on an aircraft, or storage provided for an aircraft, on or after that date.

§ 44A-55. Persons entitled to a lien on an aircraft.

Any person who has expended labor, skill, or materials on an aircraft or has furnished storage for an aircraft at the request of its owner has a perfected lien on the aircraft beginning on the date the expenditure of labor, skill, or materials or the storage commenced, for the contract price for the expenditure of labor, skill, or materials or for the storage, or, in the absence of a contract price, for the reasonable worth of the expenditure of labor, skill, or materials, or of the storage. The lien under this section survives even if the possession of the aircraft is surrendered by the lienor. (2006-222, s. 1.1.)

§ 44A-60. Notice of lien on an aircraft.

- (a) The lien under G.S. 44A-55 expires 120 days after the date the lienor voluntarily surrenders possession of the aircraft, unless the lienor, prior to the expiration of the 120-day period, files a notice of lien in the office of the clerk of court of the county in which the labor, skill, or materials were expended on the aircraft, or the storage was furnished for the aircraft.
- (b) The notice of lien shall state all of the following:
  - (1) The name of the lienor.
  - (2) The name of the registered owner of the aircraft, if known.
  - (3) The name of the person with whom the lienor entered into a contract for labor, skill, or materials on the aircraft, or storage of the aircraft.
  - (4) A description of the aircraft sufficient for identification.
  - (5) The amount for which the lien is claimed.
  - (6) The dates upon which the expenditure of labor, skill, materials, or storage was commenced and completed, or, if not completed, the date through which the claimed amount is calculated.
- (c) The notice of lien shall be sworn to or affirmed, and subscribed by the lienor, or by someone on the lienor's behalf having personal knowledge of the facts.
- (d) The notice of lien shall be in substantially the following form:

“NOTICE OF LIEN ON AIRCRAFT

[Lienor] Lienor, v. [Owner] Owner  
Notice is hereby given that [Lienor](name) claims a lien upon \_\_\_\_\_ [aircraft](describe the aircraft) for labor, skill, or materials expended on, and for storage furnished for, this aircraft; that the name of the registered owner or reputed owner, if the aircraft is not registered or the registered owner is not known, is [Owner](name), that the labor, skill, or materials were expended on the aircraft commencing the \_\_\_\_\_ day of \_\_\_\_\_, and storage was furnished on the aircraft commencing the \_\_\_\_\_ day of \_\_\_\_\_, and the labor, skill, materials, and storage furnished by the lienor [was completed] [is ongoing] on the \_\_\_\_\_ day of \_\_\_\_\_; that 120 days have not elapsed since the aircraft was released by the lienor; that the amount the lienor demands for the labor, skill, materials, and storage furnished, as of the date hereof is \$\_\_\_\_\_ (amount); that no part thereof has been paid except \$\_\_\_\_\_ (amount); and that there is now due and remaining unpaid, after deducting all credits and offsets, the sum of \$\_\_\_\_\_ (amount), in which amount [Lienor](name) claims a lien upon the aircraft.

(Signed) \_\_\_\_\_ (Lienor)  
Address of Lienor \_\_\_\_\_

State of North Carolina  
County of \_\_\_\_\_

Sworn to (or affirmed) and subscribed before me this day by [name of principal].

Date: \_\_\_\_\_ [Official Signature of Notary]

\_\_\_\_\_[Notary's printed or typed name],  
Notary Public

\_\_\_\_\_[Official Seal]" (2006-222, s. 1.1.) My Commission Expires:[Date]

### **§ 44A-65. Notice of lien filed by the clerk of court.**

Upon presentation of a notice of lien pursuant to this Article, the clerk of court shall file the notice of lien and shall index the notice of lien in a record maintained by the clerk for that purpose. (2006-222, s. 1.1.)

### **§ 44A-70. Priority of a lien on an aircraft.**

The lien under this Article shall have priority over perfected and unperfected security interests. (2006-222, s. 1.1.)

### **§ 44A-75. Termination of a lien on an aircraft.**

Any lien under this Article shall be terminated upon receipt by the lienor of the full amount owed for the labor, skill, or materials on the aircraft, and for storage of the aircraft, which amount shall not be limited to any amount shown on the notice of lien filed under G.S. 44A-60, if a notice of lien has been filed by the lienor. Upon receipt of the amount owed, the lienor or the lienor's agent shall release the aircraft to the owner, if the aircraft is in the possession of the lienor, and shall, within 20 days following a request in writing by the aircraft owner, file with the clerk of court a notice of satisfaction of lien, if a notice of lien has been filed by the lienor. A notice of satisfaction of lien shall state that the amount owed for the lienor's expenditure of labor, skill, or materials on the aircraft, and for the storage of the aircraft, has been paid and the lien against the aircraft has been terminated. The notice of satisfaction of lien shall be sworn to or affirmed, and subscribed by the lienor or by someone on the lienor's behalf having personal knowledge of the facts. Upon the filing of a notice of satisfaction of lien, the clerk of court shall make an entry of acknowledgment of satisfaction in the index. (2006-222, s. 1.1.)

### **§ 44A-80. Fees.**

The clerk of court shall collect fees for filing, copying, and certifying any document under this Article as set forth in G.S. 7A-308. (2006-222, s. 1.1.)

### **§ 44A-85. Enforcement of lien by sale.**

A lien filed under this Article may be enforced in accordance with G.S. 44A-4, and the proceeds of sale shall be applied as set forth in G.S. 44A-5, except that the three-day time period set forth in G.S. 44A-4(a) for the lienor to file a contrary statement of the amount of the lien at the time of the filing of a complaint by the owner shall be extended to 30 days. An owner may seek immediate possession of an aircraft in accordance with G.S. 44A-4. (2006-222, s. 1.1.)

### **§ 44A-90. Title of purchaser.**

(a) A purchaser for value at a properly conducted sale under this Article, and a purchaser for value without constructive notice of a defect in the sale,



whether or not the purchaser is the lienor or an agent of the lienor, acquires title to the property free of any interests over which the lienor was entitled to priority.

(b) Upon the completion of a sale conducted under this Article, the lienor or a person acting on behalf of the lienor, who conducted the sale shall furnish to the purchaser for value a bill of sale for the aircraft signed by the person who conducted the sale that includes a statement that the sale was conducted in accordance with this Article. (2006-222, s. 1.1.)

## Chapter 45.

### Mortgages and Deeds of Trust.

#### Article 4.

#### Satisfaction.

#### Sec.

45-37. Satisfaction of record of security instruments.

45-38. Recording of foreclosure.

#### Sec.

45-36.6. Document of rescission: effect; liability for wrongful recording.

### ARTICLE 2A.

### *Sales Under Power of Sale.*

#### Part 1. General Provisions.

### § 45-21.1. Definitions; construction.

#### CASE NOTES

**No Redemption Period for Junior Lien Holders.** — Because North Carolina has no redemption statute, in the sense that a debtor or junior lien holder has no special right to repurchase property from a buyer after the completion of a foreclosure sale, and instead deals with the power of sale foreclosures within 10 days of a public auction pursuant to G.S.

45-21.27, the government had to rely on the language in 26 U.S.C.S. § 7526(d)(1) which stated that the Secretary could redeem within 120 days from the date of sale, and not the language referring to redemption under state law. *Ellis v. United States*, — F. Supp. 2d —, 2005 U.S. Dist. LEXIS 16090 (M.D.N.C. July 22, 2005).

#### Part 2. Procedure for Sale.

### § 45-21.20. Satisfaction of debt after publishing or posting notice, but before completion of sale.

#### CASE NOTES

**Cited** in *Ellis v. United States*, — F. Supp. 2d —, 2005 U.S. Dist. LEXIS 16090 (M.D.N.C. July 22, 2005).

### § 45-21.27. Upset bid on real property; compliance bonds.

#### CASE NOTES

**Government's Redemption Was Untimely and Property Went to Upset Bidder.** — Title was quieted pursuant to 28 U.S.C.S. § 2409a in the plaintiff to whom title was transferred after he made an upset bid, pursuant to G.S. 45-21-27, because the government's redemption was untimely under 26 U.S.C.S. § 7425(d)(1) since the "date of sale" was the date of the public auction, based on the plain

language of 26 C.F.R. § 301.7425-2(b), and not when he made the bid nor when the property was transferred. *Ellis v. United States*, — F. Supp. 2d —, 2005 U.S. Dist. LEXIS 16090 (M.D.N.C. July 22, 2005).

**No Redemption Period for Junior Lien Holders.** — Because North Carolina has no redemption statute, in the sense that a debtor or junior lien holder has no special right to

repurchase property from a buyer after the completion of a foreclosure sale, and instead deals with the power of sale foreclosures within 10 days of a public auction pursuant to G.S. 45-21.27, the government had to rely on the language in 26 U.S.C.S. § 7526(d)(1) which

stated that the Secretary could redeem within 120 days from the date of sale, and not the language referring to redemption under state law. *Ellis v. United States*, — F. Supp. 2d —, 2005 U.S. Dist. LEXIS 16090 (M.D.N.C. July 22, 2005).

## ARTICLE 4.

### *Satisfaction.*

#### § 45-36.2. Obligation of good faith.

**Editor's Note.** — Session Laws 2005-123, s. 9.1, as added by Session Laws 2006-226, s. 28, provides: "The Revisor of Statutes shall cause to be printed at the appropriate locations in the General Statutes all relevant portions of the

official comments to the Uniform Residential Mortgage Satisfaction Act and all explanatory comments of the drafters of this act as the Revisor deems appropriate."

#### § 45-36.3. Notification by mortgagee of satisfaction of provisions of deed of trust or mortgage, or other instrument; civil penalty.

**Editor's Note.** — Session Laws 2005-123, s. 9.1, as added by Session Laws 2006-226, s. 28, provides: "The Revisor of Statutes shall cause to be printed at the appropriate locations in the General Statutes all relevant portions of the

official comments to the Uniform Residential Mortgage Satisfaction Act and all explanatory comments of the drafters of this act as the Revisor deems appropriate."

#### § 45-36.4. Definitions.

**Editor's Note.** —

Session Laws 2005-123, s. 9.1, as added by Session Laws 2006-226, s. 28, provides: "The Revisor of Statutes shall cause to be printed at the appropriate locations in the General Stat-

utes all relevant portions of the official comments to the Uniform Residential Mortgage Satisfaction Act and all explanatory comments of the drafters of this act as the Revisor deems appropriate."

#### § 45-36.5. Notification: manner of giving and effective date.

**Editor's Note.** —

Session Laws 2005-123, s. 9.1, as added by Session Laws 2006-226, s. 28, provides: "The Revisor of Statutes shall cause to be printed at the appropriate locations in the General Stat-

utes all relevant portions of the official comments to the Uniform Residential Mortgage Satisfaction Act and all explanatory comments of the drafters of this act as the Revisor deems appropriate."

#### § 45-36.6. Document of rescission: effect; liability for wrongful recording.

(a) In this section, "document of rescission" means a document stating that an identified satisfaction or affidavit of satisfaction of a security instrument was recorded erroneously or that a security instrument was satisfied of record erroneously, the secured obligation remains unsatisfied, and the security instrument remains in force.



(b) If a person records a satisfaction or affidavit of satisfaction of a security instrument in error or if a security instrument is satisfied of record erroneously by any other means, the person or the secured creditor may execute and record a document of rescission. The document of rescission must be duly acknowledged before an officer authorized to make acknowledgments. Upon recording, the document rescinds an erroneously recorded satisfaction or affidavit and the erroneous satisfaction of record of the security instrument and reinstates the security instrument.

(c) A recorded document of rescission has no effect on the rights of a person that:

- (1) Records an interest in the real property described in a security instrument after the recording of the satisfaction or affidavit of satisfaction of the security instrument or the erroneous satisfaction of record of the security instrument by other means and before the recording of the document of rescission; and
- (2) Would otherwise have priority over or take free of the lien created by the security instrument as reinstated under Chapter 47 of the General Statutes.

(d) A person that erroneously or wrongfully records a document of rescission is liable to any person injured thereby for the actual loss caused by the recording and reasonable attorneys' fees and costs. (2005-123, s. 1; 2006-259, s. 52(b); 2006-264, s. 40(a).)

**Editor's Note. —**

Session Laws 2005-123, s. 9.1, as added by Session Laws 2006-226, s. 28, provides: "The Revisor of Statutes shall cause to be printed at the appropriate locations in the General Statutes all relevant portions of the official comments to the Uniform Residential Mortgage

Satisfaction Act and all explanatory comments of the drafters of this act as the Revisor deems appropriate."

**Effect of Amendments. —** Session Laws 2006-264, s. 40(a), as amended by 2006-259, s. 52(b), effective October 1, 2006, added the second sentence in subsection (b).

## § 45-36.7. Payoff statement: request and content.

**Editor's Note. —**

Session Laws 2005-123, s. 9.1, as added by Session Laws 2006-226, s. 28, provides: "The Revisor of Statutes shall cause to be printed at the appropriate locations in the General Stat-

utes all relevant portions of the official comments to the Uniform Residential Mortgage Satisfaction Act and all explanatory comments of the drafters of this act as the Revisor deems appropriate."

## § 45-36.8. Understated payoff statement: correction; effect.

**Editor's Note. —**

Session Laws 2005-123, s. 9.1, as added by Session Laws 2006-226, s. 28, provides: "The Revisor of Statutes shall cause to be printed at the appropriate locations in the General Stat-

utes all relevant portions of the official comments to the Uniform Residential Mortgage Satisfaction Act and all explanatory comments of the drafters of this act as the Revisor deems appropriate."

## § 45-36.9. Secured creditor to submit satisfaction for recording; liability for failure.

**Editor's Note. —**

Session Laws 2005-123, s. 9.1, as added by Session Laws 2006-226, s. 28, provides: "The Revisor of Statutes shall cause to be printed at the appropriate locations in the General Stat-

utes all relevant portions of the official comments to the Uniform Residential Mortgage Satisfaction Act and all explanatory comments of the drafters of this act as the Revisor deems appropriate."

## § 45-36.10. Content and effect of satisfaction.

### Editor's Note. —

Session Laws 2005-123, s. 9.1, as added by Session Laws 2006-226, s. 28, provides: "The Revisor of Statutes shall cause to be printed at the appropriate locations in the General Stat-

utes all relevant portions of the official comments to the Uniform Residential Mortgage Satisfaction Act and all explanatory comments of the drafters of this act as the Revisor deems appropriate."

## § 45-36.11. Satisfaction: form.

### Editor's Note. —

Session Laws 2005-123, s. 9.1, as added by Session Laws 2006-226, s. 28, provides: "The Revisor of Statutes shall cause to be printed at the appropriate locations in the General Stat-

utes all relevant portions of the official comments to the Uniform Residential Mortgage Satisfaction Act and all explanatory comments of the drafters of this act as the Revisor deems appropriate."

## § 45-36.12. Limitation of secured creditor's liability.

### Editor's Note. —

Session Laws 2005-123, s. 9.1, as added by Session Laws 2006-226, s. 28, provides: "The Revisor of Statutes shall cause to be printed at the appropriate locations in the General Stat-

utes all relevant portions of the official comments to the Uniform Residential Mortgage Satisfaction Act and all explanatory comments of the drafters of this act as the Revisor deems appropriate."

## § 45-36.13. Eligibility to serve as satisfaction agent.

### Editor's Note. —

Session Laws 2005-123, s. 9.1, as added by Session Laws 2006-226, s. 28, provides: "The Revisor of Statutes shall cause to be printed at the appropriate locations in the General Stat-

utes all relevant portions of the official comments to the Uniform Residential Mortgage Satisfaction Act and all explanatory comments of the drafters of this act as the Revisor deems appropriate."

## § 45-36.14. Affidavit of satisfaction: notification to secured creditor.

### Editor's Note. —

Session Laws 2005-123, s. 9.1, as added by Session Laws 2006-226, s. 28, provides: "The Revisor of Statutes shall cause to be printed at the appropriate locations in the General Stat-

utes all relevant portions of the official comments to the Uniform Residential Mortgage Satisfaction Act and all explanatory comments of the drafters of this act as the Revisor deems appropriate."

## § 45-36.15. Affidavit of satisfaction: authorization to submit for recording.

### Editor's Note. —

Session Laws 2005-123, s. 9.1, as added by Session Laws 2006-226, s. 28, provides: "The Revisor of Statutes shall cause to be printed at the appropriate locations in the General Stat-

utes all relevant portions of the official comments to the Uniform Residential Mortgage Satisfaction Act and all explanatory comments of the drafters of this act as the Revisor deems appropriate."

## § 45-36.16. Affidavit of satisfaction: content.

### Editor's Note. —

Session Laws 2005-123, s. 9.1, as added by Session Laws 2006-226, s. 28, provides: "The

Revisor of Statutes shall cause to be printed at the appropriate locations in the General Statutes all relevant portions of the official com-

ments to the Uniform Residential Mortgage Satisfaction Act and all explanatory comments

of the drafters of this act as the Revisor deems appropriate.”

## § 45-36.17. Affidavit of satisfaction: form.

### **Editor’s Note. —**

Session Laws 2005-123, s. 9.1, as added by Session Laws 2006-226, s. 28, provides: “The Revisor of Statutes shall cause to be printed at the appropriate locations in the General Stat-

utes all relevant portions of the official comments to the Uniform Residential Mortgage Satisfaction Act and all explanatory comments of the drafters of this act as the Revisor deems appropriate.”

## § 45-36.18. Affidavit of satisfaction: effect.

### **Editor’s Note. —**

Session Laws 2005-123, s. 9.1, as added by Session Laws 2006-226, s. 28, provides: “The Revisor of Statutes shall cause to be printed at the appropriate locations in the General Stat-

utes all relevant portions of the official comments to the Uniform Residential Mortgage Satisfaction Act and all explanatory comments of the drafters of this act as the Revisor deems appropriate.”

## § 45-36.19. Liability of satisfaction agent.

### **Editor’s Note. —**

Session Laws 2005-123, s. 9.1, as added by Session Laws 2006-226, s. 28, provides: “The Revisor of Statutes shall cause to be printed at the appropriate locations in the General Stat-

utes all relevant portions of the official comments to the Uniform Residential Mortgage Satisfaction Act and all explanatory comments of the drafters of this act as the Revisor deems appropriate.”

## § 45-36.20. Trustee’s satisfaction of deed of trust: content and effect.

### **Editor’s Note. —**

Session Laws 2005-123, s. 9.1, as added by Session Laws 2006-226, s. 28, provides: “The Revisor of Statutes shall cause to be printed at the appropriate locations in the General Stat-

utes all relevant portions of the official comments to the Uniform Residential Mortgage Satisfaction Act and all explanatory comments of the drafters of this act as the Revisor deems appropriate.”

## § 45-36.21. Trustee’s satisfaction of deed of trust: form.

### **Editor’s Note. —**

Session Laws 2005-123, s. 9.1, as added by Session Laws 2006-226, s. 28, provides: “The Revisor of Statutes shall cause to be printed at the appropriate locations in the General Stat-

utes all relevant portions of the official comments to the Uniform Residential Mortgage Satisfaction Act and all explanatory comments of the drafters of this act as the Revisor deems appropriate.”

## § 45-37. Satisfaction of record of security instruments.

(a) Subject to the provisions of G.S. 45-36.9(a) and G.S. 45-73 relating to security instruments which secure future advances, any security instrument intended to secure the payment of money or the performance of any other obligation registered as required by law may be satisfied of record and thereby discharged and released of record in the following manner:

- (1) Security instruments satisfied of record prior to October 1, 2005, pursuant to this subdivision as it was in effect prior to October 1, 2005, shall be deemed satisfied of record, discharged, and released.
- (2) By presentation of any original security instrument accompanied with the original bond, note, or other instrument thereby secured to the



register of deeds, with the endorsement of payment and satisfaction appearing thereon and made by:

- a. The secured creditor,
- b. The trustee or substitute trustee, if the security instrument is a deed of trust,
- c. An assignee of the secured creditor, or
- d. Any bank, savings and loan association, savings bank, or credit union chartered under the laws of this or any other state or the United States having an office or branch in the State of North Carolina, when so endorsed in the name of the institution by an officer thereof.

The register of deeds is not required to verify or make inquiry concerning the authority of the person making the endorsement of payment and satisfaction to do so. Only upon presentation of the original instruments with endorsement of payment and satisfaction appearing thereon shall the register of deeds record a record of satisfaction as described in G.S. 45-37.2(b). The person so claiming satisfaction, performance or discharge of the debt or other obligation may retain possession of all of the instruments presented. The presentation of the security instrument alone to the register of deeds, with endorsement of payment, satisfaction, performance or discharge, shall be sufficient if the security instrument itself sets forth the obligation secured or the performance of any other obligation and does not call for or recite any note, bond or other instrument secured by it.

(3) By presentation to the register of deeds by:

- a. The grantor,
- b. The mortgagor, or
- c. An agent, attorney or successor in title of the grantor or mortgagor of any original security instrument intended to secure the payment of money or the performance of any other obligation, together with the original bond, note or other instrument secured thereby, or by presentation of the original security instrument alone if such instrument itself sets forth the obligation secured or other obligation to be performed and does not call for or recite any note, bond or other instrument secured by it, if at the time of presentation, all such instruments are more than 10 years old counting from the maturity date of the last obligation secured. If the instrument or instruments so presented have an endorsement of partial payment, satisfaction, performance or discharge within the said period of 10 years, the period of 10 years shall be counted from the date of the most recent endorsement.

Only upon presentation of the original instruments shall the register of deeds record a record of satisfaction as described in G.S. 45-37.2(b).

(4) By presentation to the register of deeds of any original security instrument given to secure the bearer or holder of any negotiable instruments transferable by delivery, together with all the evidences of indebtedness secured thereby, marked paid and satisfied in full and signed by the bearer or holder thereof.

Only upon presentation of the original security instruments, and the originals of evidences of indebtedness properly marked shall the register of deeds record a record of satisfaction as described in G.S. 45-37.2(b), which record of satisfaction shall be valid and binding upon all persons, if no person rightfully entitled to the security instrument or evidences of indebtedness has previously notified the register of deeds by means of a written affidavit of the loss or theft of

the security instrument or evidences of indebtedness and has caused the register of deeds to record the affidavit of loss or theft as a separate document, as required by G.S. 161-14.1.

Upon receipt of an affidavit of loss or theft of the security instrument or evidences of indebtedness that identify the security instrument, the original parties to the security instrument, and the recording data for the security instrument, the register of deeds shall record a record of satisfaction, as described in G.S. 45-37.2(b). The security instrument shall not be presented for satisfaction after such recording of a record of satisfaction or marginal entry until the ownership of said instrument shall have been lawfully determined. Nothing in this subdivision (4) shall be construed to impair the negotiability of any instrument otherwise properly negotiable, nor to impair the rights of any innocent purchaser for value thereof.

- (5) Security instruments satisfied of record prior to October 1, 2005, pursuant to this subdivision as it was in effect prior to October 1, 2005, shall be deemed satisfied of record, discharged, and released.
- (6) Security instruments satisfied of record prior to October 1, 2005, pursuant to this subdivision as it was in effect prior to October 1, 2005, shall be deemed satisfied of record, discharged, and released.
- (7) By recording:
  - a. A satisfaction document that satisfies the requirements of G.S. 45-36.10,
  - b. An affidavit of satisfaction that satisfies the requirements of G.S. 45-36.16, or
  - c. A trustee's satisfaction that satisfies the requirements of G.S. 45-36.20, but only if the security instrument is a deed of trust.

The register of deeds shall not be required to verify or make inquiry concerning (i) the truth of the matters stated in any satisfaction document, affidavit of satisfaction, or trustee's satisfaction, or (ii) the authority of the person executing any satisfaction document, affidavit, or trustee's satisfaction to do so.

(b) It shall be conclusively presumed that the conditions of any security instrument securing the payment of money or securing the performance of any other obligation or obligations have been complied with or the debts secured thereby paid or obligations performed, as against creditors or purchasers for valuable consideration from the mortgagor or grantor, from and after the expiration of 15 years from whichever of the following occurs last:

- (1) The date when the conditions of the security instrument were required by its terms to have been performed, or
- (2) The date of maturity of the last installment of debt or interest secured thereby;

provided that the holder of the indebtedness secured by the security instrument or party secured by any provision thereof may file an affidavit with the register of deeds which affidavit shall specifically state:

- (1) The amount of debt unpaid, which is secured by the security instrument; or
- (2) In what respect any other condition thereof shall not have been complied with; or

may record a separate instrument signed by the secured creditor and witnessed by the register of deeds stating:

- (1) Any payments that have been made on the indebtedness or other obligation secured by the security instrument including the date and amount of payments and
- (2) The amount still due or obligations not performed under the security instrument.



The effect of the filing of the affidavit or the recording of a separate instrument made as herein provided shall be to postpone the effective date of the conclusive presumption of satisfaction to a date 15 years from the filing of the affidavit or from the recording of the separate instrument. There shall be only one postponement of the effective date of the conclusive presumption provided for herein. The register of deeds shall record and index the affidavit provided for herein or the separate instrument made as herein provided as a subsequent instrument in accordance with G.S. 161-14.1. This subsection shall not apply to any security instrument made or given by any railroad company, or to any agreement of conditional sale, equipment trust agreement, lease, chattel mortgage or other instrument relating to the sale, purchase or lease of railroad equipment or rolling stock, or of other personal property.

(c) Repealed by Session Laws 1991, c. 114, s. 4.

(d) Repealed by Session Laws 2005-123, s. 1.

(e) Any transaction subject to the provisions of the Uniform Commercial Code, Chapter 25 of the General Statutes, is controlled by the provisions of that act and not by this section.

(f) Whenever this section requires a signature or endorsement, that signature or endorsement shall be followed by the name of the person signing or endorsing the document printed, stamped, or typed so as to be clearly legible.

(g) The satisfaction of record of a security instrument pursuant to this section shall operate and have the same effect as a duly executed and recorded deed of release or reconveyance of the property described in the security instrument and shall release and discharge (i) all the interest of the secured creditor in the real property arising from the security instrument and, (ii) if the security instrument is a deed of trust, all the interest of the trustee or substitute trustee in the real property arising from the deed of trust. (1870-1, c. 217; Code, s. 1271; 1891, c. 180; 1893, c. 36; 1901, c. 46; Rev., s. 1046; 1917, c. 49, s. 1; c. 50, s. 1; C.S., s. 2594; 1923, c. 192, s. 1; c. 195; 1935, c. 47; 1945, c. 988; 1947, c. 880; 1951, c. 292, s. 1; 1967, c. 765, ss. 1-5; 1969, c. 746; 1975, c. 305; 1985, c. 219; 1987, c. 405, s. 1; c. 620, s. 1; 1989, c. 434, s. 1; 1991, c. 114, s. 4; 1995, c. 292, ss. 1, 2, 5; 1995 (Reg. Sess., 1996), c. 604, s. 1; 2005-123, s. 1; 2006-226, s. 12; 2006-259, s. 2; 2006-264, s. 40(b).)

**Editor's Note.** — Session Laws 2005-123, s. 9.1, as added by Session Laws 2006-226, s. 28, provides: "The Revisor of Statutes shall cause to be printed at the appropriate locations in the General Statutes all relevant portions of the official comments to the Uniform Residential Mortgage Satisfaction Act and all explanatory comments of the drafters of this act as the Revisor deems appropriate."

Session Laws 2006-259, s. 2, which inserted "prior to October 1, 2005" in subdivisions (a)(1), (5) and (6), was repealed by S.L. 2006-259, s. 3,

which provided that: "If Senate Bill 1479, 2005 Regular Session (S.L. 2006-226), becomes law, Section 2 of this act is repealed."

**Effect of Amendments.** —

Session Laws 2006-226, s. 12, effective August 10, 2006, inserted "prior to October 1, 2005" the first time it appears in subdivisions (a)(1), (a)(5), and (a)(6).

Session Laws 2006-264, s. 40(b), effective October 10, 2005, inserted "prior to October 1, 2005" the first time it appears in subdivisions (a)(1), (a)(5), and (a)(6).

## § 45-37.2. Recording satisfactions of security instruments.

**Editor's Note.** — Session Laws 2005-123, s. 9.1, as added by Session Laws 2006-226, s. 28, provides: "The Revisor of Statutes shall cause to be printed at the appropriate locations in the General Statutes all relevant portions of the

official comments to the Uniform Residential Mortgage Satisfaction Act and all explanatory comments of the drafters of this act as the Revisor deems appropriate."

## § 45-38. Recording of foreclosure.

In case of foreclosure of any deed of trust, or mortgage, the trustee,



mortgagee, or the trustee's or mortgagee's attorney shall record a notice of foreclosure that includes the date when, and the person to whom, a conveyance was made by reason of the foreclosure. In the event the entire obligation secured by a mortgage or deed of trust is satisfied by a sale of only a part of the property embraced within the terms of the mortgage or deed of trust, the trustee, mortgagee, or the trustee's or mortgagee's attorney shall indicate in the notice of foreclosure which property was sold.

A notice of foreclosure shall consist of a separate instrument, or that part of the original deed of trust or mortgage rerecorded, reciting the information required hereinabove, the names of the original parties to the original instrument foreclosed, and the recording data for the instrument foreclosed. A notice of foreclosure shall be indexed by the register of deeds in accordance with G.S. 161-14.1. (1923, c. 192, s. 2; C.S., s. 2594(a); 1949, c. 720, s. 2; 1963, c. 1021, s. 2; 1971, c. 985; 1991, c. 114, s. 3; 1993, c. 305, s. 24; 2005-123, s. 1; 2006-226, s. 13.)

**Editor's Note.** — Session Laws 2005-123, s. 9.1, as added by Session Laws 2006-226, s. 28, provides: "The Revisor of Statutes shall cause to be printed at the appropriate locations in the General Statutes all relevant portions of the official comments to the Uniform Residential Mortgage Satisfaction Act and all explanatory

comments of the drafters of this act as the Revisor deems appropriate."

**Effect of Amendments.** —

Session Laws 2006-226, s. 13, effective August 10, 2006, substituted "foreclosure" for "forfeiture," and "G.S. 161-14.1" for "G.S. 161.14.1" in the last sentence of the second paragraph.

## § 45-41. Recorded deed of release of mortgagee's representative.

**Editor's Note.** — Session Laws 2005-123, s. 9.1, as added by Session Laws 2006-226, s. 28, provides: "The Revisor of Statutes shall cause to be printed at the appropriate locations in the General Statutes all relevant portions of the

official comments to the Uniform Residential Mortgage Satisfaction Act and all explanatory comments of the drafters of this act as the Revisor deems appropriate."

## § 45-42. Satisfaction of corporate mortgages by corporate officers.

**Editor's Note.** — Session Laws 2005-123, s. 9.1, as added by Session Laws 2006-226, s. 28, provides: "The Revisor of Statutes shall cause to be printed at the appropriate locations in the General Statutes all relevant portions of the

official comments to the Uniform Residential Mortgage Satisfaction Act and all explanatory comments of the drafters of this act as the Revisor deems appropriate."

### § 45-42.1. Corporate cancellation of lost mortgages by register of deeds.

**Editor's Note.** — Session Laws 2005-123, s. 9.1, as added by Session Laws 2006-226, s. 28, provides: "The Revisor of Statutes shall cause to be printed at the appropriate locations in the General Statutes all relevant portions of the

official comments to the Uniform Residential Mortgage Satisfaction Act and all explanatory comments of the drafters of this act as the Revisor deems appropriate."

**Chapter 46.**  
**Partition.**

ARTICLE 1.

*Partition of Real Property.*

**§ 46-17.1. Dedication of streets.**

CASE NOTES

**Cited** in Wright v. Town of Matthews, — N.C. App. —, 627 S.E.2d 650, 2006 N.C. App. LEXIS 702 (2006).

## Chapter 47.

### Probate and Registration.

#### Article 1.

##### Probate.

Sec.

47-14. Register of deeds to verify the presence of proof or acknowledgement and register instruments; order by judge; instruments to which register of deeds is a party.

#### Article 2.

##### Registration.

47-29.1. Recordation of environmental notices.

#### Article 3.

##### Forms of Acknowledgment, Probate and Order of Registration.

47-37.1. Other forms of proof.

Sec.

47-38. Acknowledgment by grantor.

47-41.01. Corporate conveyances.

47-41.02. Other forms of probate for corporate conveyances.

47-41.2. Technical defects.

47-46.1. Notice of satisfaction of deed of trust, mortgage, or other instrument.

47-46.2. Certificate of satisfaction of deed of trust, mortgage, or other instrument.

## ARTICLE 1.

### *Probate.*

#### § 47-14. Register of deeds to verify the presence of proof or acknowledgement and register instruments; order by judge; instruments to which register of deeds is a party.

(a) The register of deeds shall not accept for registration any instrument that requires proof or acknowledgement unless the execution of the instrument by one or more signers appears to have been proved or acknowledged before an officer with the apparent authority to take proofs or acknowledgements, and the said proof or acknowledgement includes the officer's signature, commission expiration date, and official seal, if required. The register of deeds shall accept an instrument for registration that does not require proof or acknowledgement if the instrument otherwise satisfies the requirements of G.S. 161-14. Any document previously recorded or any certified copy of any document previously recorded may be rerecorded, regardless of whether it has been changed or altered, or it is being rerecorded pursuant to G.S. 47-36.1. The register of deeds shall not be required to verify or make inquiry concerning (i) the legal sufficiency of any proof or acknowledgement, (ii) the authority of any officer who took a proof or acknowledgement, (iii) the legal sufficiency of any document presented for registration, or (iv) upon presentation of the original document for re-recording, whether the original document has been changed or altered.

(b) If a register of deeds denies registration pursuant to subsection (a), the person offering the instrument for registration may present the instrument to a judge, as provided in subsection (c), and the judge shall determine that if the instrument requires proof or acknowledgement and if the signature of one or more signers has been proved or acknowledged before an officer authorized to



take proofs and acknowledgements, and if said proof or acknowledgement includes the officer's signature and commission expiration date and official seal, if required, the judge shall so adjudge, and shall order the instrument to be registered, together with the certificates, and the register of deeds shall register them accordingly.

(c) Application for an order for registration pursuant to subsection (b) of this section shall be made to any judge of the district court in the district including the county in which the instrument is to be registered.

(d) Registration of an instrument pursuant to this section is not effective with regard to parties who have not executed the instrument or whose execution thereof has not been duly proved or acknowledged.

(e) Any instrument required or permitted by law to be registered in which the register of deeds of the county of registration is a party may be proved or acknowledged before any magistrate or any notary public. Any such instrument presented for registration shall be examined by the clerk of superior court of the county of registration and if it appears that the execution and acknowledgment are in due form he shall so certify and the instrument shall then be recorded in the office of the register of deeds.

(f) The acceptance of a record for registration by the register of deeds shall give rise to a presumption that, at the time the record was presented for registration, a clear and legible image of the notary's official seal was affixed or embossed on the record near the notary's official signature. This presumption shall apply regardless of whether the image is legible or photographically reproduced in the records maintained by the register of deeds. A register of deeds may not refuse to accept a record for registration because a notarial seal does not satisfy the requirements of G.S. 10B-37. (1899, c. 235, s. 7; 1905, c. 414; Rev., s. 999; C.S., s. 3305; 1921, c. 91; 1939, c. 210, s. 2; 1967, c. 639, s. 1; 1969, c. 664, s. 2; 1973, c. 60; 2005-123, s. 2; 2006-59, s. 26; 2006-259, s. 52(a)-(b); 2006-264, s. 40(c).)

**Editor's Note.** — Session Laws 2005-123, s. 9.1, as added by Session Laws 2006-226, s. 28, provides: "The Revisor of Statutes shall cause to be printed at the appropriate locations in the General Statutes all relevant portions of the official comments to the Uniform Residential Mortgage Satisfaction Act and all explanatory comments of the drafters of this act as the Revisor deems appropriate."

**Effect of Amendments.** —

Session Laws 2006-59, s. 26, effective October 1, 2006, and except as otherwise set forth in this act, applicable to notarial acts performed on or after that date, added subsection (f).

Session Laws 2006-264, s. 40(c), as amended by Session Laws 2006-259, s. 52(a), effective October 1, 2005, in subsection (a), inserted "it has been changed or altered, or" in the third sentence and added item (iv) at the end.

## ARTICLE 2.

### *Registration.*

## § 47-18. Conveyances, contracts to convey, options and leases of land.

### CASE NOTES

#### IV. Persons Protected and Rights Thereof.

##### IV. PERSONS PROTECTED AND RIGHTS THEREOF.

##### **Who Are Protected, Generally.** —

Because a real estate installment sales con-

tract was recorded before a later transferee's deed to the same property was recorded, and because the buyers under the contract paid all money due under the contract, the buyers had valid title to the property and, pursuant to G.S.

47-18, were protected against the transferee, a subsequent purchaser for value. *Watson v. Millers Creek Lumber Co.*, — N.C. App. —, 631 S.E.2d 839, 2006 N.C. App. LEXIS 1563 (2006).

### § 47-29.1. Recordation of environmental notices.

(a) A permit for the disposal of waste on land shall be recorded as provided in G.S. 130A-301.

(a1) The disposal of land clearing and inert debris in a landfill with a disposal area of ½ acre or less pursuant to G.S. 130A-301.1 shall be recorded as provided in G.S. 130A-301.1(c).

(a2) A Notice of Open Dump shall be recorded as provided in G.S. 130A-301(f).

(a3) Expired pursuant to Session Laws 1995, c. 502, s. 4, as amended by Session Laws 2001-357, s. 2, effective September 30, 2003.

(b) An inactive hazardous substance or waste disposal site shall be recorded as provided in G.S. 130A-310.8.

(c) A Notice of Brownfields Property shall be recorded as provided in G.S. 130A-310.35.

(d) A Notice of Oil or Hazardous Substance Discharge Site shall be recorded as provided in G.S. 143-215.85A.

(e) A Notice of Dry-Cleaning Solvent Remediation shall be recorded as provided in G.S. 143-215.104M.

(f) A Notice of Contaminated Site shall be recorded as provided in G.S. 143B-279.10.

(g) A Notice of Residual Petroleum shall be recorded as provided in G.S. 143B-279.11.

(h) A land-use restriction that provides for the maintenance of stormwater best management practices or site consistency with approved stormwater project plans shall be recorded as provided in G.S. 143-214.7(c1). (1995, c. 502, s. 2.1; 1997-330, s. 1; 2001-357, s. 2; 2001-384, s. 10; 2006-246, s. 16(a).)

**Effect of Amendments.** — Session Laws 2006-246, s. 16(a), effective retroactively to July 1, 2006, added subsection (h).

## ARTICLE 3.

### *Forms of Acknowledgment, Probate and Order of Registration.*

#### § 47-37.1. Other forms of proof.

(a) The proof and acknowledgment forms set forth in this Article are not exclusive. Without regard to whether an instrument presented for registration was signed by an individual acting in his or her own right or by an individual acting in a representative or fiduciary capacity, a notarial certificate that complies with the provisions of Part 6 of Article 1 of Chapter 10B shall be deemed a sufficient form of probate or acknowledgment for purposes of this Chapter. Use of a notarial certificate that satisfies the requirements of Part 6 of Article 1 of Chapter 10B shall not be grounds for a register of deeds to refuse to accept a record for registration.

(b) When an instrument presented for registration purports to be signed by an individual in a representative or fiduciary capacity, the acknowledgment or proof of that individual's signature may:

- (1) State that the individual signed the instrument in a representative or fiduciary capacity.
- (2) State that the individual who signed the instrument in a representative or fiduciary capacity had due authority to do so.



(3) Identify the represented person or the fiduciary capacity.

(c) This section relates only to the form of proof or acknowledgment. The capacity and authority of the individual who signs an instrument presented for registration are governed by other provisions of law.

(d) This section applies to proofs and acknowledgments made before, on, or after December 1, 2005. (2005-391, s. 9; 2006-59, s. 27.)

**Effect of Amendments.** — Session Laws 2006-59, s. 27, effective October 1, 2006, and except as otherwise set forth in this act, applicable to notarial acts performed on or after that date, added “or fiduciary” throughout the section preceding “capacity”; deleted “(G.S. 10B-25

et. seq.)” following “Article 1 of Chapter 10B” in the second sentence of subsection (a); substituted “may” for “may, but is not required to” at the end of subsection (b); substituted “the fiduciary capacity” for “entity” in subdivision (b)(3); and added subsections (c) and (d).

§ 47-38. Acknowledgment by grantor.

When properly completed, a certificate in substantially the following form may be used and shall be sufficient under the law of this State to satisfy the requirements for a notarial certificate for one or more individuals, acting in his, her, or their own right or, whether or not so stated in the notarial certificate, in a representative or fiduciary capacity, including one or more individuals acting on behalf of an unincorporated association, as an officer or director of a corporation, as a partner of a general or limited partnership, as a manager or member of a limited liability company, as the trustee of a trust, as the personal representative of a decedent’s estate, as an agent or attorney in fact for another, as the guardian of a minor or an incompetent, or as a public official. The authorization of the form in this section does not preclude the use of other forms. This section applies to notarial certificates made before, on, and after December 1, 2005.

North Carolina, \_\_\_\_\_ County.

I (here give the name of the official and his official title), do hereby certify that (here give the name of the individual whose acknowledgment is being taken) personally appeared before me this day and acknowledged the due execution of the foregoing instrument. Witness my hand and (where an official seal is required by law) official seal this the \_\_\_\_\_ day of \_\_\_\_\_ (year).

(Official seal.)

\_\_\_\_\_  
(Signature of officer.)  
(Title)

(Rev., s. 1002; C.S., s. 3323; 1945, c. 73, s. 13; 1977, c. 375, s. 12; 2006-59, s. 28.)

**Effect of Amendments.** — Session Laws 2006-59, s. 28, effective October 1, 2006, and except as otherwise set forth in this act, appli-

cable to notarial acts performed on or after that date, rewrote the section.

§ 47-41.01. Corporate conveyances.

(a) The following forms of probate for deeds and other conveyances executed by a corporation shall be deemed sufficient, but shall not exclude other forms of probate which would be deemed sufficient in law.

(b) If the deed or other instrument is executed by an official of the corporation, signing the name of the corporation by him in his official capacity, or any other agent authorized by resolution pursuant to G.S. 47-18.3(e), is sealed with its common or corporate seal, and is attested by another person



who is an attesting official of the corporation, the following form of acknowledgment is sufficient:

\_\_\_\_\_  
(State and county, or other  
description of place where  
acknowledgment is taken)  
I, \_\_\_\_\_,  
(Name of officer taking  
acknowledgment) (Official title of officer  
taking acknowledgment)  
certify that \_\_\_\_\_ personally came before  
(Name of attesting official)  
me this day and acknowledged that he (or she) is \_\_\_\_\_  
(Title of attesting official)  
of \_\_\_\_\_, a corporation, and that by authority duly  
(Name of corporation)  
given and as the act of the corporation, the foregoing instrument was signed in  
its name by its \_\_\_\_\_,  
(Title of official)  
sealed with its corporate seal, and attested by himself (or herself) as its  
\_\_\_\_\_  
(Title of attesting official)  
Witness my hand and official seal, this the \_\_\_\_\_ day of  
\_\_\_\_\_,  
(Month)  
\_\_\_\_\_,  
(Year)

\_\_\_\_\_  
(Signature of officer taking acknowledgment)  
(Official seal, if officer taking  
acknowledgment has one)  
My commission expires \_\_\_\_\_  
(Date of expiration of commission as  
notary public)  
(c) If the deed or other instrument is executed by an official of the  
corporation, signing the name of the corporation in his official capacity, or any  
other agent authorized by resolution pursuant to G.S. 47-18.3(e) the following  
form of acknowledgment is sufficient:

(State and county, or other  
description of place where  
acknowledgment is taken)  
I, \_\_\_\_\_,  
(Name of officer taking  
acknowledgment) (Official title of officer  
taking acknowledgment)  
certify that \_\_\_\_\_ personally came before  
(Name of official)  
me this day and acknowledged that he (or she) is \_\_\_\_\_  
(Title of official)  
of \_\_\_\_\_, a corporation, and that he/she, as  
\_\_\_\_\_, being authorized to do so, executed the  
(Title of official)  
foregoing on behalf of the corporation.  
Witness my hand and official seal, this the \_\_\_\_\_ day of

\_\_\_\_\_,  
(Month)  
\_\_\_\_\_  
(Year)  
\_\_\_\_\_  
(Signature of officer taking acknowledgment)  
(Official seal, if officer taking  
acknowledgment has one)  
My commission expires \_\_\_\_\_  
(Date of expiration of commission as  
notary public)

- (d) For purposes of this section:
- (1) The words “a corporation” following the blank for the name of the corporation may be omitted when the name of the corporation ends with the word “Corporation” or “Incorporated.”
  - (2) The words “My commission expires” and the date of expiration of the notary public’s commission may be omitted except when a notary public is the officer taking the acknowledgment. The fact that these words and this date may be located in a position on the form different from the position indicated in this subsection does not by itself invalidate the form.
  - (3) The phrase “and official seal” and the seal itself may be omitted when the officer taking the acknowledgment has no seal or when such officer is the clerk, assistant clerk, or deputy clerk of the superior court of the county in which the deed or other instrument acknowledged is to be registered.
  - (4) The official of the corporation is the corporation’s chairman, president, chief executive officer, a vice-president or an assistant vice-president, treasurer, or chief financial officer, or any other agent authorized by resolution pursuant to G.S. 47-18.3(e).
  - (5) The attesting official of the corporation is the corporation’s secretary or assistant secretary, trust officer, assistant trust officer, associate trust officer, or in the case of a bank, its secretary, assistant secretary, cashier or assistant cashier.
  - (6) The phrase “sealed with its corporate seal” may be omitted if the seal of the corporation has not been affixed to the instrument being acknowledged.
- (e) The forms of probate set forth in this section may be modified and adopted for use in the probate of deeds and other conveyances and instruments executed by entities other than corporations, including general and limited partnerships, limited liability companies, trusts, and unincorporated associations. This subsection applies to notarial certificates and forms of probate made before, on, or after December 1, 2005. (1991, c. 647, s. 4; 1995 (Reg. Sess., 1996), c. 742, s. 18; 1999-221, s. 1; 2006-59, s. 29.)

**Effect of Amendments.** — Session Laws 2006-59, s. 29, effective October 1, 2006, and except as otherwise set forth in this act, applicable to notarial acts performed on or after that date, added subsection (e).

**§ 47-41.02. Other forms of probate for corporate conveyances.**

(a) The following forms of probate for deeds and other conveyances executed by a corporation shall also be deemed sufficient but shall not exclude other forms of probate which would be deemed sufficient in law.

(b) If the instrument is executed by the president or presiding member or trustee and two other members of the corporation, and sealed with the common seal, the following form shall be sufficient:

North Carolina, \_\_\_\_\_ County.

This \_\_\_\_\_ day of \_\_\_\_\_ A.D. \_\_\_\_\_, personally came before me (here give the name and official title of the officer who signs this certificate) A.B. (here give the name of the subscribing witness), who, being by me duly sworn, says that he knows the common seal of the (here give the name of the corporation), and is also acquainted with C.D., who is the president (or presiding member or trustee), and also with E.F. and G.H., two other members of said corporation; and that he, the said A.B., saw the said president (or presiding member or trustee) and the two said other members sign the said instrument, and saw the said president (or presiding member or trustee) affix the said common seal of said corporation thereto, and that he, the said subscribing witness, signed his name as such subscribing witness thereto in their presence. Witness my hand and (when an official seal is required by law) official seal, this \_\_\_\_\_ day of \_\_\_\_\_ (year).  
(Official seal.)

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(Signature of officer.)

(c) If the deed or other instrument is executed by the president, presiding member or trustee of the corporation, and sealed with its common seal, and attested by its secretary or assistant secretary, either of the following forms of proof and certificate thereof shall be deemed sufficient:

North Carolina, \_\_\_\_\_ County.

This \_\_\_\_\_ day of \_\_\_\_\_, A.D. \_\_\_\_\_, personally came before me (here give name and official title of the officer who signs the certificate) A.B. (here give the name of the attesting secretary or assistant secretary), who, being by me duly sworn, says that he knows the common seal of (here give the name of the corporation), and is acquainted with C.D., who is the president of said corporation, and that he, the said A.B., is the secretary (or assistant secretary) of the said corporation, and saw the said president sign the foregoing (or annexed) instrument, and saw the said common seal of said corporation affixed to said instrument by said president (or that he, the said A.B., secretary or assistant secretary as aforesaid, affixed said seal to said instrument), and that he, the said A.B., signed his name in attestation of the execution of said instrument in the presence of said president of said corporation. Witness my hand and (when an official seal is required by law) official seal, this the \_\_\_\_\_ day of \_\_\_\_\_ (year).  
(Official seal.)

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(Signature of officer.)

North Carolina, \_\_\_\_\_ County.

This is to certify that on the \_\_\_\_\_ day of \_\_\_\_\_, \_\_\_\_\_, before me personally came \_\_\_\_\_ (president, vice-president, secretary or assistant secretary, as the case may be), with whom I am personally acquainted, who, being by me duly sworn, says that \_\_\_\_\_ is the president (or vice-president), and \_\_\_\_\_ is the secretary (or assistant secretary) of the \_\_\_\_\_, the corporation described in and which executed the foregoing instrument; that he knows the common seal of said corporation; that the seal affixed to the foregoing instrument is said common seal, and the name of the corporation was subscribed thereto by the said president (or vice-president), and that said president (or vice-president) and secretary (or assistant secretary) subscribed their names thereto, and said common seal was affixed, all by order of the board of directors of said corporation, and that the said instrument is the act



and deed of said corporation. Witness my hand and (when an official seal is required by law) official seal, this the \_\_\_\_\_ day of \_\_\_\_\_ (year).  
(Official seal.)

\_\_\_\_\_  
(Signature of officer.)

(d) If the deed or other instrument is executed by the signature of the president, vice-president, presiding member or trustee of the corporation, and sealed with its common seal and attested by its secretary or assistant secretary, the following form of proof and certificate thereof shall be deemed sufficient:

This \_\_\_\_\_ day of \_\_\_\_\_, A.D. \_\_\_\_\_, personally came before me (here give name and official title of officer who signs the certificate) A.B., who, being by me duly sworn, says that he is president (vice-president, presiding member or trustee) of the \_\_\_\_\_ Company, and that the seal affixed to the foregoing (or annexed) instrument in writing is the corporate seal of said company, and that said writing was signed and sealed by him in behalf of said corporation by its authority duly given. And the said A.B. acknowledged the said writing to be the act and deed of said corporation.  
(Official seal.)

\_\_\_\_\_  
(Signature of officer.)

(e) All corporate conveyances probated and recorded prior to February 14, 1939, wherein the same was attested by the assistant secretary, instead of the secretary, and otherwise regular, are hereby validated as if attested by the secretary of the corporation.

(f) The following forms of probate for contracts in writing for the purchase of personal property by corporations providing for a lien on the property or the retention of a title thereto by the vendor as security for the purchase price or any part thereof, or chattel mortgages, chattel deeds of trust, and conditional sales of personal property executed by a corporation shall be deemed sufficient but shall not exclude other forms of probate which would be deemed sufficient in law:

North Carolina

\_\_\_\_\_ County  
I, \_\_\_\_\_, do hereby certify that \_\_\_\_\_  
(Name of president, secretary or treasurer)  
personally came before me this day and acknowledged that he is  
\_\_\_\_\_ of \_\_\_\_\_ and acknowledged,  
(President, secretary (Name of corporation)  
or treasurer)  
on behalf of \_\_\_\_\_, the grantor, the due  
(Name of corporation)  
execution of the foregoing instrument.

Witness my hand and official seal, this \_\_\_\_\_ day of \_\_\_\_\_, \_\_\_\_\_  
(Official seal)

\_\_\_\_\_  
(Title of officer)

\_\_\_\_\_  
(Name of state)

\_\_\_\_\_  
(County)

I, \_\_\_\_\_ (Name of officer taking proof) \_\_\_\_\_ (Official title of officer taking proof)

of \_\_\_\_\_, certify that  
(County) (Name of state)  
\_\_\_\_\_ personally appeared before  
(Name of subscribing witness)  
me, and being duly sworn, stated that in his presence  
\_\_\_\_\_  
(Name of president, secretary or treasurer of maker)  
(signed the foregoing instrument) (acknowledged the execution of the foregoing  
instrument.) (Strike out the words not applicable.)  
Witness my hand and official seal, this \_\_\_\_\_ day of  
\_\_\_\_\_, \_\_\_\_\_  
(Month) (Year)

\_\_\_\_\_  
(Signature of official taking proof)

\_\_\_\_\_  
(Official title of official taking proof)

My commission expires \_\_\_\_\_  
(Date of expiration of official's  
commission)

(g) All deeds and other conveyances executed on or before April 12, 1974, by the president, any vice-president, assistant vice-president, manager, comptroller, treasurer, assistant treasurer, trust officer or assistant trust officer, or chairman or vice-chairman of a corporation are hereby validated to the extent that such deeds or other conveyances were otherwise properly executed, probated, and recorded.

(h) The forms of probate set forth in this section may be modified and adopted for use in the probate of deeds and other conveyances and instruments executed by entities other than corporations, including general and limited partnership, limited liability companies, trusts, and unincorporated associations. This subsection applies to notarial certificates and forms of probate made before, on, or after December 1, 2005. (1991, c. 647, s. 5; 1991 (Reg. Sess., 1992), c. 1030, s. 14; 1999-456, s. 59; 2006-59, s. 30.)

**Effect of Amendments.** — Session Laws 2006-59, s. 30, effective October 1, 2006, and except as otherwise set forth in this act, applicable to notarial acts performed on or after that date, added subsection (h).

§ 47-41.2. Technical defects.

(a) Technical defects, including technical defects under G.S. 10B-68, and errors or omissions in a form of probate or other notarial certificate, shall not affect the sufficiency, validity, or enforceability of the form of probate or the notarial certificate or the related instrument or document. A register of deeds may not refuse to accept an instrument or document for registration because of technical defects, errors, or omissions in a form of probate or other notarial certificate. This subsection applies to notarial certificates and forms of probate made on or after December 1, 2005.

(b) This section does not apply to the requirements for registration contained in G.S. 47-14(a) and a register of deeds shall not accept for registration an instrument that does not comply with the requirements of G.S. 47-14(a). (2006-59, s. 31; 2006-199, s. 3.)

**Editor's Note.** — Session Laws 2006-59, s. 33, made this section effective October 1, 2006, and except as otherwise set forth in this act, applicable to notarial acts performed on or after that date.

**Effect of Amendments.** — Session Laws 2006-199, s. 3, effective July 1, 2006, added the last sentence in subsection (a).

# **§ 47-46.1. Notice of satisfaction of deed of trust, mortgage, or other instrument.**

No particular phrasing is required for a notice of satisfaction pursuant to G.S. 45-37(a)(5) as it was prior to October 1, 2005, a satisfaction of a security instrument under G.S. 45-36.10, or a trustee's satisfaction under G.S. 45-36.20. The following form, when properly completed, is sufficient to satisfy the requirements (i) for a notice of satisfaction under G.S. 45-37(a)(5) as it was in effect prior to October 1, 2005, (ii) for a satisfaction under G.S. 45-36.10 if the form is signed and acknowledged by the secured creditor, and (iii) for a trustee's satisfaction under G.S. 45-36.20 if the security instrument is a deed of trust and the form is signed and acknowledged by the trustee:

North Carolina, \_\_\_\_\_ County.

I, \_\_\_\_\_ (name of trustee or mortgagee), certify that the debt or other obligation in the amount of \_\_\_\_\_ secured by the (deed of trust)(mortgage)(other instrument) executed by \_\_\_\_\_ (grantor)(mortgagor), \_\_\_\_\_ (trustee)(leave blank if mortgage), and \_\_\_\_\_ (beneficiary)(mortgagee), and recorded in \_\_\_\_\_ County at \_\_\_\_\_ (book and page) was satisfied on \_\_\_\_\_ (date of satisfaction).

\_\_\_\_\_  
(Signature of trustee or mortgagee)

(Acknowledgment before officer authorized to take acknowledgments)  
My commission expires \_\_\_\_\_ (Date of expiration of official's commission).  
(1987, c. 405, s. 2; c. 662, s. 4; 1989, c. 434, s. 2; 2005-123, s. 5; 2006-264, s. 82(a).)

**Editor's Note.** — Session Laws 2006-264, s. 82(a), which amended the introductory language to S.L. 2005-123, s. 5, was repealed by S.L. 2006-264, s. 82(b), which provided "If Senate Bill 1479, 2005 Regular Session [S.L. 2006-226], becomes law, this section is repealed."

Session Laws 2005-123, s. 9.1, as added by Session Laws 2006-226, s. 28, provides: "The

Revisor of Statutes shall cause to be printed at the appropriate locations in the General Statutes all relevant portions of the official comments to the Uniform Residential Mortgage Satisfaction Act and all explanatory comments of the drafters of this act as the Revisor deems appropriate."

# **§ 47-46.2. Certificate of satisfaction of deed of trust, mortgage, or other instrument.**

No particular phrasing is required for a certification of satisfaction pursuant to G.S. 45-37(a)(6) as it was in effect prior to October 1, 2005, or for a satisfaction of a security instrument under G.S. 45-36.10. The following form, when properly completed, is sufficient to satisfy the requirements (i) for a certificate of satisfaction under G.S. 45-37(a)(6) as it was in effect prior to October 1, 2005, and (ii) for a satisfaction of a security instrument under G.S. 45-36.10 when signed and acknowledged by the secured creditor:

## **CERTIFICATE OF SATISFACTION**

North Carolina, \_\_\_\_\_ County.

I, \_\_\_\_\_ (name of owner of the note or other indebtedness secured by the deed of trust or mortgage), certify that I am the owner of the indebtedness secured by the hereafter described deed of trust or mortgage and that the debt or other obligation in the amount of \_\_\_\_\_



secured by the (deed of trust)(mortgage)(other instrument) executed by \_\_\_\_\_ (grantor)(mortgagor), \_\_\_\_\_ (trustee)(leave blank if mortgage), and \_\_\_\_\_ (beneficiary)(mortgagee), and recorded in \_\_\_\_\_ County at \_\_\_\_\_ (book and page) was satisfied on \_\_\_\_\_ (date of satisfaction). I request that this certificate of satisfaction be recorded and the above-referenced security instrument be canceled of record.

\_\_\_\_\_  
(Signature of owner of note)

[Acknowledgment before officer authorized to take acknowledgments]. (1995, c. 292, s. 3; 2005-123, s. 5; 2006-226, s. 27(a); 2006-264, s. 82(a).)

**Editor’s Note.** — Session Laws 2006-264, s. 82(a), which amended the introductory language to S.L. 2005-123, s. 5, was repealed by S.L. 2006-264, s. 82(b), which provided “If Senate Bill 1479, 2005 Regular Session [S.L. 2006-226], becomes law, this section is repealed.”  
Session Laws 2005-123, s. 9.1, as added by Session Laws 2006-226, s. 28, provides: “The Revisor of Statutes shall cause to be printed at the appropriate locations in the General Stat-

utes all relevant portions of the official comments to the Uniform Residential Mortgage Satisfaction Act and all explanatory comments of the drafters of this act as the Revisor deems appropriate.”  
**Effect of Amendments.** — Session Laws 2005-123, s. 5, as amended by Session Laws 2006-226, s. 27, effective October 1, 2005, rewrote the introductory paragraph.

§ 47-46.3. Affidavit of lost note.

**Editor’s Note.** —  
Session Laws 2005-123, s. 9.1, as added by Session Laws 2006-226, s. 28, provides: “The Revisor of Statutes shall cause to be printed at the appropriate locations in the General Stat-

utes all relevant portions of the official comments to the Uniform Residential Mortgage Satisfaction Act and all explanatory comments of the drafters of this act as the Revisor deems appropriate.”

## Chapter 47B.

### Real Property Marketable Title Act.

#### § 47B-1. Declaration of policy and statement of purpose.

##### CASE NOTES

**Extinguishment of Reverter Right.** — Exception under G.S. 47B-3(6) to the extinguishment of rights after a 30-year period set forth in the Real Property Marketable Title Act in 1973 did not apply to the purported property interests of landowners that had property adjacent to the railroad's right of way and who claimed to have a possibility of a reverter to the

right of way, and any right of reverter was properly considered as extinguished. *King Assocs., LLP v. Bechtler Dev. Corp.*, — N.C. App. —, 632 S.E.2d 243, 2006 N.C. App. LEXIS 1627 (2006).

**Applied** in *Hill v. Taylor*, — N.C. App. —, 621 S.E.2d 284, 2005 N.C. App. LEXIS 2474 (2005).

#### § 47B-2. Marketable record title to estate in real property; 30-year unbroken chain of title of record; effect of marketable title.

##### CASE NOTES

##### **Establishing Title.** —

Trial court erred by applying G.S. 47B-3(3) in action to quiet title and by granting a directed verdict in favor of the defendant possessor where the claimants established prima facie ownership by presenting exhibits of plats showing their respective chains of title of more than

30 years from a grantor. The fact that the defendant was in fact in possession was not enough to resolve the factual dispute as the burden shifted to the defendant to defeat the plaintiffs' claims. *Hill v. Taylor*, — N.C. App. —, 621 S.E.2d 284, 2005 N.C. App. LEXIS 2474 (2005).

#### § 47B-3. Exceptions.

##### CASE NOTES

##### **Effect of Defendants' Possession on Rights of Ownership.** —

Trial court erred by applying G.S. 47B-3(3) in action to quiet title and by granting a directed verdict in favor of the defendant possessor where the claimants established prima facie ownership by presenting exhibits of plats showing their respective chains of title of more than 30 years from a grantor. The fact that the defendant was in fact in possession was not enough to resolve the factual dispute as the burden shifted to the defendant to defeat the plaintiffs' claims. *Hill v. Taylor*, — N.C. App. —,

621 S.E.2d 284, 2005 N.C. App. LEXIS 2474 (2005).

**Reverter Interest in a Railroad Right-of-Way.** — Exception under G.S. 47B-3(6) to the extinguishment of rights after a 30-year period set forth in the Real Property Marketable Title Act in 1973 did not apply to the purported property interests of landowners that had property adjacent to the railroad's right of way and who claimed to have a possibility of a reverter to the right of way. *King Assocs., LLP v. Bechtler Dev. Corp.*, — N.C. App. —, 632 S.E.2d 243, 2006 N.C. App. LEXIS 1627 (2006).

#### § 47B-5. Extension of time for registering notice of claims which Chapter would otherwise bar.

##### CASE NOTES

**Cited** in *King Assocs., LLP v. Bechtler Dev. Corp.*, — N.C. App. —, 632 S.E.2d 243, 2006 N.C. App. LEXIS 1627 (2006).

## Chapter 47C.

### North Carolina Condominium Act.

#### Article 3.

##### Management of the Condominium.

Sec.

47C-3-101. Organization of unit owners' association.

Sec.

47C-3-116. Lien for assessments.

47C-3-121. American and State flags and political sign displays.

#### ARTICLE 3.

#### *Management of the Condominium.*

### § 47C-3-101. Organization of unit owners' association.

A unit owners' association shall be organized no later than the date the first unit in the condominium is conveyed. The membership of the association at all times shall consist exclusively of all the unit owners, or following termination of the condominium, of all persons entitled to distributions of proceeds under G.S. 47C-2-118. The association shall be organized as a profit or nonprofit corporation or as an unincorporated nonprofit association. (1985 (Reg. Sess., 1986), c. 877, s. 1; 2006-226, s. 4.)

**Editor's Note.** — Session Laws 2006-226, s. 5, contains a severability clause.

Session Laws 2006-226, s. 6, provides: "This act does not affect an action or proceeding commenced or right accrued before this act takes effect."

Session Laws 2006-226, s. 7, provides: "The Revisor of Statutes shall cause to be printed along with this act all relevant portions of the

official comments to the Uniform Unincorporated Nonprofit Association Act and all explanatory comments of the drafters of this act as the Revisor deems appropriate."

**Effect of Amendments.** — Session Laws 2006-226, s. 4, effective January 1, 2007, substituted "unincorporated nonprofit association" for "unincorporated association" in the last sentence.

### § 47C-3-116. Lien for assessments.

(a) Any assessment levied against a unit remaining unpaid for a period of 30 days or longer shall constitute a lien on that unit when a claim of lien is filed of record in the office of the clerk of superior court of the county in which the unit is located in the manner provided herein. Unless the declaration otherwise provides, fees, charges, late charges and other charges imposed pursuant to G.S. 47C-3-102, 47C-3-107, 47C-3-107.1, and 47C-3-115 are enforceable as assessments under this section. Except as provided in subsections (a1) and (a2) of this section, the association's lien may be foreclosed in like manner as a mortgage on real estate under power of sale under Article 2A of Chapter 45 of the General Statutes.

(a1) An association may not foreclose an association assessment lien under Article 2A of Chapter 45 of the General Statutes if the debt securing the lien consists solely of fines imposed by the association, interest on unpaid fines, or attorneys' fees incurred by the association solely associated with fines imposed by the association. The association, however, may enforce the lien by judicial foreclosure as provided in Article 29A of Chapter 1 of the General Statutes.

(a2) An association shall not levy, charge, or attempt to collect a service, collection, consulting, or administration fee from any unit owner unless the fee is expressly allowed in the declaration. Any lien secured by debt consisting



solely of these fees may only be enforced by judicial foreclosure as provided in Article 29A of Chapter 1 of the General Statutes.

(b) The lien under this section is prior to all other liens and encumbrances on a unit except (i) liens and encumbrances (specifically including, but not limited to, a mortgage or deed of trust on the unit) recorded before the docketing of the lien in the office of the clerk of superior court, and (ii) liens for real estate taxes and other governmental assessments or charges against the unit. This subsection does not affect the priority of mechanics' or materialmen's liens.

(c) A lien for unpaid assessments is extinguished unless proceedings to enforce the lien are instituted within three years after the docketing thereof in the office of the clerk of superior court.

(d) This section does not prohibit actions to recover sums for which subsection (a) creates a lien or prohibit an association taking a deed in lieu of foreclosure.

(e) A judgment, decree, or order in any action brought under this section shall include costs and reasonable attorneys' fees for the prevailing party. If the unit owner does not contest the collection of debt and enforcement of a lien after the expiration of the 15-day period following notice as required in subsection (e1) of this section, then reasonable attorneys' fees shall not exceed one thousand two hundred dollars (\$1,200), not including costs or expenses incurred. The collection of debt and enforcement of a lien remain uncontested as long as the unit owner does not dispute, contest, or raise any objection, defense, offset, or counterclaim as to the amount or validity of the debt and lien asserted or the association's right to collect the debt and enforce the lien as provided in this section. The attorneys' fee limitation in this subsection shall not apply to judicial foreclosures or proceedings authorized under subsection (d) of this section or G.S. 47C-4-117.

(e1) A unit owner may not be required to pay attorneys' fees and court costs until the unit owner is notified in writing of the association's intent to seek payment of attorneys' fees and court costs. The notice must be sent by first-class mail to the property address and, if different, to the mailing address for the unit owner in the association's records. The notice shall set out the outstanding balance due as of the date of the notice and state that the unit owner has 15 days from the mailing of the notice by first-class mail to pay the outstanding balance without the attorneys' fees and court costs. If the unit owner pays the outstanding balance within this period, then the unit owner shall have no obligation to pay attorneys' fees and court costs. The notice shall also inform the unit owner of the opportunity to contact a representative of the association to discuss a payment schedule for the outstanding balance as provided in subsection (e2) of this section and shall provide the name and telephone number of the representative.

(e2) The association, acting through its executive board and in the board's sole discretion, may agree to allow payment of an outstanding balance in installments. Neither the association nor the unit owner is obligated to offer or accept any proposed installment schedule. Reasonable administrative fees and costs for accepting and processing installments may be added to the outstanding balance and included in an installment payment schedule. Reasonable attorneys' fees may be added to the outstanding balance and included in an installment schedule only after the unit owner has been given notice as required in subsection (e1) of this section.

(f) Where the holder of a first mortgage or first deed of trust of record, or other purchaser of a unit, obtains title to the unit as a result of foreclosure of a first mortgage or first deed of trust, such purchaser, and its heirs, successors and assigns, shall not be liable for the assessments against such unit which became due prior to acquisition of title to such unit by such purchaser. Such

unpaid assessments shall be deemed to be common expenses collectible from all the unit owners including such purchaser, and its heirs, successors and assigns.

(g) A claim of lien shall set forth the name and address of the association, the name of the record owner of the lot at the time the claim of lien is filed, a description of the lot, and the amount of the lien claimed. (1985 (Reg. Sess., 1986), c. 877, s. 1; 2005-422, s. 16; 2006-226, s. 14(a).)

**Effect of Amendments.** — for “G.S. 47F-4-117” in the last sentence of Session Laws 2006-226, s. 14(a), effective subsection (e).  
August 10, 2006, substituted “G.S. 47C-4-117”

## § 47C-3-121. American and State flags and political sign displays.

Notwithstanding any provision in any declaration of covenants, no restriction on the use of land shall be construed to:

- (1) Regulate or prohibit the display of the flag of the United States or North Carolina, of a size no greater than four feet by six feet, which is displayed in accordance with or in a manner consistent with the patriotic customs set forth in 4 U.S.C. §§ 5-10, as amended, governing the display and use of the flag of the United States unless:
  - a. For restrictions registered prior to October 1, 2005, the restriction specifically uses the following terms:
    1. Flag of the United States of America;
    2. American flag;
    3. United States flag; or
    4. North Carolina flag.
  - b. For restrictions registered on or after October 1, 2005, the restriction shall be written on the first page of the instrument or conveyance in print that is in boldface type, capital letters, and no smaller than the largest print used elsewhere in the instrument or conveyance. The restriction shall be construed to regulate or prohibit the display of the United States or North Carolina flag only if the restriction specifically states: **“THIS DOCUMENT REGULATES OR PROHIBITS THE DISPLAY OF THE FLAG OF THE UNITED STATES OF AMERICA OR STATE OF NORTH CAROLINA”**.

This subdivision shall apply to owners of property who display the flag of the United States or North Carolina on property owned exclusively by them and does not apply to common areas, easements, rights-of-way, or other areas owned by others.

- (2) Regulate or prohibit the indoor or outdoor display of a political sign by an association member on that member’s property owned exclusively by the member, unless:
  - a. For restrictions registered prior to October 1, 2005, the restriction specifically uses the term “political signs”.
  - b. For restrictions registered on or after October 1, 2005, the restriction shall be written on the first page of the instrument or conveyance in print that is in boldface type, capital letters, and no smaller than the largest print used elsewhere in the instrument or conveyance. The restriction shall be construed to regulate or prohibit the display of political signs only if the restriction specifically states: **“THIS DOCUMENT REGULATES OR PROHIBITS THE DISPLAY OF POLITICAL SIGNS”**.

Even when display of a political sign is permitted under this subdivision, an association (i) may prohibit the display of political signs

earlier than 45 days before the day of the election and later than seven days after an election day, and (ii) may regulate the size and number of political signs that may be placed on a member's property if the association's regulation is no more restrictive than any applicable city, town, or county ordinance that regulates the size and number of political signs on residential property. If the local government in which the property is located does not regulate the size and number of political signs on residential property, the association shall permit at least one political sign with the maximum dimensions of 24 inches by 24 inches on a member's property. For the purposes of this subdivision, "political sign" means a sign that attempts to influence the outcome of an election, including supporting or opposing an issue on the election ballot. This subdivision shall apply to owners of property who display political signs on property owned exclusively by them and does not apply to common areas, easements, rights-of-way, or other areas owned by others. (2005-422, s. 18; 2006-226, s. 14(b).)

**Effect of Amendments.** — Session Laws 2006-226, s. 14(b), effective August 10, 2006, deleted "THE" preceding "POLITICAL SIGNS" at the end of subdivision (2)b.

## ARTICLE 4.

### *Protection of Purchasers.*

## § 47C-4-117. Effect of violations on rights of action; attorney's fees.

### CASE NOTES

#### **Attorney's Fees. —**

Denial of plaintiffs' claim for attorney's fees in their action for the right to review financial records of an incorporated homeowners' association and for declaratory judgments that they could attend board meetings and non-owners could not be on association committees was not

an abuse of discretion; although the trial court judge did not provide findings of fact or conclusions of law, the decision was not unsupported by reason. *Rosenstadt v. Queens Towers Homeowners' Ass'n*, — N.C. App. —, 628 S.E.2d 431, 2006 N.C. App. LEXIS 844 (2006).



**Chapter 47F.**  
**North Carolina Planned Community Act.**

**Article 1.**

**General Provisions.**

Sec.  
47F-1-102. Applicability.

**Article 3.**

**Management of Planned Community.**

Sec.  
47F-3-121. American and State flags and political sign displays.

**ARTICLE 1.**

*General Provisions.*

**§ 47F-1-101. Short title.**

**CASE NOTES**

**Power of Homeowners' Association Not Covered by Act.** — In a community that was not subject to the North Carolina Planned Community Act, the homeowners' association's amendment to the declaration of restrictive covenants to provide almost unlimited power to assess lot owners was unreasonable; the amendment exceeded the original intent of the contracting parties, as the original declaration provided no such authority, and the community had public roads, no common areas, and no amenities. *Armstrong v. Ledges Homeowners Ass'n*, 360 N.C. 547, 633 S.E.2d 78, 2006 N.C. LEXIS 845 (2006).

Where a community is not governed by the North Carolina Planned Community Act, amendments to a declaration of restrictive covenants must be reasonable; reasonableness may be ascertained from the language of the declaration, deeds, and plats, together with other objective circumstances surrounding the parties' bargain, including the nature and character of the community. *Armstrong v. Ledges Homeowners Ass'n*, 360 N.C. 547, 633 S.E.2d 78, 2006 N.C. LEXIS 845 (2006).

**§ 47F-1-102. Applicability.**

(a) This Chapter applies to all planned communities created within this State on or after January 1, 1999, except as otherwise provided in this section.

(b) This Chapter does not apply to a planned community created within this State on or after January 1, 1999:

- (1) Which contains no more than 20 lots (including all lots which may be added or created by the exercise of development rights) unless the declaration provides or is amended to provide that this Chapter does apply to that planned community; or
- (2) In which all lots are restricted exclusively to nonresidential purposes, unless the declaration provides or is amended to provide that this Chapter does apply to that planned community.

(c) Notwithstanding the provisions of subsection (a) of this section, G.S. 47F-3-102(1) through (6) and (11) through (17)(Powers of owners' association), G.S. 47F-3-103(f)(Executive board members and officers), G.S. 47F-3-107(a), (b), and (c)(Upkeep of planned community; responsibility and assessments for damages), G.S. 47F-3-107.1 (Procedures for fines and suspension of planned community privileges or services), G.S. 47F-3-108 (Meetings), G.S. 47F-3-115 (Assessments for common expenses), G.S. 47F-3-116 (Lien for assessments), G.S. 47F-3-118 (Association records), and G.S. 47F-3-121 (American and State flags and political sign displays) apply to all planned communities created in this State before January 1, 1999, unless the articles of incorporation or the

declaration expressly provides to the contrary, and G.S. 47F-3-120 (Declaration limits on attorneys' fees) applies to all planned communities created in this State before January 1, 1999. These sections apply only with respect to events and circumstances occurring on or after January 1, 1999, and do not invalidate existing provisions of the declaration, bylaws, or plats and plans of those planned communities. G.S. 47F-1-103 (Definitions) also applies to all planned communities created in this State before January 1, 1999, to the extent necessary in construing any of the preceding sections.

(d) Notwithstanding the provisions of subsections (a) and (c) of this section, any planned community created prior to January 1, 1999, may elect to make the provisions of this Chapter applicable to it by amending its declaration to provide that this Chapter shall apply to that planned community. The amendment may be made by affirmative vote or written agreement signed by lot owners of lots to which at least sixty-seven percent (67%) of the votes in the association are allocated or any smaller majority the declaration specifies. To the extent the procedures and requirements for amendment in the declaration conflict with the provisions of this subsection, this subsection shall control with respect to any amendment to provide that this Chapter applies to that planned community.

(e) This Chapter does not apply to planned communities or lots located outside this State. (1998-199, s. 1; 2002-112, s. 2; 2004-109, s. 3; 2005-214, s. 1; 2005-422, s. 9; 2006-226, s. 15(a).)

**Effect of Amendments. —**

Session Laws 2006-226, s. 15(a), effective August 10, 2006, substituted "G.S. 47F-3-121"

for "G.S. 47C-3-121" in the first sentence of subsection (c).

**CASE NOTES**

**Applied** in Peninsula Prop. Owners Ass'n v. Crescent Res., LLC, 171 N.C. App. 89, 614 S.E.2d 351, 2005 N.C. App. LEXIS 1165 (2005).

**Cited** in Armstrong v. Ledges Homeowners

Ass'n, 174 N.C. App. 172, 620 S.E.2d 294, 2005 N.C. App. LEXIS 2305 (2005); Armstrong v. Ledges Homeowners Ass'n, 360 N.C. 547, 633 S.E.2d 78, 2006 N.C. LEXIS 845 (2006).

**§ 47F-1-103. Definitions.**

**CASE NOTES**

**Cited** in Armstrong v. Ledges Homeowners Ass'n, 174 N.C. App. 172, 620 S.E.2d 294, 2005 N.C. App. LEXIS 2305 (2005); Armstrong v.

Ledges Homeowners Ass'n, 360 N.C. 547, 633 S.E.2d 78, 2006 N.C. LEXIS 845 (2006).

**ARTICLE 3.**

*Management of Planned Community.*

**§ 47F-3-102. Powers of owners' association.**

**CASE NOTES**

**Cited** in Armstrong v. Ledges Homeowners Ass'n, 360 N.C. 547, 633 S.E.2d 78, 2006 N.C. LEXIS 845 (2006).

## § 47F-3-107.1. Procedures for fines and suspension of planned community privileges or services.

### CASE NOTES

Cited in *Armstrong v. Ledges Homeowners Ass'n*, 360 N.C. 547, 633 S.E.2d 78, 2006 N.C. LEXIS 845 (2006).

## § 47F-3-121. American and State flags and political sign displays.

Notwithstanding any provision in any declaration of covenants, no restriction on the use of land shall be construed to:

- (1) Regulate or prohibit the display of the flag of the United States or North Carolina, of a size no greater than four feet by six feet, which is displayed in accordance with or in a manner consistent with the patriotic customs set forth in 4 U.S.C. §§ 5-10, as amended, governing the display and use of the flag of the United States unless:
  - a. For restrictions registered prior to October 1, 2005, the restriction specifically uses the following terms:
    1. Flag of the United States of America;
    2. American flag;
    3. United States flag; or
    4. North Carolina flag.
  - b. For restrictions registered on or after October 1, 2005, the restriction shall be written on the first page of the instrument or conveyance in print that is in boldface type, capital letters, and no smaller than the largest print used elsewhere in the instrument or conveyance. The restriction shall be construed to regulate or prohibit the display of the United States or North Carolina flag only if the restriction specifically states: **"THIS DOCUMENT REGULATES OR PROHIBITS THE DISPLAY OF THE FLAG OF THE UNITED STATES OF AMERICA OR STATE OF NORTH CAROLINA"**.

This subdivision shall apply to owners of property who display the flag of the United States or North Carolina on property owned exclusively by them and does not apply to common areas, easements, rights-of-way, or other areas owned by others.

- (2) Regulate or prohibit the indoor or outdoor display of a political sign by an association member on property owned exclusively by the member, unless:
  - a. For restrictions registered prior to October 1, 2005, the restriction specifically uses the term "political signs".
  - b. For restrictions registered on or after October 1, 2005, the restriction shall be written on the first page of the instrument or conveyance in print that is in boldface type, capital letters, and no smaller than the largest print used elsewhere in the instrument or conveyance. The restriction shall be construed to regulate or prohibit the display of political signs only if the restriction specifically states: **"THIS DOCUMENT REGULATES OR PROHIBITS THE DISPLAY OF POLITICAL SIGNS"**.

Even when display of a political sign is permitted under this subdivision, an association (i) may prohibit the display of political signs earlier than 45 days before the day of the election and later than seven days after an election day, and (ii) may regulate the size and number



of political signs that may be placed on a member's property if the association's regulation is no more restrictive than any applicable city, town, or county ordinance that regulates the size and number of political signs on residential property. If the local government in which the property is located does not regulate the size and number of political signs on residential property, the association shall permit at least one political sign with the maximum dimensions of 24 inches by 24 inches on a member's property. For the purposes of this subdivision, "political sign" means a sign that attempts to influence the outcome of an election, including supporting or opposing an issue on the election ballot. This subdivision shall apply to owners of property who display political signs on property owned exclusively by them and does not apply to common areas, easements, rights-of-way, or other areas owned by others. (2005-422, s. 8; 2006-226, s. 15(b).)

**Effect of Amendments.** — Session Laws 2006-226, s. 15(b), effective August 10, 2006, deleted "THE" preceding "POLITICAL SIGNS" at the end of subdivision (2)b.

## Chapter 48.

### Adoptions.

#### ARTICLE 1.

##### *General Provisions.*

### § 48-1-100. Legislative findings and intent; construction of Chapter.

#### CASE NOTES

**Consent Not Procured by Fraud.** — Adoptive father's attempt to void his consent to the adoption of his wife's daughter based on fraud failed, because the adoptive father failed to prove that the wife made any misrepresentations with regard to any alleged plans on her part to separate or divorce; based on the wife telling the adoptive father of her unhappiness and the couple's frequent arguments with re-

gard to the adoptive father's drug use, the adoptive father knew or should have known that there was some possibility that the parties would separate. *Fakhoury v. Fakhoury*, 171 N.C. App. 104, 613 S.E.2d 729, 2005 N.C. App. LEXIS 1163 (2005), cert. denied, 360 N.C. 62, 621 S.E.2d 622 (2005).

**Applied** in *In re Anderson*, 360 N.C. 271, 624 S.E.2d 626, 2006 N.C. LEXIS 5 (2006).

#### ARTICLE 2.

##### *General Adoption Procedure.*

#### Part 5. Report to the Court.

### § 48-2-501. Report to the court during proceeding for adoption of a minor.

#### CASE NOTES

**Applied** in *Fakhoury v. Fakhoury*, 171 N.C. App. 104, 613 S.E.2d 729, 2005 N.C. App.

LEXIS 1163 (2005), cert. denied, 360 N.C. 62, 621 S.E.2d 622 (2005).

#### ARTICLE 3.

##### *Adoption of Minors.*

#### Part 6. Consent to Adoption.

### § 48-3-601. Persons whose consent to adoption is required.

#### CASE NOTES

**Consent Not Required of Father Who Did Not Provide Support.** — Putative father's consent to the adoption of his minor child was not required, pursuant to G.S. 48-3-

601(2)(b)(4)(II), as the father's mere offers of support were insufficient under the statute to require the consent of the father to the adoption. Despite possessing adequate wherewithal,

the father, a teenager who had obtained employment, never provided any actual financial payments to the mother, much less the reasonable and consistent payments required under the subsection. In re Anderson, 360 N.C. 271,

624 S.E.2d 626, 2006 N.C. LEXIS 5 (2006).

**Cited** in A Child's Hope, LLC v. Doe, — N.C. App. —, 630 S.E.2d 673, 2006 N.C. App. LEXIS 1291 (2006).

## § 48-3-608. Revocation of consent.

### CASE NOTES

**Consent Not Procured by Fraud.** — Adoptive father's attempt to void his consent to the adoption of his wife's daughter based on fraud failed, because the adoptive father failed to prove that the wife made any misrepresentations with regard to any alleged plans on her part to separate or divorce; based on the wife telling the adoptive father of her unhappiness

and the couple's frequent arguments with regard to the adoptive father's drug use, the adoptive father knew or should have known that there was some possibility that the parties would separate. Fakhoury v. Fakhoury, 171 N.C. App. 104, 613 S.E.2d 729, 2005 N.C. App. LEXIS 1163 (2005), cert. denied, 360 N.C. 62, 621 S.E.2d 622 (2005).

## § 48-3-609. Challenges to validity of consent.

### CASE NOTES

**Consent Not Procured by Fraud.** — Adoptive father's attempt to void his consent to the adoption of his wife's daughter based on fraud failed, because the adoptive father failed to prove that the wife made any misrepresentations with regard to any alleged plans on her part to separate or divorce; based on the wife telling the adoptive father of her unhappiness

and the couple's frequent arguments with regard to the adoptive father's drug use, the adoptive father knew or should have known that there was some possibility that the parties would separate. Fakhoury v. Fakhoury, 171 N.C. App. 104, 613 S.E.2d 729, 2005 N.C. App. LEXIS 1163 (2005), cert. denied, 360 N.C. 62, 621 S.E.2d 622 (2005).

## ARTICLE 9.

### *Confidentiality of Records and Disclosure of Information.*

## § 48-9-104. Release of identifying information.

### CASE NOTES

**Applied** in In re Anderson, 360 N.C. 271, 624 S.E.2d 626, 2006 N.C. LEXIS 5 (2006).



**Chapter 49.****Bastardy.****ARTICLE 2.***Legitimation of Illegitimate Children.***§ 49-10. Legitimation.****CASE NOTES****No Standing to Bring Legitimation Action After Termination of Parental Rights.**

— Where father's parental rights had been terminated under G.S. 7B-1112 in 1999, he lacked standing to bring an action under G. S. 49-10, G.S. 49-11 to legitimate the same child to

whom his parental rights had been terminated. *Gorsuch v. Dees*, 173 N.C. App. 223, 618 S.E.2d 747, 2005 N.C. App. LEXIS 1914 (2005).

**Cited in** *In re Z.T.B.*, 170 N.C. App. 564, 613 S.E.2d 298, 2005 N.C. App. LEXIS 1093 (2005).

**§ 49-11. Effects of legitimation.****CASE NOTES****Standing to Bring Action After Termination of Parental Rights.**

— Where father's parental rights had been terminated under G.S. 7B-1112 in 1999, he lacked standing to bring an action under G.S. 49-10, G.S. 49-11 to

legitimate the same child to whom his parental rights had been terminated. *Gorsuch v. Dees*, 173 N.C. App. 223, 618 S.E.2d 747, 2005 N.C. App. LEXIS 1914 (2005).

## Chapter 50.

### Divorce and Alimony.

#### Article 1.

#### Divorce, Alimony, and Child Support, Generally.

Sec.

50-13.9. Procedure to insure payment of child support.

#### ARTICLE 1.

#### *Divorce, Alimony, and Child Support, Generally.*

### § 50-5.1. Grounds for absolute divorce in cases of incurable insanity.

#### CASE NOTES

**Cited in** Stark v. Ratashara, — N.C. App. —, 628 S.E.2d 471, 2006 N.C. App. LEXIS 962 (2006).

### § 50-6. Divorce after separation of one year on application of either party.

#### CASE NOTES

#### I. In General.

#### I. IN GENERAL.

**Alimony.** — When a husband was granted an absolute divorce on the grounds of separation for one year, and the wife did not file a counterclaim or separate claim for alimony before the trial court entered a judgment of absolute divorce, which did not preserve an alimony claim, a statement in the wife's answer that "the claims for alimony and equitable

distribution pending this action are to be reserved" was insufficient to give the trial court jurisdiction, under G.S. 50-11, to consider the wife's amended answer and counterclaim for alimony, despite the husband's answer to that counterclaim, as subject matter jurisdiction could not be conferred by the parties' consent. Stark v. Ratashara, — N.C. App. —, 628 S.E.2d 471, 2006 N.C. App. LEXIS 962 (2006).

### § 50-7. Grounds for divorce from bed and board.

#### CASE NOTES

#### V. Indignities.

#### V. INDIGNITIES.

#### **Illustrative Cases.** —

As a ground for the divorce, the trial court did not err in finding that the wife subjected the husband to indignities that made the husband's life burdensome and the husband's condition intolerable under G.S. 50-7(4); there was evi-

dence that the wife (1) was involved in an extramarital affair, (2) wrecked the marital home after being ordered to leave it, (3) twice had the husband removed after filing false domestic violence proceedings, (4) was physically violent to the husband, (5) left the husband on three occasions without telling the

husband where she was going, and (6) did not return for three or four nights. *Evans v. Evans*,

169 N.C. App. 358, 610 S.E.2d 264, 2005 N.C. App. LEXIS 609 (2005).

## § 50-11. Effects of absolute divorce.

### CASE NOTES

**Subsection (e) merely requires an equitable distribution claim to be asserted at any time prior to judgment, etc. —**

Trial court erred in granting a husband's motion to dismiss a wife's motion for equitable distribution, pursuant to G.S. 50-20, in a divorce action where the wife filed the motion on the day before the judgment was signed by the judge and filed, at which point the judgment became final pursuant to G.S. 1A-1-58; therefore, G.S. 50-11(e) did not destroy the wife's right to seek equitable distribution as the motion was filed before an absolute divorce was granted. *Santana v. Santana*, 171 N.C. App. 432, 614 S.E.2d 438, 2005 N.C. App. LEXIS 1204 (2005).

**Power to Enter Alimony Order Ends Upon Divorce. —** Party's filed counterclaim was sufficient to constitute an action pending when judgment of absolute divorce was entered, and a person had to apply specifically for the claim by cross-action or by a separate action, and the bare reservation by a trial court only preserved the claim for the party who had

asserted the right prior to judgment of absolute divorce; while this applied to equitable distribution, there was no reason why alimony should not be treated the same for preservation purposes. *Stark v. Ratashara*, — N.C. App. —, 628 S.E.2d 471, 2006 N.C. App. LEXIS 962 (2006).

When a husband was granted an absolute divorce on the grounds of separation for one year, and the wife did not file a counterclaim or separate claim for alimony before the trial court entered a judgment of absolute divorce, which did not preserve an alimony claim, a statement in the wife's answer that "the claims for alimony and equitable distribution pending this action are to be reserved" was insufficient to give the trial court jurisdiction, under G.S. 50-11, to consider the wife's amended answer and counterclaim for alimony, despite the husband's answer to that counterclaim, as subject matter jurisdiction could not be conferred by the parties' consent. *Stark v. Ratashara*, — N.C. App. —, 628 S.E.2d 471, 2006 N.C. App. LEXIS 962 (2006).

## § 50-13.1. Action or proceeding for custody of minor child.

### CASE NOTES

**Best Interests of Child. —**

Order that deferred to a ch. 50 custody action but required agency to develop a permanency plan and the child's aunt to take specific steps to comply with it was not a final order; since the trial court also had a continuing G.S. 7B-907 duty to consider evidence regarding the child's best interests, *res judicata* did not bar it from terminating the aunt's parental rights. In re C.E.L., 171 N.C. App. 468, 615 S.E.2d 427, 2005 N.C. App. LEXIS 1361 (2005).

**Award of Custody to Great-grandmother. —** Termination of the aunt's parental rights and an award of permanent custody to the child's maternal great-grandmother was supported by substantial, competent evidence

and affirmed, even though they had a pending ch. 50 custody action, where evidence at the G.S. 7B-907 hearing indicated that the child's aunt, who had been awarded temporary custody, failed to: (1) comply with court orders, including drug testing; (2) make reasonable and timely progress towards permanency, including providing suitable living conditions; (3) prove that it was possible for the child to return to her home within six months; and (4) prove it was in the child's best interests to live with her. In re C.E.L., 171 N.C. App. 468, 615 S.E.2d 427, 2005 N.C. App. LEXIS 1361 (2005).

**Cited in** *Gorsuch v. Dees*, 173 N.C. App. 223, 618 S.E.2d 747, 2005 N.C. App. LEXIS 1914 (2005).

## § 50-13.2. Who entitled to custody; terms of custody; visitation rights of grandparents; taking child out of State.

### CASE NOTES

- I. In General.
- II. Welfare of Child.
- VII. Findings of Fact.



## I. IN GENERAL.

**Collateral estoppel effect of findings in domestic violence protective order** entered under G.S. 50B-1(a), finding that the mother was responsible for the incident, collaterally estopped the finding in the custody case that the father was responsible for the incident; when the protective order was not appealed the collateral legal consequences of that order became final, precluding reconsideration of the order in the custody action under G.S. 50-13.2. *Doyle v. Doyle*, — N.C. App. —, 626 S.E.2d 845, 2006 N.C. App. LEXIS 517 (2006).

**Cited in** *Faulkenberry v. Faulkenberry*, 169 N.C. App. 428, 610 S.E.2d 237, 2005 N.C. App. LEXIS 688 (2005).

## II. WELFARE OF CHILD.

**Tender Years Presumption Abolished.** — Trial court erred in entering a custody order concerning the parties' child; the trial court improperly relied on the tender years presumption in granting custody to the mother, as that presumption had been abolished, and G.S. 50-13.2(a) required that the custody decision be based solely on the best interests of the child, and G.S. 8C-1, Rule 201(b) did not allow the trial court to take judicial notice of the assumptions underlying an abolished doctrine in order to resurrect the doctrine. *Greer v. Greer*, — N.C. App. —, 624 S.E.2d 423, 2006 N.C. App. LEXIS 183 (2006).

## VII. FINDINGS OF FACT.

**Findings Supported by the Evidence.** — Trial court did not err in awarding primary physical custody of the children to the husband under G.S. 50-13.2(a); by placing the children in the husband's physical custody, the children remained in the home and community where they had been raised, the husband demonstrated his ability to care for the children, and some of the husband's extended family lived nearby and could help with the children. *Evans v. Evans*, 169 N.C. App. 358, 610 S.E.2d 264, 2005 N.C. App. LEXIS 609 (2005).

**Only One Finding.** — While a court had the power under G.S. 7B-903 to enter an order transferring the custody of a minor child from her father to her mother, there was no evidence in the record in a proceeding on the parties' cross-motions for contempt that supported the finding that transferring custody to the mother was in the child's best interests. The court made only one finding, that the child missed the two people in her life who had neglected her, which was not a basis for not allowing custody to remain with the father, the trial court had a right under G.S. 50-13.2(a) to consider, but did not consider, acts of domestic violence by the child's stepfather toward her mother when determining the child's best interests, and the trial court had no right to take custody away from the father simply because he was unmarried. *In re H.S.F.*, — N.C. App. —, 628 S.E.2d 416, 2006 N.C. App. LEXIS 866 (2006).

## § 50-13.4. Action for support of minor child.

## CASE NOTES

- I. In General.
- III. Liability for Support.
- IV. Amount of Support.
  - A. In General.
- VII. Findings and Conclusions.
- IX. Remedies.
  - G. Contempt.

## I. IN GENERAL.

**Applied in** *Holland v. Holland*, 169 N.C. App. 564, 610 S.E.2d 231, 2005 N.C. App. LEXIS 674 (2005).

## III. LIABILITY FOR SUPPORT.

**Voluntary Unemployment.** — Trial court order finding that mother was obligated to pay child support to her ex-husband for their three minor children who resided with the ex-husband, which was based on a deviation from the North Carolina Child Support Guidelines, was error; although the deviation was supported by

the evidence in that the mother was voluntarily unemployed and had cash reserves to meet her financial obligations of the children, the amount awarded was not supported by any evidence. *Roberts v. McAllister*, — N.C. App. —, 621 S.E.2d 191, 2005 N.C. App. LEXIS 2490 (2005).

## IV. AMOUNT OF SUPPORT.

## A. In General.

**Use of Guidelines to Determine Support Proper.** — Where parents' combined gross income was \$11,980, below the \$20,000 per

month threshold, the trial court was permitted to use the child support guidelines and require the husband to continue paying \$1,521 per month in child support. *Francis v. Francis*, 169 N.C. App. 442, 612 S.E.2d 141, 2005 N.C. App. LEXIS 647 (2005).

#### **Deviation From Guidelines. —**

North Carolina Child Support Guidelines were inapplicable because the combined monthly adjusted gross income of the parents exceeded \$20,000; thus, the trial court was required to make a case-by-case determination. Consequently, the trial court was not bound by the Guidelines in determining the father's child support obligations. *Diehl v. Diehl*, — N.C. App. —, 630 S.E.2d 25, 2006 N.C. App. LEXIS 1180 (2006).

#### **Findings and Conclusions of Law Required. —**

Trial court erred in failing to make findings regarding the reasonable needs of a child for support, or regarding its refusal to award support for the time between the filing of suit for support and the entry of the support order. *State ex rel. Gillikin v. McGuire*, 174 N.C. App. 347, 620 S.E.2d 899, 2005 N.C. App. LEXIS 2364 (2005).

#### **Remand to Allow Court to Make Findings. —**

Mother admitted that clearly, the trial court did not use all of the expenses listed in the parties' financial affidavits; without more explanation, it was impossible to determine on appeal where the figures used by the trial court came from at all. Moreover, although the trial court's child support order did contain certain historical costs associated with the children, it included no findings as to the individual costs and expenses the trial court expected to be associated with each child in the future, and, while the trial court did make findings regarding the parents' particular estates, earnings, conditions, and accustomed standard of living, those were insufficient to remedy the absence of findings explaining the reasonable needs of the children; accordingly, the case was remanded for further findings of fact regarding the amount of child support awarded. *Diehl v. Diehl*, — N.C. App. —, 630 S.E.2d 25, 2006 N.C. App. LEXIS 1180 (2006).

## **VII. FINDINGS AND CONCLUSIONS.**

### **Remand for Further Findings. —**

A case involving a motion to modify child support under G.S. 50-13.7, was remanded for further findings of fact because, in entering an order deviating from the North Carolina Child Support Guidelines, the trial court did not make sufficient findings of fact regarding the reasonable needs of the children; the order only made findings regarding health insurance and the fact that the children did not need private schooling. *Beamer v. Beamer*, 169 N.C. App. 594, 610 S.E.2d 220, 2005 N.C. App. LEXIS 673 (2005).

## **IX. REMEDIES.**

### **G. Contempt.**

**Priority of G.S. 50-13.4(f)(8)-(9) over G.S. Ch. 5A. —** Because G.S. 50-13.4(f)(8)-(9) is more specific than the generalized contempt allowances set forth in G.S. ch. 5A, G.S. 50-13.4(f)(8)-(9) must control. *Brown v. Brown*, 171 N.C. App. 358, 615 S.E.2d 39, 2005 N.C. App. LEXIS 1206 (2005), cert. denied, 360 N.C. 60, 621 S.E.2d 175 (2005).

**When order reducing child support arrears to a money judgment does not provide for periodic payments** although the lower court's prior judgment reduced the father's child support arrearage to a money judgment, it did not provide for periodic payments so his failure to satisfy the arrearage was enforceable by execution under G.S. 1-302, and not civil contempt under G.S. 50-13.4(f)(8)-(9), so the lower court's judgment holding him in contempt was beyond its jurisdiction and was vacated. *Brown v. Brown*, 171 N.C. App. 358, 615 S.E.2d 39, 2005 N.C. App. LEXIS 1206 (2005), cert. denied, 360 N.C. 60, 621 S.E.2d 175 (2005).

**When order reducing child support arrears to a money judgment does not provide for periodic payments** or other deadline for payment, it is not enforceable by contempt, and the trial court does not have jurisdiction to enter an order finding a defendant in contempt. *Brown v. Brown*, 171 N.C. App. 358, 615 S.E.2d 39, 2005 N.C. App. LEXIS 1206 (2005), cert. denied, 360 N.C. 60, 621 S.E.2d 175 (2005).

## **§ 50-13.6. Counsel fees in actions for custody and support of minor children.**

### **CASE NOTES**

- I. In General.
- II. Actions for Support Only.



**I. IN GENERAL.****Order Must Contain Factual Findings.**

— In a father's appeal from a child custody and support order, although the trial court denied a mother's request for attorneys' fees under G.S. 50-13.6, it made no findings relating to that denial, such as whether the mother acted in good faith or whether she had insufficient means to defray the expense of the suit. Consequently, the case was remanded for entry of proper factual findings to support the trial court's decision regarding the mother's request for attorneys' fees. *Diehl v. Diehl*, — N.C. App. —, 630 S.E.2d 25, 2006 N.C. App. LEXIS 1180 (2006).

**II. ACTIONS FOR SUPPORT ONLY.**

**Award Upheld.** — Trial court order requiring mother to pay \$2,500 to the father of the parties' three minor children was proper because the three children resided with the father, along with his new wife and three other children, the father had inadequate monthly income, and the attorneys' fees were reasonable. The fees were found to have been increased as a result of the mother's failure to contribute a reasonable sum to the support of the children after being asked to do so. *Roberts v. McAllister*, — N.C. App. —, 621 S.E.2d 191, 2005 N.C. App. LEXIS 2490 (2005).

## § 50-13.7. Modification of order for child support or custody.

**CASE NOTES**

- I. In General.
- III. Change in Circumstances.
- V. Findings and Discretion of Trial Court.

**I. IN GENERAL.**

**Cited in** *Cunningham v. Cunningham*, 171 N.C. App. 550, 615 S.E.2d 675, 2005 N.C. App. LEXIS 1371 (2005).

**III. CHANGE IN CIRCUMSTANCES.****Communication Between Parents.** —

There was insufficient evidence to support trial court's findings of a substantial change in circumstances justifying a modification of a child custody order based on findings that subsequent to the parents' failed efforts to reunite, communication between them had been unsuccessful, issues relating to domestic violence had not been effectively resolved and had resulted in emotional trauma to the child, and that the parents' failure to communicate regarding issues with the minor child had jeopardized the success of the joint custodial arrangement of the previous order; instead, a review of the record showed ample evidence that although the parents had disagreements and verbal disputes, they had developed ways to communicate regarding the welfare of their son, communicated about the child's health, and that upon request by the mother, the father had delivered medicine to the child's pre-school and had cared for the child at unscheduled times. *Ford v. Wright*, 170 N.C. App. 89, 611 S.E.2d 456, 2005 N.C. App. LEXIS 889 (2005).

**Adverse Effect on Child as Factor to Support Modification.** —

Because the trial court carefully laid out in sequential order the facts regarding the fa-

ther's relationship with a married woman, resulting in him resigning from his job, and culminating in his separation from his wife who provided at least 50 percent of the minor child's care, including helping the child with his homework, and then found that the child's grades had suffered as a result, it provided a nexus between the substantial change in circumstances and the affect on the child's welfare to overrule the father's motion to dismiss the mother's custody modification action; moreover, when balanced against the mother's attainment of both a stable living environment and a vast improvement in health after suffering from a brain tumor, the trial court's custody modification order in favor of the mother was upheld. *Karger v. Wood*, — N.C. App. —, 622 S.E.2d 197, 2005 N.C. App. LEXIS 2609 (2005).

**Imposition of Earnings Capacity Rule.**

— Where trial court made no findings as to self-employed father's present earnings, nor as to his reduction of income in bad faith that would support application of the earnings capacity rule, and made no findings as to a substantial change in his income compared to the findings in the previous order, the trial court's conclusion and order increasing his child support under the guidelines for self-employed individuals was not supported by the findings. *Ford v. Wright*, 170 N.C. App. 89, 611 S.E.2d 456, 2005 N.C. App. LEXIS 889 (2005).

**Showing of Changed Circumstances Held Insufficient.** —



There was insufficient evidence to support trial court's findings of a substantial change in circumstances justifying a modification of a child custody order based on findings that the parents' failure to communicate regarding issues with the minor child had resulted in trauma to the child and jeopardized the success of the joint custodial arrangement of the previous order; other than the mother's testimony regarding the child's normal reaction to a parental disagreement, no testimony was offered which supported a finding of emotional harm; indeed, the trial court made a specific finding of fact as to the current condition of the minor child, stating that he was very smart, very inquisitive and very happy, and daycare workers, grandparents, individuals who knew the parties, and both parents supported the trial court's finding as to the child's condition. *Ford v. Wright*, 170 N.C. App. 89, 611 S.E.2d 456, 2005 N.C. App. LEXIS 889 (2005).

There was insufficient evidence to support trial court's findings of a substantial change in circumstances justifying a modification of a child custody order based on findings that issues relating to domestic violence had not been effectively resolved; the trial court's findings reflected no substantial changes in the parties' communication difficulties from the prior order, the trial court had already considered the parties' past domestic troubles and communication

difficulties in the prior custody order, and without findings of additional changes in circumstances or conditions, modification of the prior custody order was in error. *Ford v. Wright*, 170 N.C. App. 89, 611 S.E.2d 456, 2005 N.C. App. LEXIS 889 (2005).

## V. FINDINGS AND DISCRETION OF TRIAL COURT.

### Findings Held Insufficient. —

A case involving a motion to modify child support under G.S. 50-13.7, was remanded for further findings of fact because, in entering an order deviating from the North Carolina Child Support Guidelines, the trial court did not make sufficient findings of fact regarding the reasonable needs of the children; the order only made findings regarding health insurance and the fact that the children did not need private schooling. *Beamer v. Beamer*, 169 N.C. App. 594, 610 S.E.2d 220, 2005 N.C. App. LEXIS 673 (2005).

When a father sought a modification of child support, remand was required because without a specific finding as to the father's income at the time of the hearing, the issue of whether his income had been involuntarily decreased could not be resolved. *Armstrong v. Droessler*, — N.C. App. —, 630 S.E.2d 19, 2006 N.C. App. LEXIS 1221 (2006).

## § 50-13.9. Procedure to insure payment of child support.

(a) Upon its own motion or upon motion of either party, the court may order at any time that support payments be made to the State Child Support Collection and Disbursement Unit for remittance to the party entitled to receive the payments. For child support orders initially entered on or after January 1, 1994, the immediate income withholding provisions of G.S. 110-136.5(c1) apply.

(b) After entry of an order by the court under subsection (a) of this section, the State Child Support Collection and Disbursement Unit shall transmit child support payments that are made to it to the custodial parent or other party entitled to receive them, unless a court order requires otherwise.

(b1) In a IV-D case:

- (1) The designated child support enforcement agency shall have the sole responsibility and authority for monitoring the obligor's compliance with all child support orders in the case and for initiating any enforcement procedures that it considers appropriate.
- (2) The clerk of court shall maintain all official records in the case.
- (3) The designated child support enforcement agency shall maintain any other records needed to monitor the obligor's compliance with or to enforce the child support orders in the case, including records showing the amount of each payment of child support received from or on behalf of the obligor, along with the dates on which each payment was received. In any action establishing, enforcing, or modifying a child support order, the payment records maintained by the designated child support agency shall be admissible evidence, and the court shall permit the designated representative to authenticate those records.

(b2) In a non-IV-D case:

- (1) Repealed by Session Laws 2005, ch. 389, s. 1.
- (2) The clerk of court shall maintain all official records and all case data concerning child support matters previously enforced by the clerk of court.
- (3) Repealed by Session Laws 2005, ch. 389, s. 1.

(c) In a IV-D case, the parties affected by the order shall inform the designated child support enforcement agency of any change of address or other condition that may affect the administration of the order. The court may provide in the order that a party failing to inform the court or, as appropriate, the designated child support enforcement agency, of a change of address within a reasonable period of time may be held in civil contempt.

(d) Upon affidavit of an obligee, the clerk or a district court judge may order the obligor to appear and show cause why the obligor should not be subjected to income withholding or adjudged in contempt of court, or both. The order shall require the obligor to appear and show cause why the obligor should not be subjected to income withholding or adjudged in contempt of court, or both, and shall order the obligor to bring to the hearing records and information relating to the obligor's employment, the obligor's licensing privileges, and the amount and sources of the obligor's disposable income. The order shall state:

- (1) That the obligor is under a court order to provide child support, the name of each child for whose benefit support is due, and information sufficient to identify the order;
- (2) That the obligor is delinquent and the amount of overdue support;
- (2a) That the court may order the revocation of some or all of the obligor's licensing privileges if the obligor is delinquent in an amount equal to the support due for one month;
- (3) That the court may order income withholding if the obligor is delinquent in an amount equal to the support due for one month;
- (4) That income withholding, if implemented, will apply to the obligor's current payors and all subsequent payors and will be continued until terminated pursuant to G.S. 110-136.10;
- (5) That failure to bring to the hearing records and information relating to his employment and the amount and sources of his disposable income will be grounds for contempt;
- (6) That if income withholding is not an available or appropriate remedy, the court may determine whether the obligor is in contempt or whether any other enforcement remedy is appropriate.

The order may be signed by the clerk or a district court judge, and shall be served on the obligor pursuant to G.S. 1A-1, Rule 4, Rules of Civil Procedure. On motion of the person to whom support is owed in a non-IV-D case, with the approval of the district court judge, if the district court judge finds it is in the best interest of the child, no order shall be issued.

(e) Repealed by Session Laws 2005, ch. 389, s. 1.

(f) Repealed by Session Laws 2005, ch. 389, s. 1.

(g) Nothing in this section shall preclude the independent initiation by a party of proceedings for civil contempt or for income withholding. ( 1983, c. 677, s. 1; 1985 (Reg. Sess., 1986), c. 949, ss. 3-6; 1989, c. 479; 1993, c. 517, s. 6; c. 553, s. 67.1; 1995, c. 444, s. 1; c. 538, s. 1.2; 1997-443, s. 11A.118(a); 1999-293, ss. 11-14; 2001-237, s. 7; 2005-389, s. 1; 2006-264, s. 97.)

**Effect of Amendments.** — Session Laws 2005-389, s. 1, as amended by Session Laws 2006-264, s. 97, effective January 1, 2007, re-wrote subsection (b2); deleted the former first sentence of subsection (c), which read: "In a non-IV-D case, the parties affected by the order

shall inform the clerk of court of any change of address or of other condition that may affect the administration of the order."; rewrote subsection (d); deleted former subsection (e), which read: "The clerk of court shall maintain and make available to the district court judge a list



of attorneys who are willing to undertake representation, pursuant to this section, of persons to whom child support is owed. No attorney shall be placed on such list without his permis-

sion"; and deleted former subsection (f), which related to exceptions to requirements for notification of judge in all enforcement hearings.

## § 50-16.2A. Postseparation support.

### CASE NOTES

**Misconduct Found.** — Trial court did not err in refusing to award the wife post-separation support pursuant to G.S. 50-16.1A(4) as a result of the wife's misconduct pursuant to G.S. 50-16.2A(d); the trial court's finding of subjection of the husband to indignities pursuant to G.S. 50-16.1A(3)(f) was sufficient, as it found that, while the husband was a supporting spouse, the wife forceably removed the husband from the house on two occasions under false domestic violence complaints and engaged in

other improper behavior. *Evans v. Evans*, 169 N.C. App. 358, 610 S.E.2d 264, 2005 N.C. App. LEXIS 609 (2005).

**Order Supported by Evidence.** — Order of postseparation support was supported by evidence that the husband's income from interest, dividends, capital gains, and partnerships averaged \$622,136 per year. *Squires v. Squires*, — N.C. App. —, 631 S.E.2d 156, 2006 N.C. App. LEXIS 1410 (2006).

## § 50-16.3A. Alimony.

### CASE NOTES

**Consideration of Wife's Investment Portfolio Proper.** — Trial court had the authority to evaluate wife's investment portfolio under G.S. 50-16.3A(b)(15) in determining the amount and duration of alimony. *Francis v. Francis*, 169 N.C. App. 442, 612 S.E.2d 141, 2005 N.C. App. LEXIS 647 (2005).

**Findings as to Duration of Alimony Award.** —

While the trial court made sufficient findings regarding the reasons for the amount and manner of payment, the trial court failed to make findings concerning the reasons for the duration of the alimony payments; therefore, the court remanded the alimony order for further findings of fact concerning the duration of the alimony award. *Cunningham v. Cunningham*, 171 N.C. App. 550, 615 S.E.2d 675, 2005 N.C. App. LEXIS 1371 (2005).

Trial court erred in failing to specify the duration of the alimony award. *Squires v. Squires*, — N.C. App. —, 631 S.E.2d 156, 2006 N.C. App. LEXIS 1410 (2006).

**Failure to Consider Change in Circumstances.** — While it made sufficient findings to support its determinations that the ex-wife was a dependent spouse, because the trial court abused its discretion by not considering alleged changes of circumstances occurring after the first hearing before entering a lump sum retroactive alimony award, the appellate court had to vacate the lump sum award. *Rhew v. Felton*, — N.C. App. —, 631 S.E.2d 859, 2006 N.C. App. LEXIS 1560 (2006).

Where the trial court found that the ex-husband had a net monthly income of approxi-

mately \$5,400 and reasonable monthly expenses in the amount of \$4,200, yielding a surplus of \$1,200, and the ex-wife's reasonable needs exceeded her income by \$1,400, there was no abuse of discretion in finding the ex-wife was a dependent spouse and the ex-husband was a supporting spouse and awarding the ex-wife \$1,200 per month in alimony. *Rhew v. Felton*, — N.C. App. —, 631 S.E.2d 859, 2006 N.C. App. LEXIS 1560 (2006).

**Trial court did not abuse its discretion by making reductions to husband's monthly expenses** because it found that he could reasonably lower his monthly living expenses by almost \$1,500 by reducing his \$134 telephone bill to \$100, canceling his \$55 cable television subscription, reducing his \$650 food expense to \$400.00, reducing his \$100 clothing expense to \$50, stopping his \$60 allowance to the children since he would be paying child support, reducing his \$207 gift and special occasion expense to \$104, reducing his vacation and recreation expense from \$450 to \$100, and reducing his \$60 grooming and hygiene expense to \$20; additionally, the trial court found that the husband's \$150 furniture payment would soon end and his \$400 credit card payments were a duplication of other expenses. *Cunningham v. Cunningham*, 171 N.C. App. 550, 615 S.E.2d 675, 2005 N.C. App. LEXIS 1371 (2005).

**Failure to Consider Earning Capacity Not Erroneous.** — Trial court properly declined to consider the husband's earning capacity when ruling on the wife's request for alimony because there was no evidence that the



husband, a doctor, was intentionally depressing the husband's income or in any way acting in bad faith; the trial court found that the husband's reduction in income was attributable to the fact that the husband's patients were not happy with the husband's services and were

choosing other doctors. *Megremis v. Megremis*, — N.C. App. —, 633 S.E.2d 117, 2006 N.C. App. LEXIS 1828 (2006).

**Cited** in *McCutchen v. McCutchen*, 360 N.C. 280, 624 S.E.2d 620, 2006 N.C. LEXIS 2 (2006).

## § 50-16.4. Counsel fees in actions for alimony, postseparation support.

### CASE NOTES

- I. In General.
- II. Amount of Fees.
- IV. Review on Appeal.

#### I. IN GENERAL.

##### **No Fees Awarded For Pro Bono Counsel.**

— Where the wife received pro bono counsel during the alimony proceedings, she was not entitled to an award of counsel fees under G.S. 50-16.4, as counsel fees referred only to fees paid by the wife to counsel for services rendered, and no such payment was made; the purpose of the statute was to even the playing field for a dependent spouse seeking alimony, and since pro bono services were rendered there were no costs to shift. *Patronelli v. Patronelli*, — N.C. App. —, 623 S.E.2d 322, 2006 N.C. App. LEXIS 56 (2006).

**Applied** in *Squires v. Squires*, — N.C. App. —, 631 S.E.2d 156, 2006 N.C. App. LEXIS 1410 (2006).

#### II. AMOUNT OF FEES.

##### **Reasonableness Is Key Factor.** —

Although the dependent spouse was not entitled to receive attorney's fees for the portions of the case relating to equitable distribution and divorce, the supporting spouse was required to pay \$35,000 of her \$64,830 in attorneys fees, which were reasonable fees for 244.8 hours of service based on \$300 per hour. *Cunningham v. Cunningham*, 171 N.C. App. 550, 615 S.E.2d 675, 2005 N.C. App. LEXIS 1371 (2005).

#### IV. REVIEW ON APPEAL.

**Fees Upheld.** — Since the trial court found that the ex-wife was without sufficient means whereon to subsist during the prosecution of the action and to defray the necessary expenses of the action, the unchallenged findings were sufficient to support the ex-wife's entitlement to attorney fees. *Rhew v. Felton*, — N.C. App. —, 631 S.E.2d 859, 2006 N.C. App. LEXIS 1560 (2006).

## § 50-16.9. Modification of order.

### CASE NOTES

- II. Change of Circumstances.
- III. Separation Agreements, Consent Judgments, etc.
- V. Modification of Foreign Judgments and Modification By Foreign Courts.

#### II. CHANGE OF CIRCUMSTANCES.

**Remand from Appellate Court.** — If, on remand from the appeal of an alimony award, the ex-husband were not afforded the chance to present new evidence of changed circumstances, the ex-husband would be deprived of the statutory right to move for a modification of alimony based upon a change of circumstances for the five-year period from the initial order until the hearing on the prior remand. *Rhew v.*

*Felton*, — N.C. App. —, 631 S.E.2d 859, 2006 N.C. App. LEXIS 1560 (2006).

#### III. SEPARATION AGREEMENTS, CONSENT JUDGMENTS, ETC.

**Award Binding Heirs Violated Statute.** — Order making post separation award binding on husband's heirs violated G.S. 50-16.9(b). *Squires v. Squires*, — N.C. App. —, 631 S.E.2d 156, 2006 N.C. App. LEXIS 1410 (2006).

## V. MODIFICATION OF FOREIGN JUDGMENTS AND MODIFICATION BY FOREIGN COURTS.

**Statute Invalid to the Extent it Conflicts with UIFSA.** — Since the Uniform Interstate Family Support Act (UIFSA), G.S. 52C-1-100 et seq. is a more specific and more recent statute than G.S. 50-16.9(c), any conflict between UIFSA and G.S. 50-16.9(c) must be resolved in accordance with the provisions of UIFSA. *Hook*

v. *Hook*, 170 N.C. App. 138, 611 S.E.2d 869, 2005 N.C. App. LEXIS 899 (2005).

G.S. 52C-2-205 and G.S. 52C-2-206 of the Uniform Interstate Family Support Act, G.S. 52C-1-100 et seq., which prohibit a responding state from modifying spousal support orders issued in another state, control over any conflict created by G.S. 50-16.9(c). *Hook v. Hook*, 170 N.C. App. 138, 611 S.E.2d 869, 2005 N.C. App. LEXIS 899 (2005).

## § 50-20. Distribution by court of marital and divisible property.

### CASE NOTES

- I. General Consideration.
- II. Marital and Separate Property.
  - B. Marital Property Generally.
  - E. Pension and Retirement Benefits.
- III. Distribution of Property.
  - A. In General.
  - B. Factors to Be Considered.
  - C. Distributive Awards.
- IV. Valuation of Property.
- V. Agreements.
- VI. Alimony and Child Support.

### I. GENERAL CONSIDERATION.

**Rights in Bankruptcy.** — Wife, separated from her debtor husband, was entitled to relief from the automatic stay, 11 U.S.C.S. § 362, to liquidate her right to an equitable distribution against debtor because she held an unsecured claim against debtor's bankruptcy estate, the matter was one controlled by state law, and relief would not unduly delay the administration of debtor's estate. *In re Linville*, — Bankr. —, 2005 Bankr. LEXIS 1115 (Bankr. M.D.N.C. Feb. 1, 2005).

**Applied** in *Roberts v. Roberts*, 173 N.C. App. 354, 618 S.E.2d 761, 2005 N.C. App. LEXIS 2030 (2005).

**Cited** in *McKyer v. McKyer*, — N.C. App. —, 632 S.E.2d 828, 2006 N.C. App. LEXIS 1829 (2006).

## II. MARITAL AND SEPARATE PROPERTY.

### B. Marital Property Generally.

**Entireties Property Presumed to Be Gift to Marital Estate.** —

Trial court did not err in finding that the entire parcel was marital property as the only relevant evidence that the husband offered to rebut the marital gift presumption was his own testimony. Thus, the husband did not demonstrate that he did not intend to make his

interest in the parcel a gift to the marital estate. *Warren v. Warren*, — N.C. App. —, 623 S.E.2d 800, 2006 N.C. App. LEXIS 139 (2006).

**Property Held As Tenancy By the Entireties After Party's Death.** — Trial court's order declaring an ex-wife as the owner of three parcels of property held with a decedent as tenancy by the entireties was reversed as an equitable distribution proceeding was pending at the time of the decedent's death and title to the parcels was not acquired in a manner prescribed by G.S. 50-20(b)(2); the parcels were marital property, subject to the equitable distribution action, which did not abate upon the death of the decedent. *Estate of Nelson v. Nelson*, — N.C. App. —, 633 S.E.2d 124, 2006 N.C. App. LEXIS 1831 (2006).

**Payments Decreasing Marital Debt and Related Financing Charges and Interest.**

— Since the husband's payments decreased financing charges and interest related to marital debt, those payments, to the extent made after the amendment to G.S. 50-20(b)(4)(d), constituted divisible property. *Warren v. Warren*, — N.C. App. —, 623 S.E.2d 800, 2006 N.C. App. LEXIS 139 (2006).

### E. Pension and Retirement Benefits.

**Division of Retirement Pay Upheld.** —

Because the trial court had not previously addressed the issues of retirement included in the separation agreement entered into by the

parties pursuant to G.S. 50-20(d), the trial court had the authority to enter its subsequent order awarding the ex-wife a portion of the ex-husband's military retirement pay; additionally, the appellate court concluded that the retirement provision of the separation agreement was not so overly broad or vague as to prevent the trial court from awarding the wife a portion of the husband's retirement pay. *Brenenstuhl v. Brenenstuhl*, 169 N.C. App. 433, 610 S.E.2d 301, 2005 N.C. App. LEXIS 603 (2005).

**Trial court erred in a divorce proceeding by classifying a wife's civil service retirement system pension as separate property;** the General Assembly had indicated through the plain language of G.S. 50-20(b)(1) that all pensions were to have been classified as marital property. *Rowland v. Rowland*, — N.C. App. —, 623 S.E.2d 287, 2005 N.C. App. LEXIS 2716 (2005).

### III. DISTRIBUTION OF PROPERTY.

#### A. In General.

##### **Only Marital Property Distributed. —**

Pursuant to G.S. 50-20(a), once the trial court found that the vehicle was separate property, that property was not subject to distribution, and the trial court erred in specifying that the car was the property of the couple's oldest child. The trial court had no authority to distribute separate property. *Warren v. Warren*, — N.C. App. —, 623 S.E.2d 800, 2006 N.C. App. LEXIS 139 (2006).

##### **Trial Judge Must Consider Distributional Factors. —**

Trial court erred in making no findings regarding the G.S. 50-20(c) factors and instead concluded only that an equal distribution of the property was equitable. The husband offered evidence in support of his request for an unequal distribution and the trial court was required to make findings of fact under G.S. 50-20(c) regarding any of the factors for which evidence was introduced at trial. *Warren v. Warren*, — N.C. App. —, 623 S.E.2d 800, 2006 N.C. App. LEXIS 139 (2006).

##### **Insufficient Findings to Support Award.**

Although it did not order an in-kind distribution of the parcel of land, the trial court erred because it made no findings of fact or conclusions of law regarding the in-kind presumption and whether it was rebutted, pursuant to G.S. 50-20(e). *Warren v. Warren*, — N.C. App. —, 623 S.E.2d 800, 2006 N.C. App. LEXIS 139 (2006).

#### B. Factors to Be Considered.

**Substantial Income Findings Properly Considered. —** Court made findings required

by G.S. 50-20 when it found, inter alia, that the husband had substantial income, and that the husband's age and health problems did not prevent the husband from earning income. *Squires v. Squires*, — N.C. App. —, 631 S.E.2d 156, 2006 N.C. App. LEXIS 1410 (2006).

**Distributional Factors Do Not Control Classification of Property Under G.S. 50-20(b). —** Trial court must follow three distinct analytical steps in making an equitable distribution award; it is only after the property has been classified as marital or separate property that the trial court applies the distributional factors found in G.S. 50-20(c) to effect an equitable distribution of marital property and while § 50-20(c) contains a number of factors the trial court may consider, § 50-20(c) does not manifest any intent that a distributional factor control the classification of property under subsection (b). *Estate of Nelson v. Nelson*, — N.C. App. —, 633 S.E.2d 124, 2006 N.C. App. LEXIS 1831 (2006).

##### **Failure of Court to Find Distributional Factors. —**

It was error for a trial court to order an equitable distribution of divorcing parties' marital property under G.S. 50-20(b)(2) or (4) because the court did not make written findings supporting its determination, it did not indicate whether an equal division was an equitable division, and it could not be determined whether the court had properly valued, classified, and distributed the property. *Davis v. Davis*, 360 N.C. 518, 631 S.E.2d 114, 2006 N.C. LEXIS 593 (2006).

#### C. Distributive Awards.

##### **Motion for Equitable Distribution Filed Before Divorce Was Absolute Was Valid. —**

Trial court erred in granting a husband's motion to dismiss a wife's motion for equitable distribution, pursuant to G.S. 50-20, in a divorce action where the wife filed the motion on the day before the judgment was signed by the judge and filed, at which point the judgment became final pursuant to G.S. 1A-1-58; therefore, G.S. 50-11(e) did not destroy the wife's right to seek equitable distribution as the motion was filed before an absolute divorce was granted. *Santana v. Santana*, 171 N.C. App. 432, 614 S.E.2d 438, 2005 N.C. App. LEXIS 1204 (2005).

### IV. VALUATION OF PROPERTY.

##### **Date of Separation to Be Used in Valuing Property. —**

Since the trial court was required by G.S. 50-21(b) to find the value of the IRA as of the date of separation, the court did not err by doing so. The husband's evidence was more



properly considered as a distributional factor under G.S. 50-20(c). *Warren v. Warren*, — N.C. App. —, 623 S.E.2d 800, 2006 N.C. App. LEXIS 139 (2006).

#### **Valuation Upheld. —**

Trial court's finding pursuant to G.S. 50-21(b) that the pickup truck had a value on the date of separation of \$4,860.00 was supported by competent evidence. *Warren v. Warren*, — N.C. App. —, 623 S.E.2d 800, 2006 N.C. App. LEXIS 139 (2006).

#### **Debts. —**

With respect to the increased amount paid as a result of the wife's \$7,500.00 post-separation draw on the line of credit, the draw and the resulting finance charges and interest were not marital debt (or divisible property) and, therefore, the trial court had no authority to distribute that debt. The trial court was directed on remand to take into account the husband's payment of finance charges incurred for the wife's separate debt. *Warren v. Warren*, — N.C. App. —, 623 S.E.2d 800, 2006 N.C. App. LEXIS 139 (2006).

### **V. AGREEMENTS.**

**Interpretation of Settlement Agreement.** — District court erred by interpreting a property settlement agreement via a declaratory judgment action brought by an ex-husband against his ex-wife because the proper remedy with regard to interpreting the agreement, which had been incorporated into a consent judgment of divorce, was a contempt proceeding and not an independent declaratory judgment action; as a result, the district court lacked subject matter jurisdiction of the matter and the order interpreting the agreement, which was in favor of the ex-husband, was vacated on appeal. *Fucito v. Francis*, — N.C. App. —, 622 S.E.2d 660, 2005 N.C. App. LEXIS 2715 (2005).

#### **Consent Order Was Not A Conveyance.**

— Dismissal of assignee's motion to subject real estate to execution sale was reversed as the assignee's judgment lien attached to a husband's undivided interest in property formerly held as a tenancy by the entirety upon the date of his divorce, when the property was converted by law to a tenancy in common, and when he conveyed his interest to his former wife, she took title subject to the judgment lien; a consent order providing for a future transfer of the property was not a conveyance as it provided for a future transfer of the property, did not provide a legal description or state the location of the property, and was not filed with the register of deeds. *Martin v. Roberts*, — N.C. App. —, 628 S.E.2d 812, 2006 N.C. App. LEXIS 964 (2006).

### **VI. ALIMONY AND CHILD SUPPORT.**

**No Application Where No Existing Alimony Order.** — G.S. 50-20(f) had no application because there was no existing alimony order to modify until the effective date of the alimony order; therefore, the ex-husband's request that the trial court take judicial notice of the equitable distribution order before the entry of the alimony order was ineffectual. *Rhew v. Felton*, — N.C. App. —, 631 S.E.2d 859, 2006 N.C. App. LEXIS 1560 (2006).

#### **Reconsideration of Alimony or Child Support After Equitable Distribution. —**

Even assuming *arguendo* that the parties' settlement agreement in a divorce was an equitable distribution, a prior child support award, following an equitable distribution, need only be reconsidered upon the request of a party pursuant to G.S. 50-20(f); the father made no such request, and, consequently, the trial court was not required to recalculate his child support obligation in light of any equitable distribution. *Diehl v. Diehl*, — N.C. App. —, 630 S.E.2d 25, 2006 N.C. App. LEXIS 1180 (2006).

## **§ 50-20.1. Pension and retirement benefits.**

### **CASE NOTES**

**Valuation of Military Pension Plan.** — Court properly attempted, pursuant to G.S. 50-20.1(b)(3), to award a wife a prorated portion of her husband's military pension, one-half of the marital portion of each of defendant's pension payments, to be paid by defendant at the time he began receiving benefits; however, the trial court failed to determine that defendant's military pension was a defined benefit retirement plan and failed to value it. *Cunningham v. Cunningham*, 171 N.C. App. 550, 615

S.E.2d 675, 2005 N.C. App. LEXIS 1371 (2005).

**Military Retirement Benefits Under Separation Agreement.** — Because the parties' separation agreement offered no specific language referring to an alternate means of distribution of the ex-husband's military retirement pay, the trial court correctly applied the provisions related to distribution of retirement benefits found in G.S. 50-20.1(d). *Brenenstuhl v. Brenenstuhl*, 169 N.C. App. 433, 610 S.E.2d 301, 2005 N.C. App. LEXIS 603 (2005).

## § 50-21. Procedures in actions for equitable distribution of property; sanctions for purposeful and prejudicial delay.

### CASE NOTES

#### **Bankruptcy. —**

Wife, separated from her debtor husband, was entitled to relief from the automatic stay, 11 U.S.C.S. § 362, to liquidate her right to an equitable distribution against debtor because she held an unsecured claim against debtor's bankruptcy estate, the matter was one controlled by state law, and relief would not unduly delay the administration of debtor's estate. In re Linville, — Bankr. —, 2005 Bankr. LEXIS 1115 (Bankr. M.D.N.C. Feb. 1, 2005).

#### **Marital Property Is Valued as of the Date of the Parties' Separation. —**

Trial court's finding pursuant to G.S. 50-21(b) that the pickup truck had a value on the date of separation of \$ 4,860.00 was supported by competent evidence. Warren v. Warren, — N.C. App. —, 623 S.E.2d 800, 2006 N.C. App. LEXIS 139 (2006).

Since the trial court was required by G.S. 50-21(b) to find the value of the IRA as of the

date of separation, the court did not err by doing so. The husband's evidence was more properly considered as a distributional factor under G.S. 50-20(c). Warren v. Warren, — N.C. App. —, 623 S.E.2d 800, 2006 N.C. App. LEXIS 139 (2006).

#### **Sanctions for Willful Obstruction and Unreasonable Delay. —**

Wife's due process rights were violated when sanctions were imposed for the wife's willful obstruction and unreasonable delay of equitable distribution hearing because the wife did not receive notice required by G.S. 50-21(e); the husband did not make a written request for sanctions and the language cited by the husband as allegedly giving the wife notice appeared in the equitable distribution order a distributional factor, and not as grounds for sanctions. Megremis v. Megremis, — N.C. App. —, 633 S.E.2d 117, 2006 N.C. App. LEXIS 1828 (2006).

**Chapter 50A.****Uniform Child-Custody Jurisdiction and Enforcement Act.****ARTICLE 2.***Uniform Child-Custody Jurisdiction and Enforcement Act.***Part 1. General Provisions.****§ 50A-102. Definitions.****CASE NOTES**

**Cited in** *In re M.B.*, — N.C. App. —, — S.E.2d —, 2006 N.C. App. LEXIS 1960 (Sept. 19, 2006).

**§ 50A-104. Application to Indian tribes.****CASE NOTES**

**Cited in** *In re A.D.L.*, 169 N.C. App. 701, 612 S.E.2d 639, 2005 N.C. App. LEXIS 797 (2005).

**Part 2. Jurisdiction.****§ 50A-201. Initial child-custody jurisdiction.****CASE NOTES**

**Cited in** *In re M.B.*, — N.C. App. —, — S.E.2d —, 2006 N.C. App. LEXIS 1960 (Sept. 19, 2006).

**§ 50A-204. Temporary emergency jurisdiction.****CASE NOTES**

**Review.** — Trial court properly entered a temporary custody order placing a child in the custody of a county's department of social services pursuant to its temporary emergency jurisdiction under G.S. 50A-204 where the child's father had been incarcerated and the child's mother had threatened to kill the child and throw the child out. *In re M.B.*, — N.C. App. —, — S.E.2d —, 2006 N.C. App. LEXIS 1960 (Sept. 19, 2006).



## Chapter 50B.

### Domestic Violence.

#### § 50B-1. Domestic violence; definition.

##### CASE NOTES

**Collateral estoppel effect of findings in domestic violence protective order** entered under G.S. 50B-1(a), finding that the mother was responsible for the incident, collaterally estopped the finding in the custody case that the father was responsible for the incident;

when the protective order was not appealed the collateral legal consequences of that order became final, precluding reconsideration of the order in the custody action under G.S. 50-13.2. *Doyle v. Doyle*, — N.C. App. —, 626 S.E.2d 845, 2006 N.C. App. LEXIS 517 (2006).

#### § 50B-3. Relief.

##### CASE NOTES

**Collateral Estoppel Effect of Findings in Protective Order.** — Where a trial judge found in domestic violence protective order proceedings that the mother was responsible for the altercation and where a different trial judge made the opposite finding in later custody proceedings, G.S. 50B-3(a1)(4) did not preclude an award of primary physical custody to the mother, but G.S. 50B-3(a1)(4) did not mandate a de novo consideration of which party commit-

ted domestic violence, as this would have undermined the mandate of G.S. 50B-3(a) requiring a trial court to issue a domestic violence protective order if it found that domestic violence occurred. *Doyle v. Doyle*, — N.C. App. —, 626 S.E.2d 845, 2006 N.C. App. LEXIS 517 (2006).

**Cited** in *Cockerham-Ellerbee v. Town of Jonesville*, — N.C. App. —, 626 S.E.2d 685, 2006 N.C. App. LEXIS 533 (2006).

#### § 50B-4. Enforcement of orders.

##### CASE NOTES

**Civil Liability for Failing to Enforce Protective Order.** — If, as plaintiff alleged, police officers promised to protect her by arresting her husband for violating a protective order but failed to do so, and her reliance on the promise was causally related to her injury by her husband, the officers owed her a “special duty” and therefore were not shielded from liability for negligence under the public duty doctrine. *Cockerham-Ellerbee v. Town of Jonesville*, — N.C. App. —, 626 S.E.2d 685, 2006 N.C. App. LEXIS 533 (2006).

Despite the use of the word “shall” in G.S. 50B-4(c) and G.S. 50B-4.1(b), police have no mandatory duty to arrest those in violation of a protective order, without any ability to exercise any discretion. As police have some level of discretionary authority in carrying out the enforcement of protective orders, the public duty doctrine is applicable to claims of negligent failure to enforce such orders. *Cockerham-Ellerbee v. Town of Jonesville*, — N.C. App. —, 626 S.E.2d 685, 2006 N.C. App. LEXIS 533 (2006).

#### § 50B-4.1. Violation of valid protective order.

##### CASE NOTES

**Civil Liability for Failing to Enforce Protective Order.** — Despite the use of the word “shall” in G.S. 50B-4(c) and G.S. 50B-4.1(b), police have no mandatory duty to arrest those in violation of a protective order, without

any ability to exercise any discretion. As police have some level of discretionary authority in carrying out the enforcement of protective orders, the public duty doctrine is applicable to claims of negligent failure to enforce such or-

ders. Cockerham-Ellerbee v. Town of Jonesville, — N.C. App. —, 626 S.E.2d 685, 2006 N.C. App. LEXIS 533 (2006).

If, as plaintiff alleged, police officers promised to protect her by arresting her husband for violating a protective order but failed to do so, and her reliance on the promise was causally

related to her injury by her husband, the officers owed her a “special duty” and therefore were not shielded from liability for negligence under the public duty doctrine. Cockerham-Ellerbee v. Town of Jonesville, — N.C. App. —, 626 S.E.2d 685, 2006 N.C. App. LEXIS 533 (2006).

## Chapter 50C.

### Civil No-Contact Orders.

Sec.

50C-8. Duration; extension of orders.

#### § 50C-8. Duration; extension of orders.

(a) A temporary civil no-contact order shall be effective for not more than 10 days as the court fixes, unless within the time so fixed the temporary civil no-contact order, for good cause shown, is extended for a like period or a longer period if the respondent consents. The reasons for the extension shall be stated in the temporary order. In case a temporary civil no-contact order is granted without notice and a motion for a permanent civil no-contact order is made, it shall be set down for hearing at the earliest possible time and takes precedence over all matters except older matters of the same character. When the motion for a permanent civil no-contact order comes on for hearing, the complainant may proceed with a motion for a permanent civil no-contact order, and, if the complainant fails to do so, the judge shall dissolve the temporary civil no-contact order. On two days' notice to the complainant or on such shorter notice to that party as the judge may prescribe, the respondent may appear and move its dissolution or modification. In that event the judge shall proceed to hear and determine such motion as expeditiously as the ends of justice require.

(b) A permanent civil no-contact order shall be effective for a fixed period of time not to exceed one year.

(c) Any order may be extended one or more times, as required, provided that the requirements of G.S. 50C-6 or G.S. 50C-7, as appropriate, are satisfied. The court may renew an order, including an order that previously has been renewed, upon a motion by the complainant filed before the expiration of the current order. The court may renew the order for good cause. The commission of an act of unlawful conduct by the respondent after entry of the current order is not required for an order to be renewed. If the motion for extension is uncontested and the complainant seeks no modification of the order, the order may be extended if the complainant's motion or affidavit states that there has been no material change in relevant circumstances since entry of the order and states the reason for the requested extension. Extensions may be granted only in open court and not under the provisions of G.S. 50C-6(d).

(d) Any civil no-contact order expiring on a day the court is not open for business shall expire at the close of the next court business day. (2004-194, s. 1; 2006-264, s. 41.)

**Effect of Amendments.** — Session Laws 2006-264, s. 41, effective August 27, 2006, substituted "G.S. 50C-6(d)" for "G.S. 50C-6(c)" in subsection (c).



## **Chapter 51.**

### **Marriage.**

#### **ARTICLE 1.**

#### *General Provisions.*

### **§ 51-1. Requisites of marriage; solemnization.**

#### **CASE NOTES**

**Cited in** *In re Linville*, — Bankr. —, 2005 Bankr. LEXIS 1115 (Bankr. M.D.N.C. Feb. 1, 2005).

### **§ 51-3. Want of capacity; void and voidable marriages.**

#### **CASE NOTES**

**Undue Influence.** — Where an executrix had filed a case on a decedent's behalf as his guardian ad litem, seeking an annulment of the decedent's marriage while the decedent was alive, and where substantial property rights hinged on the validity of the marriage, the action did not abate on the decedent's death

and the executrix was entitled to pursue it; further, as there was no evidence showing the birth of issue into the union between the decedent and the wife, G.S. 51-3 did not preclude an annulment based on undue influence. *Clark v. Foust-Graham*, 171 N.C. App. 707, 615 S.E.2d 398, 2005 N.C. App. LEXIS 1365 (2005).

**Chapter 52B.**  
**Uniform Premarital Agreement Act.**

**§ 52B-2. Definitions.**

**CASE NOTES**

**Applied** in Roberts v. Roberts, 173 N.C. App. 354, 618 S.E.2d 761, 2005 N.C. App. LEXIS 2030 (2005).

**§ 52B-3. Formalities.**

**CASE NOTES**

**Applied** in Roberts v. Roberts, 173 N.C. App. 354, 618 S.E.2d 761, 2005 N.C. App. LEXIS 2030 (2005).

## Chapter 52C.

### Uniform Interstate Family Support Act.

#### ARTICLE 1.

#### *General Provisions.*

### § 52C-1-100. Short title.

#### CASE NOTES

**Conflict Between UIFSA and Prior Law.** — Since the Uniform Interstate Family Support Act (UIFSA), G.S. 52C-1-100 et seq. is a more specific and more recent statute than G.S. 50-16.9(c), any conflict between UIFSA and G.S. 50-16.9(c) must be resolved in accordance with the provisions of UIFSA. *Hook v. Hook*, 170 N.C. App. 138, 611 S.E.2d 869, 2005 N.C. App. LEXIS 899 (2005).

**Foreign Order.** — Where a Washington court issued the original divorce decree but, within two years, nei-

ther party nor their children were living there, Washington lost jurisdiction over the child support order; because Tennessee acquired continuing, exclusive jurisdiction over the child support order since the father and the children lived there and the parties consented to Tennessee's jurisdiction over the order, the trial court did not err in finding that the Tennessee child support order was controlling. *Uhrig v. Madaras*, 174 N.C. App. 357, 620 S.E.2d 730, 2005 N.C. App. LEXIS 2394 (2005).

### § 52C-1-101. Definitions.

#### CASE NOTES

**Applied** in *Hook v. Hook*, 170 N.C. App. 138, 611 S.E.2d 869, 2005 N.C. App. LEXIS 899 (2005).

#### ARTICLE 2.

#### *Jurisdiction.*

### Part 2. Proceedings Involving Two or More States.

### § 52C-2-205. Continuing, exclusive jurisdiction.

#### CASE NOTES

**Conflict Between UIFSA and Prior Law.** — G.S. 52C-2-205 and G.S. 52C-2-206 of the Uniform Interstate Family Support Act, G.S. 52C-1-100 et seq., which prohibit a responding state from modifying spousal support orders issued in another state, control over any conflict created by G.S. 50-16.9(c). *Hook v. Hook*, 170 N.C. App. 138, 611 S.E.2d 869, 2005 N.C. App. LEXIS 899 (2005).

Former wife's registering a New Jersey divorce judgment in North Carolina had no effect on New Jersey's status as the issuing state with continuing, exclusive jurisdiction over its alimony order. New Jersey was the only state with jurisdiction to modify the former husband's alimony obligation. *Hook v. Hook*, 170 N.C. App. 138, 611 S.E.2d 869, 2005 N.C. App. LEXIS 899 (2005).



**§ 52C-2-206. Enforcement and modification of support order by tribunal having continuing jurisdiction.**

CASE NOTES

**Conflict Between UIFSA and Prior Law.** — G.S. 52C-2-205 and G.S. 52C-2-206 of the Uniform Interstate Family Support Act, G.S. 52C-1-100 et seq., which prohibit a responding state from modifying spousal support orders

issued in another state, control over any conflict created by G.S. 50-16.9(c). *Hook v. Hook*, 170 N.C. App. 138, 611 S.E.2d 869, 2005 N.C. App. LEXIS 899 (2005).

ARTICLE 3.

*Civil Provisions of General Application.*

**§ 52C-3-301. Proceedings under this Chapter.**

CASE NOTES

**Applied** in *Hook v. Hook*, 170 N.C. App. 138, 611 S.E.2d 869, 2005 N.C. App. LEXIS 899 (2005).

ARTICLE 6.

*Enforcement and Modification of Support Order After Registration.*

Part 1. Registration and Enforcement of Support Order.

**§ 52C-6-601. Registration of order for enforcement.**

CASE NOTES

**Applied** in *Hook v. Hook*, 170 N.C. App. 138, 611 S.E.2d 869, 2005 N.C. App. LEXIS 899 (2005).

**§ 52C-6-602. Procedure to register order for enforcement.**

CASE NOTES

**Applied** in *Hook v. Hook*, 170 N.C. App. 138, 611 S.E.2d 869, 2005 N.C. App. LEXIS 899 (2005).

## Chapter 53.

### Banks.

#### Article 8.

##### Commissioner of Banks and State Banking Commission.

Sec.

53-92. Appointment of Commissioner of Banks; State Banking Commission.

#### Article 14.

##### Banks Acting in a Fiduciary Capacity.

Part 2. Uniform Common Trust Fund Act.

53-163.5. Establishment of common trust funds.

#### Article 15.

##### North Carolina Consumer Finance Act.

53-166. Scope of Article; evasions; penalties; loans in violation of Article void.

#### Article 19A.

##### Mortgage Lending Act.

Sec.

53-243.05. Qualifications for licensure; issuance.

53-243.06. License renewal; termination.

53-243.17. Participation in national mortgage licensing system; licensing proprietary software.

53-243.18. Payment of fees.

#### Article 20.

##### Refund Anticipation Loan Act.

53-245. Title and scope.

### ARTICLE 8.

#### *Commissioner of Banks and State Banking Commission.*

### § 53-92. Appointment of Commissioner of Banks; State Banking Commission.

(a) On or before April 1, 1983, and quadrennially thereafter, the Governor shall appoint a Commissioner of Banks subject to confirmation by the General Assembly by joint resolution. The name of the Commissioner of Banks shall be submitted to the General Assembly on or before February 1, of the year in which the term of his office begins. The term of office for the Commissioner of Banks shall be four years. In case of a vacancy in the office of Commissioner of Banks for any reason prior to the expiration of his term of office, the name of his successor shall be submitted by the Governor to the General Assembly, not later than four weeks after the vacancy arises. If a vacancy arises in the office when the General Assembly is not in session, the Commissioner of Banks shall be appointed by the Governor to serve on an interim basis pending confirmation by the General Assembly.

(b) **(Effective until July 1, 2007)** The State Banking Commission, which has heretofore been created, shall consist of the State Treasurer, who shall serve as an ex officio member thereof, 19 members appointed by the Governor, and two members appointed by the General Assembly under G.S. 120-121, one of whom shall be appointed upon the recommendation of the President Pro Tempore of the Senate and one of whom shall be appointed upon the recommendation of the Speaker of the House of Representatives. The Governor shall appoint five practical bankers, 11 persons selected primarily as representatives of the borrowing public, and two chief executive officers of State savings institutions. The person appointed by the General Assembly upon the recommendation of the President Pro Tempore of the Senate shall be a practical banker. The person appointed by the General Assembly upon the recommendation of the Speaker of the House shall be a person selected

**G.S. 53-92(b) is set out twice. See note.**

primarily as a representative of the borrowing public. The persons selected primarily as representatives of the borrowing public shall not be employees or directors of any financial institution nor shall they have any interest in any regulated financial institution other than as a result of being a depositor or borrower. Under this section, no person shall be considered to have an interest in a financial institution whose interest in any financial institution does not exceed one-half of one percent (1/2 of 1%) of the capital stock of that financial institution. These members of the Commission shall be selected so as to fully represent the consumer, industrial, manufacturing, professional, business and farming interests of the State. No person shall serve on the Commission for more than two complete consecutive terms. As the terms of office of the appointive members of the Commission expire, their successors shall be appointed by the person appointing them, for terms of four years each. Any vacancy occurring in the membership of the Commission shall be filled by the appropriate appointing officer for the unexpired term, except that vacancies among members appointed by the General Assembly shall be filled in accordance with G.S. 120-122. The appointed members of the Commission shall receive as compensation for their services the same per diem and expenses as is paid to the members of the Advisory Budget Commission. This compensation shall be paid from the fees collected from the examination of banks as provided by law.

(b) **(Effective July 1, 2007)** The State Banking Commission, which has heretofore been created, shall consist of the State Treasurer, who shall serve as an ex officio member thereof, 19 members appointed by the Governor, and two members appointed by the General Assembly under G.S. 120-121, one of whom shall be appointed upon the recommendation of the President Pro Tempore of the Senate and one of whom shall be appointed upon the recommendation of the Speaker of the House of Representatives. The Governor shall appoint five practical bankers, 11 persons selected primarily as representatives of the borrowing public, and two chief executive officers of State savings institutions. The person appointed by the General Assembly upon the recommendation of the President Pro Tempore of the Senate shall be a practical banker. The person appointed by the General Assembly upon the recommendation of the Speaker of the House shall be a person selected primarily as a representative of the borrowing public. The persons selected primarily as representatives of the borrowing public shall not be employees or directors of any financial institution nor shall they have any interest in any regulated financial institution other than as a result of being a depositor or borrower. Under this section, no person shall be considered to have an interest in a financial institution whose interest in any financial institution does not exceed one-half of one percent (1/2 of 1%) of the capital stock of that financial institution. These members of the Commission shall be selected so as to fully represent the consumer, industrial, manufacturing, professional, business and farming interests of the State. No person shall serve on the Commission for more than two complete consecutive terms. As the terms of office of the appointive members of the Commission expire, their successors shall be appointed by the person appointing them, for terms of four years each. Any vacancy occurring in the membership of the Commission shall be filled by the appropriate appointing officer for the unexpired term, except that vacancies among members appointed by the General Assembly shall be filled in accordance with G.S. 120-122. The appointed members of the Commission shall receive subsistence and travel expenses at the rates set forth in G.S. 120-3.1. The subsistence and travel expenses shall be paid from the fees collected from the examination of banks as provided by law.



(c) The Banking Commission shall meet at such time or times, and not less than once every three months, as the Commission shall, by resolution, prescribe, and the Commission may be convened in special session at the call of the Governor, or upon the request of the Commissioner of Banks. The State Treasurer shall be chairman of the said Commission.

No member of said Commission shall act in any matter affecting any bank in which he is financially interested, or with which he is in any manner connected. No member of said Commission shall divulge or make use of any information coming into his possession as a result of his service on such Commission, and shall not give out any information with reference to any facts coming into his possession by reason of his services on such Commission in connection with the condition of any State banking institution, unless such information shall be required of him at any hearing at which he is duly subpoenaed, or when required by order of a court of competent jurisdiction.

A quorum shall consist of a majority of the total membership of the Banking Commission. A majority vote of the members qualified with respect to a matter under review present at that meeting shall constitute valid action of the Banking Commission. The State Treasurer and all disqualified members who are present shall be counted to determine whether a quorum is present at a meeting.

The Commissioner of Banks shall act as the executive officer of the Banking Commission, but the Commission shall provide, by rules and regulations, for hearings before the Commission upon any matter or thing which may arise in connection with the banking laws of this State upon the request of any person interested therein, and review any action taken or done by the Commissioner of Banks.

(d) The Banking Commission is hereby vested with full power and authority to supervise, direct and review the exercise by the Commissioner of Banks of all powers, duties, and functions now vested in or exercised by the Commissioner of Banks under the banking laws of this State. Upon an appeal to the Banking Commission by any party from an order entered by the Commissioner of Banks following an administrative hearing pursuant to Article 3A of Chapter 150B of the General Statutes, the Administrative Procedure Act, the chairman of the Commission may appoint an appellate review panel of not less than five members to review the record on appeal, hear oral arguments, and make a recommended decision to the Commission. Unless another time period for appeals is provided by this Chapter, any party to an order by the Commissioner of Banks may, within 20 days after the order and upon written notice to the Commissioner, appeal the Commissioner's order to the Banking Commission for review. Upon notice of an appeal, the Commissioner of Banks shall, within 30 days of the notice, certify to the Commission the record on appeal. Any party to a proceeding before the Banking Commission may, within 20 days after final order of said Commission and by written notice to the Commissioner of Banks, appeal to the Superior Court of Wake County for a final determination of any question of law which may be involved. The cause shall be entitled "State of North Carolina on Relation of the Banking Commission against (here insert name of appellant)." It shall be placed on the civil issue docket of such court and shall have precedence over other civil actions. In the event of an appeal the Commissioner shall certify the record to the Clerk of Superior Court of Wake County within 15 days thereafter. (1931, c. 243, s. 1; 1935, c. 266; 1939, c. 91, s. 1; 1949, c. 372; 1953, c. 1209, ss. 4, 6; 1961, c. 547, s. 2; 1967, c. 789, s. 16; 1969, c. 844, s. 6; c. 920; 1979, c. 478, s. 1; 1981, c. 884, s. 1; 1983, c. 328, ss. 1, 3; 1985, c. 318; 1989, c. 781, s. 41.1; 1995, c. 490, s. 9; 2001-193, s. 14; 2003-63, s. 2; 2006-203, s. 16.)

**Subsection (b) Set Out Twice.** — The first version of subsection (b) set out above is effective until July 1, 2007. The second version of subsection (b) set out about is effective July 1, 2007.

**Editor's Note.** —

Session Laws 2006-203, s. 126, provides in part: "Prosecutions for offenses committed before the effective date of this act [July 1, 2007] are not abated or affected by this act, and the statutes that would be applicable but for this act remain applicable to those prosecutions.

**Effect of Amendments.** — Session Laws 2006-203, s. 16, effective July 1, 2007, and applicable to the budget for the 2007-2009 biennium and each subsequent biennium thereafter, substituted "subsistence and travel expenses at the rates set forth in G.S. 120-3.1. The subsistence and travel expenses" for "compensation for their services the same per diem and expenses as is paid to the members of the Advisory Budget Commission. This compensation" near the end of subsection (b).

## ARTICLE 14.

### *Banks Acting in a Fiduciary Capacity.*

#### Part 2. Uniform Common Trust Fund Act.

### § 53-163.5. Establishment of common trust funds.

(a) Any bank or trust company duly authorized to act as a fiduciary in this State may establish and maintain one or more common trust funds for the collective investment of funds held in a fiduciary capacity by such bank or trust company hereafter referred to as the "maintaining bank". The maintaining bank may include for the purposes of collective investment in such common trust fund or funds established and maintained by it, funds held in a fiduciary capacity by any other bank or trust company duly authorized to act as a fiduciary, wherever located, which other bank or trust company is hereinafter referred to as the "participating bank".

Provided, however, that the relationship between the maintaining bank and the participating bank is (i) the maintaining bank owns, controls or is affiliated with the participating bank or (ii) a bank holding company owns, controls or is affiliated with both the maintaining bank and the participating bank.

(b) For the purposes of this section, a bank or trust company shall be considered to be owned, controlled or affiliated if twenty-five percent (25%) or more of any class of its voting stock is owned by a bank or bank holding company or if twenty-five percent (25%) or more of any class of its voting stock is owned by one person or no more than 10 persons who are the same person or persons who own twenty-five percent (25%) or more of any class of the voting stock of the maintaining bank.

(c) Such common trust funds may include a fund composed solely of funds held under an agency agreement in which the bank or trust company assumes investment discretion and assumes fiduciary responsibility.

(d) Such bank or trust company may invest the funds held by it in any fiduciary capacity in one or more common trust funds, provided that (i) such investment is not prohibited by the instrument, judgment, decree or order creating such fiduciary relationship or amendment thereof, and (ii) the bank has no interest in the assets of the common trust fund other than as a fiduciary. (1939, c. 200, s. 1; 1973, c. 1276; 1977, c. 502, s. 2; 2005-192, s. 1; 2006-259, s. 13(q).)

**Editor's Note.** —

Session Laws 2006-259, s. 13(s) provides: "This section becomes effective October 1, 2006, and applies to (i) all trusts created before, on, or after that date; (ii) all judicial proceedings

concerning trusts commenced on or after that date; and (iii) all judicial proceedings concerning trusts commenced before that date unless the court finds that application of a particular provision of this act would substantially inter-



fere with the effective conduct of the judicial proceedings or prejudice the rights of the parties, in which case the law as it existed on September 30, 2006, shall apply.”

**Effect of Amendments.** — Session Laws 2006-259, s. 13(q), effective October 1, 2006, rewrote subsection (d). See Editor’s note for applicability.

## ARTICLE 15.

### *North Carolina Consumer Finance Act.*

#### § 53-164. Title.

#### CASE NOTES

**Cited in State ex rel. Cooper v. NCCS Loans, Inc.,** — N.C. App. —, 620 S.E.2d 697, 2005 N.C. App. LEXIS 2392 (2005); **State ex rel. Cooper v.**

**NCCS Loans, Inc.,** — N.C. App. —, 624 S.E.2d 371, 2005 N.C. App. LEXIS 2588 (2005).

#### § 53-166. Scope of Article; evasions; penalties; loans in violation of Article void.

(a) Scope. — No person shall engage in the business of lending in amounts of ten thousand dollars (\$10,000) or less and contract for, exact, or receive, directly or indirectly, on or in connection with any such loan, any charges whether for interest, compensation, consideration, or expense, or any other purpose whatsoever, which in the aggregate are greater than permitted by Chapter 24 of the General Statutes, except as provided in and authorized by this Article, and without first having obtained a license from the Commissioner. The word “lending” as used in this section, shall include, but shall not be limited to, endorsing or otherwise securing loans or contracts for the repayment of loans.

(b) Evasions. — The provisions of subsection (a) of this section apply to any person who seeks to avoid its application by any device, subterfuge, or pretense whatsoever. Devices, subterfuges, and pretenses include any transaction in which a cash rebate or other advance of funds is offered and all of the following apply:

- (1) The cash advance is made contemporaneously with the transaction or soon thereafter.
- (2) The amount of the cash advance is required to be repaid at a later date.
- (3) The selling or providing of any item, service, or commodity with the transaction is incidental to, or a pretext for, the advance of funds.

(c) Penalties; Commissioner to Provide and Testify as to Facts in His Possession. — Any person not exempt from this Article, or any officer, agent, employee, or representative thereof, who fails to comply with or who otherwise violates any of the provisions of this Article, or any regulation of the Banking Commission adopted pursuant to this Article, shall be guilty of a Class 1 misdemeanor. Each violation shall be considered a separate offense. It is the duty of the Commissioner of Banks to provide the district attorney of the court having jurisdiction of any offense under this subsection with all facts and evidence in the Commissioner’s actual or constructive possession, and to testify as to these facts upon the trial of any person for the offense.

(d) Additional Penalties. — Any contract of loan, the making or collecting of which violates any provision of this Article, or regulation thereunder, except as a result of accidental or bona fide error of computation is void, and the licensee or any other party in violation shall not collect, receive, or retain any principal or charges whatsoever with respect to the loan. If an affiliate operating in the same office or subsidiary operating in the same office of a licensee makes a loan in violation of G.S. 53-180(i), the affiliate or subsidiary may recover only its



principal on the loan. (1955, c. 1279; 1957, c. 1429, s. 8; 1961, c. 1053, s. 1; 1969, c. 1303, ss. 13, 14; 1973, c. 47, s. 2; c. 1042, s. 1; 1979, c. 33, s. 1; 1985, c. 154, ss. 6, 13; 1987, c. 444, s. 3; 1989, c. 17, ss. 1, 13; 1989 (Reg. Sess., 1990), c. 881, s. 1; 1993, c. 539, s. 425; 1994, Ex. Sess., c. 24, s. 14(c); 2006-243, s. 2.)

**Editor's Note.** — Session Laws 2006-243, s. 1, provides "The General Assembly makes the following findings:

"(1) Consumer loans in North Carolina are regulated by the North Carolina Consumer Finance Act, Article 15 of Chapter 53 of the General Statutes. The North Carolina Consumer Finance Act requires consumer finance lenders to be licensed and, under G.S. 53-173, authorizes interest rates of up to thirty-six percent (36%) on loans of three thousand dollars (\$3,000) or less.

"(2) Some lenders have attempted to evade the restrictions of the North Carolina Consumer Finance Act by offering cash advances in the form of instant cash rebates or other guises. These cash advance transactions are typically offered in conjunction with the sale of Internet access, telephone time units, catalog certificates, or the use of office equipment, when in fact the sale of the goods or services is a pretext for the making of a loan.

"(3) North Carolina courts have declared some of these transactions to be unlawful, but new schemes continue to be devised in order to circumvent the lending laws of North Carolina and to avoid regulation by the Commissioner of Banks.

"(4) It is the intent of the General Assembly that G.S. 53-166(a) should be construed broadly to prohibit illicit lending schemes and to clarify the devices, subterfuges, and pretenses that are prohibited under G.S. 53-166(b), as amended by Section 2 of this act."

**Effect of Amendments.** — Session Laws 2006-243, s. 2, effective October 1, 2006, and applicable to transactions that are investigated on or after that date under the North Carolina Consumer Finance Act, Article 15 of Chapter 53 of the General Statutes, and to transactions that are subject to enforcement actions under the North Carolina Consumer Finance Act that are filed on or after that date, rewrote the section.

#### CASE NOTES

**Applicability To Check Cashing Business That Charged Usurious Interest Rates.** — Where evidence against a check cashing business established that it executed contracts for usurious loans, it used its alternative business purpose of providing Internet access to consumers as a guise to cover this illegal activity, and no evidentiary basis existed upon which a reasonable fact-finder could reach a contrary conclusion, the State's claims of usury and violations of the Consumer Finance Act were established as a matter of law; moreover, the contracts which customers had with the business were cancelled pursuant to G.S. 75-15.1, requiring all funds collected by the business pursuant to such contracts to be refunded to the customers. *State ex rel. Cooper v. NCCS Loans, Inc.*, — N.C. App. —, 624 S.E.2d

371, 2005 N.C. App. LEXIS 2588 (2005).

**Check Cashing Companies.** — Reorganized check cashing companies' policy of extending an immediate cash rebate and Internet usage to its customers in exchange for a one-year commitment to make bi-weekly payments in an amount equal to five times the amount of the rebate, violated G.S. § 24-2.1, was usurious, and constituted an unfair and deceptive trade practice in violation of G.S. 75-1.1. The fact that the reorganized companies characterized the transactions as rebates or Internet service agreements was subterfuge to conceal the usurious rate of interest. *State ex rel. Cooper v. NCCS Loans, Inc.*, — N.C. App. —, 620 S.E.2d 697, 2005 N.C. App. LEXIS 2392 (2005).

**§ 53-168. License required; showing of convenience, advantage and financial responsibility; investigation of applicants; hearings; existing businesses; contents of license; transfer; posting.**

#### CASE NOTES

**Unlicensed Check Cashing Companies.** — Reorganized check cashing companies' policy of extending an immediate cash rebate and Internet usage to its customers in exchange for

a one-year commitment to make bi-weekly payments in an amount equal to five times the amount of the rebate, violated G.S. 24-2.1, was usurious, and constituted an unfair and decep-

tive trade practice in violation of G.S. 75-1.1. The fact that the reorganized companies characterized the transactions as rebates or Internet service agreements was subterfuge to

conceal the usurious rate of interest. State ex rel. Cooper v. NCCS Loans, Inc., — N.C. App. —, 620 S.E.2d 697, 2005 N.C. App. LEXIS 2392 (2005).

## ARTICLE 19A.

### *Mortgage Lending Act.*

#### § 53-243.01. Definitions.

##### CASE NOTES

**Denial of Application Upheld.** — North Carolina State Banking Commission's decision denying the applications for licensure for two mortgage loan officers was upheld on appeal and the lower court did not err by relying upon a previously entered default judgment against the two since the applicants' prior mortgage company had been awarded that default judgment for engaging in a pattern of business operations regarding false and misleading rep-

resentations and they were not exempt from the qualifications of G.S. 53-243.05 pursuant to a grandfather provision, because that grandfather provision only exempted already licensed persons from taking the three-year training requirement. State ex rel. Banking Comm'n Against Weiss v. N.C. Comm'r of Banks, 174 N.C. App. 78, 620 S.E.2d 540, 2005 N.C. App. LEXIS 2282 (2005).

#### § 53-243.05. Qualifications for licensure; issuance.

(a) Any person, other than an exempt person, desiring to obtain a license pursuant to this Article shall make written application for licensure to the Commissioner on forms prescribed by the Commissioner. In accordance with rules adopted by the Commission, the application shall contain any information the Commissioner deems necessary regarding the following:

- (1) The applicant's name and address and social security number.
- (2) The applicant's form and place of organization, if applicable.
- (3) The applicant's proposed method of and locations for doing business, if applicable.
- (4) The qualifications and business history of the applicant and, if applicable, the business history of any partner, officer, or director, any person occupying a similar status or performing similar functions, or any person directly or indirectly controlling the applicant, including: (i) a description of any injunction or administrative order by any state or federal authority to which the person is or has been subject; (ii) a conviction of a misdemeanor involving fraudulent dealings or moral turpitude or relating to any aspect of the residential mortgage lending business; (iii) any felony convictions.
- (5) With respect to an application for licensing as a mortgage banker or broker, the applicant's financial condition, credit history, and business history; and with respect to the application for licensing as a loan officer, the applicant's credit history and business history.
- (6) The applicant's consent to a federal and State criminal history record check and a set of the applicant's fingerprints in a form acceptable to the Commissioner. In the case of an applicant that is a corporation, partnership, limited liability company, association, or trust, each individual who has control of the applicant or who is the managing principal or a branch manager shall consent to a federal and State criminal history record check and submit a set of that individual's fingerprints pursuant to this subdivision. Refusal to consent to a



criminal history record check constitutes grounds for the Commissioner to deny licensure to the applicant as well as to any entity (i) by whom or by which the applicant is employed, (ii) over which the applicant has control, or (iii) as to which the applicant is the current or proposed managing principal or a current or proposed branch manager.

(b) In addition to the requirements imposed by the Commissioner under subsection (a) of this section, each individual applicant for licensure as a loan officer shall:

- (1) Be at least 18 years of age.
- (2) Have satisfactorily completed, within the three years immediately preceding the date application is made, a mortgage lending fundamentals course approved by the Commissioner. The course shall consist of at least eight hours of classroom instruction in subjects related to mortgage lending approved by the Commissioner. In addition, the applicant shall have satisfactorily completed a written examination approved by the Commissioner or possess residential mortgage lending education or experience in residential mortgage lending transactions that the Commissioner deems equivalent to the course.

(c) In addition to the requirements under subsection (a) of this section, each applicant for licensure as a mortgage broker or mortgage banker at the time of application and at all times thereafter shall comply with the following requirements:

- (1) Except as provided for in subdivision (1a) of this subsection, if the applicant is a sole proprietor, the applicant shall have at least three years of experience in residential mortgage lending or other experience or competency requirements as the Commissioner may impose. Experience as an exclusive mortgage broker or as a limited loan officer shall not constitute mortgage-lending experience under this subdivision.
- (1a) If an individual applicant to be licensed as a mortgage broker meets all other requirements for licensure under this section but does not meet the requirements of subdivision (1) of this subsection, the individual applicant may be licensed as an exclusive mortgage broker upon compliance with all of the following:
  - a. Successfully complete both a residential mortgage-lending course approved by the Commissioner of not less than 40 hours of classroom instruction, and a written examination approved by the Commissioner.
  - b. Act exclusively as a mortgage broker for a single mortgage banker licensee or single exempt mortgage banker for whom the broker shall be deemed an agent, who shall be responsible for supervising the broker as required by this Article, who shall sign the license application of the applicant, and who shall be jointly and severally liable with the broker for any claims arising out of the broker's mortgage lending activities.
  - c. Shall be compensated for the broker's mortgage brokering activities on a basis that is not dependent upon the loan amount, interest rate, fees, or other terms of the loans brokered.
  - d. Shall not handle borrower or other third-party funds in connection with the brokering or closing of mortgage loans.
- (2) If the applicant is a general or limited partnership, at least one of its general partners shall have the experience as described under subdivision (1) of this subsection.
- (3) If the applicant is a corporation, at least one of its principal officers shall have the experience as described under subdivision (1) of this subsection.



- (4) If the applicant is a limited liability company, at least one of its managers shall have the experience as described under subdivision (1) of this subsection.

(d) Each applicant shall identify one person meeting the requirements of subsection (c) of this section to serve as the applicant's managing principal.

(e) Every applicant for initial licensure shall pay a filing fee not to exceed one thousand two hundred fifty dollars (\$1,250) for licensure as a mortgage broker or mortgage banker or sixty-seven dollars and fifty cents (\$67.50) for licensure as a loan officer or limited loan officer, in addition to the actual cost of obtaining credit reports and State and national criminal history record checks.

(f) A mortgage banker shall post a surety bond in the amount of one hundred fifty thousand dollars (\$150,000), and a mortgage broker shall post a surety bond in the amount of fifty thousand dollars (\$50,000). The surety bond shall be in a form satisfactory to the Commissioner and shall run to the State for the benefit of any claimants against the licensee to secure the faithful performance of the obligations of the licensee under this Article. The aggregate liability of the surety shall not exceed the principal sum of the bond. A party having a claim against the licensee may bring suit directly on the surety bond, or the Commissioner may bring suit on behalf of any claimants, either in one action or in successive actions. Consumer claims shall be given priority in recovering from the bond. Any appropriate deposit of cash or securities shall be accepted in lieu of any bond that is required. An audited financial statement from a qualified lender showing a net worth of two hundred fifty thousand dollars (\$250,000) or more shall be accepted in lieu of any bond required.

(g) Any general partner, manager of a limited liability company, or officer of a corporation who individually meets the requirements under subsection (b) of this section shall, upon payment of the applicable fee, meet the qualifications for licensure as a loan officer subject to the provisions of subsection (i) of this section.

(h) Each principal office and each branch office of a mortgage broker or mortgage banker licensed under the provisions of this Article shall be issued a separate license. A licensed mortgage broker or mortgage banker shall file with the Commissioner an application on a form prescribed by the Commissioner that identifies the address of the principal office and each branch office and branch manager. A filing fee not to exceed one hundred twenty-five dollars (\$125.00) shall be assessed by the Commissioner for each branch office issued a license.

(i) If the Commissioner determines that an applicant meets the qualifications for licensure and finds that the financial responsibility, character, and general fitness of the applicant are such as to command the confidence of the community and to warrant belief that the business will be operated honestly and fairly, the Commissioner shall issue a license to the applicant. In addition, for an applicant qualifying as an exclusive mortgage broker, the Commissioner shall determine if the mortgage broker/mortgage banker relationship is in the public interest. (2001-393, s. 2; 2002-169, ss. 3-6; 2004-171, s. 8; 2005-316, ss. 3, 4; 2006-239, s. 1.)

#### **Editor's Note. —**

Session Laws 2006-239, s. 4, effective October 1, 2006, provides: "The amount set as the maximum amount that may be charged for fees in this act shall be the actual amount of the fee until the Banking Commission adopts rules setting the fee at a lower rate."

#### **Effect of Amendments. —**

Session Laws 2006-239, s. 1, effective Octo-

ber 1, 2006, in subsection (e) substituted "not to exceed one thousand two hundred fifty dollars (\$1,250) for licensure as a mortgage broker or mortgage banker or sixty-seven dollars and fifty cents (\$67.50)" for "of one thousand dollars (\$1,000) for licensure as a mortgage broker or mortgage banker or fifty dollars (\$50.00)" in subsection (h) substituted "not to exceed one hundred twenty-five dollars (\$125.00) shall be

assessed by the Commissioner for each branch” for “of one hundred dollars (\$100.00) shall be assessed by the Commissioner for each.”

#### CASE NOTES

**Denial of Application Upheld.** — North Carolina State Banking Commission’s decision denying the applications for licensure for two mortgage loan officers was upheld on appeal and the lower court did not err by relying upon a previously entered default judgment against the two since the applicants’ prior mortgage company had been awarded that default judgment for engaging in a pattern of business operations regarding false and misleading rep-

resentations, and they were not exempt from the qualifications of G.S. 53-243.05 pursuant to a grandfather provision because that grandfather provision only exempted already licensed persons from taking the three-year training requirement. *State ex rel. Banking Comm’n Against Weiss v. N.C. Comm’r of Banks*, 174 N.C. App. 78, 620 S.E.2d 540, 2005 N.C. App. LEXIS 2282 (2005).

### § 53-243.06. License renewal; termination.

(a) All licenses issued by the Commissioner under the provisions of this Article shall expire annually on the 30th day of June following issuance or on any other date that the Commissioner may determine. The license shall become invalid after that date unless renewed. A license may be renewed 45 days prior to the expiration date by compliance with subsection (b1) of this section and by paying to the Commissioner, in addition to the actual cost of obtaining credit reports and State and national criminal history record checks as the Commissioner may require, a renewal fee as follows:

- (1) Licensed mortgage bankers shall pay an annual fee not to exceed six hundred twenty-five dollars (\$625.00) and one hundred twenty-five dollars (\$125.00) for each branch office.
- (2) Licensed mortgage brokers shall pay an annual fee not to exceed six hundred twenty-five dollars (\$625.00) and one hundred twenty-five dollars (\$125.00) for each branch office. Licensed exclusive mortgage brokers shall pay an annual fee not to exceed six hundred twenty-five dollars (\$625.00).
- (3) Licensed loan officers shall pay an annual fee not to exceed sixty-seven dollars and fifty cents (\$67.50).

(b) If a mortgage banker or mortgage broker license is not renewed prior to the applicable expiration date, then an additional two hundred fifty dollars (\$250.00) in addition to the renewal fee under subsection (a) of this section shall be assessed as a late fee to any renewal. If a loan officer or limited loan officer license is not renewed prior to the applicable expiration date, then an additional fifty dollars (\$50.00) in addition to the renewal fee under subsection (a) of this section shall be assessed as a late fee to any renewal. In the event a licensee fails to obtain a reinstatement of the license within 90 days after the date the license expires, the Commissioner may require the licensee to comply with the requirements for the initial issuance of a license under the provisions of this Article.

(b1) When required by the Commissioner, each individual described in G.S. 53-245.05(a)(6) shall furnish to the Commissioner his or her consent to a criminal history record check and a set of his or her fingerprints in a form acceptable to the Commissioner. Refusal to consent to a criminal history record check may constitute grounds for the Commissioner to deny renewal of the license of the person as well as the license of any other person by which he or she is employed, over which he or she has control, or as to which he or she is the current or proposed managing principal or a current or proposed branch manager.



(c) Licenses issued under this Article are not assignable. Control of a licensee shall not be acquired through a stock purchase or other device without the prior written consent of the Commissioner. The Commissioner shall not give written consent if the Commissioner finds that any of the grounds for denial, revocation, or suspension of a license pursuant to G.S. 53-243.12 are applicable to the acquiring person. (2001-393, s. 2; 2002-169, s. 7; 2004-171, s. 9; 2006-239, s. 2.)

**Editor's Note.** — Session Laws 2006-239, s. 4, effective October 1, 2006, provides: "The amount set as the maximum amount that may be charged for fees in this act shall be the actual amount of the fee until the Banking Commission adopts rules setting the fee at a lower rate."

**Effect of Amendments.** —

Session Laws 2006-239, s. 2, effective October 1, 2006, rewrote subdivisions (a)(1) through (3); in subsection (b) inserted "mortgage banker or mortgage broker" near the beginning and added the second sentence.

## § 53-243.17. Participation in national mortgage licensing system; licensing proprietary software.

(a) The Commissioner of Banks is authorized to participate in the formation and operation of a centralized and automated licensing system and data depository funded by State mortgage regulators and law enforcement agencies. Pursuant to this authority, the Commissioner may:

- (1) Cause funds of the Office of Commissioner of Banks to be applied to the initial capitalization, organizational expenses, and operating expenses of a limited liability company, nonprofit corporation or foundation, or other entity created to operate the licensing system and data depository and to serve as a manager or director of the entity;
- (2) Enter into operating agreements, information sharing agreements, interstate cooperative agreements, and technology licensing agreements necessary to the organization and operation of the entity and the licensing system and data depository; and
- (3) Take such further actions as are reasonably necessary to give effect to the provisions of this section.

(b) The Commissioner is authorized to enter into agreements to license the use of the proprietary software owned by the Office of the Commissioner of Banks to banking, mortgage, or financial services supervisory agencies of other states.

(c) Notwithstanding any other provision of this section, the Commissioner retains full authority and discretion under this Article to license mortgage brokers, mortgage bankers, loan officers, and limited loan officers and to enforce this Article to its fullest extent. Nothing in this section shall be deemed to be a reduction or derogation of that authority and discretion. (2006-239, s. 3.)

**Editor's Note.** — Session Laws 2006-239, s. 5, made this section effective October 1, 2006.

Session Laws 2006-239, s. 4, effective October 1, 2006, provides: "The amount set as the

maximum amount that may be charged for fees in this act shall be the actual amount of the fee until the Banking Commission adopts rules setting the fee at a lower rate."

## § 53-243.18. Payment of fees.

Payment of fees specified in this Article shall be made to the Office of Commissioner of Banks or, at the election of the Commissioner, to a national mortgage licensing system, agency, or enterprise designated by the Commissioner. (2006-239, s. 3.)



**Editor's Note.** — Session Laws 2006-239, s. 5, made this section effective October 1, 2006.

Session Laws 2006-239, s. 4, effective October 1, 2006, provides: "The amount set as the

maximum amount that may be charged for fees in this act shall be the actual amount of the fee until the Banking Commission adopts rules setting the fee at a lower rate."

## ARTICLE 20.

### *Refund Anticipation Loan Act.*

#### § 53-245. Title and scope.

(a) Title. This Article shall be known and cited as the "Refund Anticipation Loan Act".

(b) **(Effective until July 1, 2007)** Scope. No person may individually or in conjunction or cooperation with another person process, receive, or accept for delivery an application for a refund anticipation loan or a check in payment of refund anticipation loan proceeds or in any other manner facilitate the making of a refund anticipation loan unless the person has complied with the provisions of this Article. In addition, G.S. 143-3.3 prohibits refund anticipation loans repaid from refunds of North Carolina tax.

(b) **(Effective July 1, 2007)** Scope. No person may individually or in conjunction or cooperation with another person process, receive, or accept for delivery an application for a refund anticipation loan or a check in payment of refund anticipation loan proceeds or in any other manner facilitate the making of a refund anticipation loan unless the person has complied with the provisions of this Article. In addition, G.S. 143B-426.40A prohibits refund anticipation loans repaid from refunds of North Carolina tax. (1989 (Reg. Sess., 1990), c. 881, s. 2; 2006-66, s. 6.19(a); 2006-203, s. 17; 2006-221, s. 3A; 2006-259 s. 40(a).)

**Subsection (b) Set Out Twice.** The first version of subsection (b) set out above is effective until July 1, 2007. The second version of subsection (b) set out above is effective July 1, 2007.

**Editor's Note.** — Session Laws 2006-66, s. 6.19(a), as added by Session Laws 2006-221, s. 3A, substituted G.S. 143B-426.39D for G.S. 143B-426.39A, which had been substituted for "G.S. 143-3.3" by Session Laws 2006-203, s. 17. The reference to G.S. 143B-426.39D has been changed to G.S. 143B-426.40A at the direction of the Revisor of Statutes.

Session Laws 2006-203, s. 126, provides that "This act becomes effective July 1, 2007, and applies to the budget for the 2007-2009 biennium and each subsequent biennium thereafter. Prosecutions for offenses committed before the effective date of this act are not abated or

affected by this act, and the statutes that would be applicable but for this act remain applicable to those prosecutions."

Session Laws 2006-259, s. 40(a), which made identical changes to those made by Session Laws 2006-66, s. 6.19(a) as added by Session Laws 2006-221, s. 3A, was repealed, pursuant to the terms of Session Laws 2006-259, s. 40(i) upon Session Laws 2006-221 becoming law.

**Effect of Amendments.** — Session Laws 2006-66, s. 6.19(a), as added by Session Laws 2006-221, s. 3A, effective July 1, 2007, in subsection (b), substituted "G.S. 143B-426.39D" for "G.S. 143B-426.39A" which had been substituted for "G.S. 143-3.3" by Session Laws 2006-203, s. 17. See Editor's note.

Session Laws 2006-203, s. 17, effective July 1, 2007, substituted "G.S. 143B-426.39A" for "G.S. 143-3.3" in subsection (b). See Editor's note for applicability.

## Chapter 53B.

### Financial Privacy Act.

Sec.

53B-2. Definitions.

53B-4. Access to financial records.

#### § 53B-2. Definitions.

As used in this Chapter, unless the context otherwise requires, the term:

- (1) “Customer” means a person who has transacted business with a financial institution or has used the services offered by a financial institution.
- (2) “Financial institution” means a banking corporation, trust company, savings and loan association, credit union, or other entity principally engaged in the business of lending money or receiving or soliciting money on deposit.
- (3) “Financial record” means an original of, a copy of, or information derived from, a record held by a financial institution pertaining to a customer’s relationship with the financial institution and identified with or identifiable with the customer. Financial record shall not include forged or counterfeit financial instruments or records relating to an account established under a fictitious name or another person’s name without proper authorization.
- (4) “Government authority” means an agency or department of the State or of any of its political subdivisions, including any officer, employee, or agent thereof.
- (5) “Government inquiry” means a lawful investigation by a government agency or official proceeding inquiring into a violation of, or failure to comply with, any criminal or civil statute, law, or rule.
- (6) “Supervisory agency” means a State agency or department having the statutory authority to examine the financial condition or business operation of a financial institution. (1985 (Reg. Sess., 1986), c. 1002, s. 1; 2006-259, s. 14(a).)

**Effect of Amendments.** — Session Laws 2006-259, s. 14(a), effective October 1, 2006, and applicable to acts committed on or after that date, added the last sentence to subsection (3).

#### § 53B-4. Access to financial records.

Notwithstanding any other provision of law, no government authority may have access to a customer’s financial record held by a financial institution unless the financial record is described with reasonable specificity and access is sought pursuant to any of the following:

- (1) Customer authorization that meets the requirements of the Right to Financial Privacy Act § 1104, 12 U.S.C. § 3404, provided, however, a customer authorization received by a State agency or a county department of social services for the purpose of determining eligibility for the programs of public assistance under Chapter 108A of the General Statutes, or for purposes of a government inquiry concerning these same programs of public assistance, cannot be revoked and shall remain valid for 12 months unless a shorter period is specified in the authorization, or a customer authorization that is given by a licensed attorney with respect to an account in which the attorney holds funds as a fiduciary.

- (2) Authorization under G.S. 105-251, 105-251.1, or 105-258.
- (3) Search warrant as provided in Article 11 of Chapter 15A of the General Statutes.
- (4) Statutory authority of a supervisory agency to examine or have access to financial records in the exercise of its supervisory, regulatory, or monetary functions with respect to a financial institution.
- (5) The authority granted under G.S. 116B-72 and G.S. 116B-75.
- (6) Examination and review by the State Auditor or his authorized representative under G.S. 147-64.6(c)(9) or G.S. 147-64.7(a).
- (7) Request by a government authority authorized to buy and sell student loan notes under Article 23 of Chapter 116 of the General Statutes for financial records relating to insured student loans.
- (8) Pending litigation to which the government authority and the customer are parties.
- (9) Subpoena or court order in connection with a grand jury proceeding.
- (10) A writ of execution under Article 28 of Chapter 1 of the General Statutes.
- (11) Other court order or administrative or judicial subpoena authorized by law if the requirements of G.S. 53B-5 are met.
- (12) The authority granted to the Attorney General under Chapter 75 of the General Statutes.

As used in this section, the term “reasonable specificity” means that degree of specificity reasonable under all the circumstances, and, with respect to requests under G.S. 116B-72 and G.S. 116B-75, may include designation by general type or class. (1985 (Reg. Sess., 1986), c. 1002, s. 1; 1999-460, s. 11; 2006-259, s. 14(b).)

**Effect of Amendments.** — Session Laws 2006-259, s. 14(b), effective October 1, 2006, and applicable to acts committed on or after that date, substituted “pursuant to any of the

following” for “pursuant to” at the end of the introductory paragraph, added subdivision (12) and made minor stylistic changes.



**Chapter 55.**  
**North Carolina Business Corporation Act.**

**Article 8.**

**Directors and Officers.**

**Part 1. Board of Directors.**

Sec.

55-8-03. Number and election of directors.

**Article 11.**

**Merger and Share Exchange.**

Sec.

55-11-04. Merger with subsidiary.

55-11-05. Articles of merger or share exchange.

55-11-06. Effect of merger or share exchange.

**ARTICLE 7.**

*Shareholders.*

**Part 4. Derivative Proceedings.**

**§ 55-7-42. Demand.**

**CASE NOTES**

**Failure to Satisfy Requirements of This Section Results in Dismissal. —**

Trial court properly dismissed a property owners association's suit against its developer, which asserted claims of constructive fraud and unfair and deceptive trade practices, for lack of standing on the part of the association, because the association failed to obtain a two-thirds vote of its membership authorizing the suit, as was required by its bylaws; as a result, the trial

court lacked subject matter jurisdiction and properly granted the developer's motion to dismiss and motion for summary judgment. *Peninsula Prop. Owners Ass'n v. Crescent Res., LLC*, 171 N.C. App. 89, 614 S.E.2d 351, 2005 N.C. App. LEXIS 1165 (2005).

**Applied** in *Wright v. Krispy Kreme Doughnuts, Inc.*, 231 F.R.D. 475, 2005 U.S. Dist. LEXIS 25557 (M.D.N.C. 2005).

**§ 55-7-43. Stay of proceedings.**

**CASE NOTES**

**Applied** in *Wright v. Krispy Kreme Doughnuts, Inc.*, 231 F.R.D. 475, 2005 U.S. Dist. LEXIS 25557 (M.D.N.C. 2005).

**ARTICLE 8.**

*Directors and Officers.*

**Part 1. Board of Directors.**

**§ 55-8-03. Number and election of directors.**

(a) A board of directors must consist of one or more individuals, with the number specified in or fixed in accordance with the articles of incorporation or bylaws.

(b) The number of directors may be increased or decreased from time to time by amendment to, or in the manner provided in, the articles of incorporation or

the bylaws, but for a corporation to which G.S. 55-7-28(e) applies in which shares are entitled to be voted cumulatively, the number of directors shall not be decreased unless one of the following applies:

- (1) The decrease is approved by the shareholders in a vote in which the number of shares entitled to be voted cumulatively that vote against the proposal for decrease would not be sufficient to elect a director by cumulative voting.
- (2) The decrease is made pursuant to a provision of the articles of incorporation or bylaws fixing a minimum and maximum number of directors and authorizing the number of directors to be fixed or changed from time to time, within the maximum and the minimum, by the shareholders or, unless the articles of incorporation or an agreement valid under G.S. 55-7-31 provides otherwise, the board of directors.
- (c) Repealed by Session Laws 2005-268, s. 7.
- (d) Directors are elected at the first annual shareholders' meeting and at each annual meeting thereafter unless their terms are staggered under G.S. 55-8-06. (1901, c. 2, ss. 14, 39; Rev., ss. 1147, 1182; C.S., ss. 1144, 1175; 1927, c. 138; G.S., ss. 55-48, 55-112; 1955, c. 1371, s. 1; 1959, c. 1316, s. 33; 1969, c. 751, ss. 10, 11; 1989, c. 265, s. 1; 1993, c. 552, s. 13; 2005-268, s. 7; 2006-264, s. 44(a).)

**Effect of Amendments.** —

Session Laws 2006-264, s. 44(a), effective August 27, 2006, substituted “applies in which shares are entitled to be voted cumulatively,

the number” for “applies, the number” in subsection (b), in subsection (b)(1) substituted “entitled to be voted cumulatively that vote against” for “voting against.”

## Part 3. Standards of Conduct.

### § 55-8-30. General standards for directors.

#### CASE NOTES

**Action Untimely.** — Summary judgment was granted in favor of a director of a corporation in an action alleging violations of G.S. 55-8-30 and N.Y. Gen. Bus. Law § 717 relating to the sale of certain illegal agreements because

the causes of action were time barred. *Rich Food Servs., Inc. v. Rich Plan Corp.*, — F. Supp. 2d —, 2002 U.S. Dist. LEXIS 27799 (E.D.N.C. Nov. 11, 2002).

## ARTICLE 11.

### *Merger and Share Exchange.*

### § 55-11-04. Merger with subsidiary.

(a) Subject to Article 9, a parent corporation owning at least ninety percent (90%) of the outstanding shares of each class of a subsidiary corporation may merge the subsidiary into itself without approval of the shareholders of the parent corporation unless the articles of incorporation of the parent corporation require approval of the shareholders or the plan of merger contains one or more amendments to the articles of incorporation of the parent corporation for which shareholder approval is required by G.S. 55-10-03, and without approval of the board of directors or shareholders of the subsidiary corporation unless the articles of incorporation of the subsidiary corporation require approval of the shareholders of the subsidiary corporation. Subject to Article 9, a parent

corporation owning at least ninety percent (90%) of the outstanding shares of each class of a subsidiary corporation may merge itself into the subsidiary corporation without approval of the board of directors or shareholders of the subsidiary corporation unless the articles of incorporation of the subsidiary corporation provide otherwise or the plan of merger contains one or more amendments to the articles of incorporation of the subsidiary corporation for which shareholder approval is required by G.S. 55-10-03. Except as otherwise provided in this subsection, the provisions of G.S. 55-11-01 and G.S. 55-11-03 apply to any merger described in this subsection.

(b) If a merger is consummated without approval of the subsidiary corporation's shareholders, the surviving corporation shall, within 10 days after the effective date of the merger, notify each shareholder of the subsidiary corporation as of the effective date of the merger, that the merger has become effective.

(c) Repealed by Session Laws 2005, c. 268, s. 21.

(d) Repealed by Session Laws 2005, c. 268, s. 21.

(e) Repealed by Session Laws 2005, c. 268, s. 21.

(f) The provisions of G.S. 55-13-02(c) do not apply to subsidiary corporations that are parties to mergers consummated under this section. (1955, c. 1371, s. 1; 1959, c. 1316, s. 37; 1973, c. 469, s. 33; 1989, c. 265, s. 1; 1997-485, s. 29; 2005-268, s. 21; 2006-226, s. 16(a).)

**Effect of Amendments. —**

Session Laws 2006-226, s. 16(a), effective August 10, 2006, substituted "the surviving

corporation" for "the parent corporation" in subsection (b).

## § 55-11-05. Articles of merger or share exchange.

(a) After a plan of merger or a plan of share exchange for the acquisition of shares of a domestic corporation has been authorized as required by this Chapter, the surviving or acquiring corporation shall deliver to the Secretary of State for filing articles of merger or share exchange.

In the case of a merger, the articles of merger shall set forth (i) the name and state or country of incorporation of each merging corporation, (ii) the name of the merging corporation that will survive the merger and, if the surviving corporation is not authorized to transact business or conduct affairs in this State, a designation of its mailing address and a commitment to file with the Secretary of State a statement of any subsequent change in its mailing address, (iii) any amendments to the articles of incorporation of the surviving corporation provided in the plan of merger if the surviving corporation is a domestic corporation, and (iv) a statement that the plan of merger has been approved by each merging corporation in the manner required by law.

In the case of a share exchange, the articles of share exchange shall set forth (i) the name of the corporation whose shares will be acquired, (ii) the name and state or country of incorporation of the acquiring corporation, (iii) a designation of its mailing address and a commitment to file with the Secretary of State a statement of any subsequent change in its mailing address if the acquiring corporation is not authorized to transact business or conduct affairs in this State, and (iv) a statement that the plan of share exchange has been approved by the corporation whose shares will be acquired and by the acquiring corporation in the manner required by law.

(a1) If the plan of merger or share exchange is amended after the articles of merger or share exchange have been filed but before the articles of merger or share exchange become effective and any statement in the articles of merger or share exchange becomes incorrect as a result of the amendment, the surviving or acquiring corporation shall deliver to the Secretary of State for filing prior



to the time the articles of merger or share exchange become effective an amendment to the articles of merger or share exchange correcting the incorrect statement. If the articles of merger or share exchange are abandoned after the articles of merger or share exchange are filed but before the articles of merger or share exchange become effective, the surviving or acquiring corporation shall deliver to the Secretary of State for filing prior to the time the articles of merger or share exchange become effective an amendment reflecting abandonment of the plan of merger or share exchange.

(b) A merger or share exchange takes effect when the articles of merger or share exchange become effective.

(c) Certificates of merger shall also be registered as provided in G.S. 47-18.1.

(d) In the case of a merger pursuant to G.S. 55-11-07 or a share exchange pursuant to G.S. 55-11-07, references in subsections (a) and (a1) of this section to “corporation” shall include a domestic corporation, a domestic nonprofit corporation, a foreign corporation, and a foreign nonprofit corporation as applicable. (1925, c. 77, s. 1; 1939, c. 5; 1943, c. 270; G.S., s. 55-165; 1955, c. 1371, s. 1; 1967, c. 823, s. 18; 1973, c. 469, s. 34; 1989, c. 265, s. 1; 1991, c. 645, s. 10(b); 2005-268, s. 22; 2006-226, s. 16(b); 2006-259, s. 14.5(a)-(b); 2006-264, s. 44(b).)

**Editor’s Note. —**

Session Laws 2006-264, s. 44(b), which amended subsection (d), was repealed by Session Laws 2006-259, s. 14.5(a).

**Effect of Amendments. —**

Session Laws 2006-226, s. 16(b), as amended by Session Laws 2006-259, s. 14.5(b), effective

August 10, 2006, substituted “merger pursuant to G.S. 55-11-07 or G.S. 55-11-09, or a share exchange pursuant to G.S. 55-11-07, references in subsections (a) and (a1)” for “merger or share exchange pursuant to G.S. 55-11-07 or G.S. 55-11-09, references in subsections (a) and (b)” in subsection (d).

## § 55-11-06. Effect of merger or share exchange.

(a) When a merger pursuant to G.S. 55-11-01, 55-11-04, 55-11-07, or 55-11-09 takes effect:

- (1) Each other merging corporation merges into the surviving corporation and the separate existence of each merging corporation except the surviving corporation ceases.
- (2) The title to all real estate and other property owned by each merging corporation is vested in the surviving corporation without reversion or impairment.
- (3) The surviving corporation has all liabilities of each merging corporation.
- (4) A proceeding pending by or against any merging corporation may be continued as if the merger did not occur or the surviving corporation may be substituted in the proceeding for a merging corporation whose separate existence ceases in the merger.
- (5) If a domestic corporation survives the merger, its articles of incorporation are amended to the extent provided in the articles of merger.
- (6) The shares of each merging corporation that are to be converted into shares, obligations, or other securities of the surviving or any other corporation or into the right to receive cash or other property are thereupon converted, and the former holders of the shares are entitled only to the rights provided to them in the plan of merger or, in the case of former holders of shares in a domestic corporation, any right they may have under Article 13 of this Chapter.
- (7) If a foreign corporation or foreign nonprofit corporation survives the merger, it is deemed:
  - a. To agree that it will promptly pay to dissenting shareholders of any merging domestic corporation the amount, if any, to which they

are entitled under Article 13 of this Chapter and otherwise to comply with the requirements of Article 13 as if it were a surviving domestic corporation in the merger.

- b. To agree that it may be served with process in this State in any proceeding for enforcement (i) of any obligation of any merging domestic corporation, (ii) of the rights of dissenting shareholders of any merging domestic corporation under Article 13 of this Chapter, and (iii) of any obligation of the surviving foreign corporation or foreign nonprofit corporation arising from the merger.
- c. To have appointed the Secretary of State as its agent for service of process in any proceeding for enforcement as specified in subdivision b. of this subdivision. Service of process on the Secretary of State shall be made by delivering to, and leaving with, the Secretary of State, or with any clerk authorized by the Secretary of State to accept service of process, duplicate copies of the process and the fee required by G.S. 55-1-22(b). Upon receipt of service of process on behalf of a surviving foreign corporation or foreign nonprofit corporation in the manner provided for in this section, the Secretary of State shall immediately mail a copy of the process by registered or certified mail, return receipt requested, to the surviving foreign corporation or foreign nonprofit corporation. If the surviving foreign corporation or foreign nonprofit corporation is authorized to transact business or conduct affairs in this State, the address for mailing shall be its principal office designated in the latest document filed with the Secretary of State that is authorized by law to designate the principal office, or, if there is no principal office on file, its registered office. If the surviving foreign corporation or foreign nonprofit corporation is not authorized to transact business or conduct affairs in this State, the address for mailing shall be the mailing address designated pursuant to G.S. 55-11-05(a).

The merger shall not affect the liability or absence of liability of any holder of shares in a merging corporation for any acts, omissions, or obligations of any merging corporation made or incurred prior to the effectiveness of the merger.

(b) When a share exchange for the acquisition of shares of a domestic corporation pursuant to G.S. 55-11-02 or G.S. 55-11-07 takes effect:

- (1) The shares of the acquired corporation are exchanged as provided in the plan of share exchange, and the former holders of the shares are entitled only to the exchange rights provided in the plan of share exchange or any right they may have under Article 13 of this Chapter.
- (2) If the acquiring corporation is not a domestic corporation, it is deemed to agree that it will promptly pay to dissenting shareholders of the acquired corporation the amount, if any, to which they are entitled under Article 13 of this Chapter and otherwise to comply with the requirements of Article 13 as if it were an acquiring domestic corporation in the share exchange.
- (3) If the acquiring corporation is not a domestic corporation, the acquiring corporation is deemed:
  - a. To agree that it may be served with process in this State in any proceeding for enforcement (i) of the rights of dissenting shareholders of the acquired corporation under Article 13 of this Chapter and (ii) of any obligation of the acquiring corporation arising from the share exchange; and
  - b. To have appointed the Secretary of State as its agent for service of process in any proceeding for enforcement as specified in sub-



subdivision a. of this subdivision. Service of process on the Secretary of State shall be made by delivering to, and leaving with, the Secretary of State, or with any clerk authorized by the Secretary of State to accept service of process, duplicate copies of the process and the fee required by G.S. 55-1-22(b). Upon receipt of service of process on behalf of an acquiring corporation in the manner provided for in this section, the Secretary of State shall immediately mail a copy of the process by registered or certified mail, return receipt requested, to the acquiring corporation. If the acquiring corporation is authorized to transact business or conduct affairs in this State, the address for mailing shall be its principal office designated in the latest document filed with the Secretary of State that is authorized by law to designate the principal office or, if there is no principal office on file, its registered office. If the acquiring corporation is not authorized to transact business or conduct affairs in this State, the address for mailing shall be the mailing address designated pursuant to G.S. 55-11-05(a).

(c) In the case of a merger pursuant to G.S. 55-11-07 or G.S. 55-11-09 or a share exchange pursuant to G.S. 55-11-07, references in subsections (a) and (b) of this section to “corporation” shall include a domestic corporation, a domestic nonprofit corporation, a foreign corporation, and a foreign nonprofit corporation as applicable. (1925, c. 77, s. 1; 1943, c. 270; G.S., s. 55-166; 1955, c. 1371, s. 1; 1967, c. 950, s. 1; 1989, c. 265, s. 1; 1999-369, s. 1.7; 2005-268, s. 23; 2006-264, s. 44(c).)

**Effect of Amendments. —**

Session Laws 2006-264, s. 44(c), effective August 27, 2006, substituted “Each other merg-

ing” for “Each merging” at the beginning of subdivision (a)(1).

## ARTICLE 13.

### *Dissenters’ Rights.*

#### Part 2. Procedure for Exercise of Dissenters’ Rights.

#### § 55-13-25. Payment.

##### CASE NOTES

**Subsection (b) is Mandatory. —** G.S. 55-13-25(b) made the inclusion of the required information in that subsection mandatory for a payment to be complete; a letter sent to a shareholder by merging banks failed to offer an explanation as to how the fair value of the stock was calculated, so the bank’s proffered payment

was incomplete, and the proper date for the determination of the shareholder’s 60-day filing period was the date of the shareholder’s payment demand. *Foard v. Avery County Bank*, 169 N.C. App. 625, 610 S.E.2d 460, 2005 N.C. App. LEXIS 686 (2005).

#### Part 3. Judicial Appraisal of Shares.

#### § 55-13-30. Court action.

##### CASE NOTES

**Determination of 60-Day Filing Period. —** G.S. 55-13-25(b) made the inclusion of the

required information in that subsection mandatory for a payment to be complete; a letter



sent to a shareholder by merging banks failed to offer an explanation as to how the fair value of the stock was calculated, so the bank's proffered payment was incomplete, and the proper date for the determination of the shareholder's

60-day filing period was the date of the shareholder's payment demand. *Foard v. Avery County Bank*, 169 N.C. App. 625, 610 S.E.2d 460, 2005 N.C. App. LEXIS 686 (2005).

## ARTICLE 15.

### *Foreign Corporations.*

#### Part 1. Certificate of Authority.

#### § 55-15-01. Authority to transact business required.

##### CASE NOTES

- II. Transacting or Doing Business Within State.
  - C. Activity Not Constituting Business Within State.

#### II. TRANSACTING OR DOING BUSINESS WITHIN STATE.

##### C. Activity Not Constituting Business Within State.

**Maintaining Lawsuit.** — Trial court did not err in denying the general contractor's motion to dismiss based on its argument that

the judgment creditor had failed to obtain a certificate of authority to do business in North Carolina; the judgment creditor was not required to have obtained a certificate of authority to maintain its lawsuit to collect money it believed it was owed. *Quantum Corporate Funding, Ltd. v. B.H. Bryan Bldg. Co.*, — N.C. App. —, 623 S.E.2d 793, 2006 N.C. App. LEXIS 187 (2006).

#### § 55-15-02. Consequences of transacting business without authority.

##### CASE NOTES

**Action by Foreign Judgement Creditor Not Barred.** — Trial court did not err in denying the general contractor's motion to dismiss based on its argument that the judgment creditor had failed to obtain a certificate of authority to do business in North Carolina; the

judgment creditor was not required to have obtained a certificate of authority to maintain its lawsuit to collect money it believed it was owed. *Quantum Corporate Funding, Ltd. v. B.H. Bryan Bldg. Co.*, — N.C. App. —, 623 S.E.2d 793, 2006 N.C. App. LEXIS 187 (2006).

## ARTICLE 16.

### *Records and Reports.*

#### Part 1. Records.

#### § 55-16-02. Inspection of records by shareholders.

##### CASE NOTES

**Applied in** *Wright v. Krispy Kreme Doughnuts, Inc.*, 231 F.R.D. 475, 2005 U.S. Dist. LEXIS 25557 (M.D.N.C. 2005).

**Chapter 55A.**  
**North Carolina Nonprofit Corporation Act.**

<b>Article 11.</b>	Sec.
<b>Merger.</b>	55A-11-05. Effect of merger. 55A-11-06. Merger with foreign corporation.
Sec.	
55A-11-04. Articles of merger.	

**ARTICLE 1.**  
*General Provisions.*

**Part 1. Short Title and Reservation of Power.**

**§ 55A-1-01. Short title.**

**CASE NOTES**

**Applied** in Peninsula Prop. Owners Ass’n v. Crescent Res., LLC, 171 N.C. App. 89, 614 S.E.2d 351, 2005 N.C. App. LEXIS 1165 (2005).

**ARTICLE 2.**  
*Organization.*

**§ 55A-2-06. Bylaws.**

**CASE NOTES**

**Failure to Comply With Bylaw Vote Requirement Before Bringing Suit.** — Trial court properly dismissed a property owners association’s suit against its developer, which asserted claims of constructive fraud and unfair and deceptive trade practices, for lack of standing on the part of the association, because the association failed to obtain a two-thirds

vote of its membership authorizing the suit, as was required by its bylaws. As a result, the trial court lacked subject matter jurisdiction and properly granted the developer’s motion to dismiss and motion for summary judgment. Peninsula Prop. Owners Ass’n v. Crescent Res., LLC, 171 N.C. App. 89, 614 S.E.2d 351, 2005 N.C. App. LEXIS 1165 (2005).

**ARTICLE 6.**  
*Members and Memberships.*

**Part 2. Members’ Rights and Obligations.**

**§ 55A-6-20. Designations, qualifications, rights, and obligations of members.**

**CASE NOTES**

**Failure to Comply With Bylaw Vote Requirement Before Bringing Suit.** — Trial

court properly dismissed a property owners association’s suit against its developer, which

asserted claims of constructive fraud and unfair and deceptive trade practices, for lack of standing on the part of the association, because the association failed to obtain a two-thirds vote of its membership authorizing the suit, as was required by its bylaws; as a result, the trial

court lacked subject matter jurisdiction and properly granted the developer's motion to dismiss and motion for summary judgment. *Peninsula Prop. Owners Ass'n v. Crescent Res., LLC*, 171 N.C. App. 89, 614 S.E.2d 351, 2005 N.C. App. LEXIS 1165 (2005).

## ARTICLE 11.

### *Merger.*

#### **§ 55A-11-04. Articles of merger.**

(a) After a plan of merger has been authorized as required by this Chapter, the surviving corporation shall deliver to the Secretary of State for filing articles of merger setting forth:

- (1) The name and state or country of incorporation of each merging corporation.
- (2) The name of the merging corporation that will survive the merger and, if the surviving corporation is not authorized to transact business or conduct affairs in this State, a designation of its mailing address and a commitment to file with the Secretary of State a statement of any subsequent change in its mailing address.
- (3) If the surviving corporation is a domestic corporation, any amendment to the articles of incorporation of the corporation provided in the plan of merger.
- (4) A statement that the plan of merger has been approved by each merging corporation in the manner required by law.

(a1) If the plan of merger is amended after the articles of merger have been filed but before the articles of merger become effective and any statement in the articles of merger becomes incorrect as a result of the amendment, the surviving corporation shall deliver to the Secretary of State for filing prior to the time the articles of merger become effective an amendment to the articles of merger correcting the incorrect statement. If the articles of merger are abandoned after the articles of merger are filed but before the articles of merger become effective, the surviving corporation shall deliver to the Secretary of State for filing prior to the time the articles of merger become effective an amendment reflecting abandonment of the plan of merger.

(b) A merger takes effect when the articles of merger become effective.

(c) Certificates of merger shall also be registered as provided in G.S. 47-18.1.

(d) In the case of a merger pursuant to G.S. 55A-11-06 or G.S. 55A-11-08, references in subsections (a) and (a1) of this section to "corporation" shall include a domestic corporation, a foreign nonprofit corporation, a domestic business corporation, and a foreign business corporation as applicable. (1955, c. 1230; 1967, c. 823, s. 22; 1993, c. 398, s. 1; 2005-268, s. 40; 2006-264, s. 44(d).)

#### **Effect of Amendments. —**

Session Laws 2006-264, s. 44(d), effective August 27, 2006, rewrote subsection (d).

#### **§ 55A-11-05. Effect of merger.**

(a) When a merger pursuant to G.S. 55A-11-01, 55A-11-06, or 55A-11-08 takes effect:



- (1) Each other merging corporation merges into the surviving corporation and the separate existence of each merging corporation except the surviving corporation ceases.
- (2) The title to all real estate and other property owned by each merging corporation is vested in the surviving corporation without reversion or impairment subject to any and all conditions to which the property was subject prior to the merger.
- (3) The surviving corporation has all liabilities and obligations of each merging corporation.
- (4) A proceeding pending by or against any merging corporation may be continued as if the merger did not occur or the surviving corporation may be substituted in the proceeding for a merging corporation whose separate existence ceases in the merger.
- (5) If a domestic corporation survives the merger, its articles of incorporation are amended to the extent provided in the articles of merger.
- (6) If a foreign corporation or a foreign business corporation survives the merger, it is deemed:
  - a. To agree that it may be served with process in this State in any proceeding for enforcement (i) of any obligation of any merging domestic corporation and (ii) of any obligation of the surviving foreign corporation or foreign business corporation arising from the merger.
  - b. To have appointed the Secretary of State as its agent for service of process in any proceeding for enforcement as specified in subdivision a. of this subdivision. Service of process on the Secretary of State shall be made by delivering to, and leaving with, the Secretary of State, or with any clerk authorized by the Secretary of State to accept service of process, duplicate copies of the process and the fee required by G.S. 55A-1-22(b). Upon receipt of service of process on behalf of a surviving foreign corporation or foreign business corporation in the manner provided for in this section, the Secretary of State shall immediately mail a copy of the process by registered or certified mail, return receipt requested, to the surviving foreign corporation or foreign business corporation. If the surviving foreign corporation or foreign business corporation is authorized to transact business or conduct affairs in this State, the address for mailing shall be its principal office designated in the latest document filed with the Secretary of State that is authorized by law to designate the principal office, or if there is no principal office on file, its registered office. If the surviving foreign corporation or foreign business corporation is not authorized to transact business or conduct affairs in this State, the address for mailing shall be the mailing address designated pursuant to G.S. 55A-11-04(a)(2).

The merger shall not affect the liability or absence of liability of any member of a merging corporation for acts, omissions, or obligations of any merging corporation made or incurred prior to the effectiveness of the merger.

(b) In the case of a merger pursuant to G.S. 55A-11-06 or G.S. 55A-11-08, references in subsection (a) of this section to “corporation” shall include a domestic corporation, a foreign nonprofit corporation, a domestic business corporation, and a foreign business corporation, as applicable. (1955, c. 1230; 1967, c. 950, s. 2; 1993, c. 398, s. 1; 1999-369, s. 2.5; 2005-268, s. 41; 2006-264, s. 44(e).)

**Effect of Amendments. —**

Session Laws 2006-264, s. 44(e), effective

August 27, 2006, substituted “Each other merging” for “Each merging” in subdivision (a)(1).

**§ 55A-11-06. Merger with foreign corporation.**

(a) Except as provided in G.S. 55A-11-02, one or more foreign corporations may merge with one or more domestic nonprofit corporations if:

- (1) The merger is permitted by the law of the state or country under whose law each foreign corporation is incorporated and each foreign corporation complies with that law in effecting the merger;
- (2) The foreign corporation complies with G.S. 55A-11-04 if it is the surviving corporation of the merger; and
- (3) Each domestic nonprofit corporation complies with the applicable provisions of G.S. 55A-11-01 through G.S. 55A-11-03 and, if it is the surviving corporation of the merger, with G.S. 55A-11-04.

(b) Repealed by Session Laws 2005, c. 268, s. 42.

(c) This section does not limit the power of a foreign corporation to acquire all or part of the memberships of one or more classes of a domestic nonprofit corporation through a voluntary exchange or otherwise. (1973, c. 314, s. 4; 1985 (Reg. Sess., 1986), c. 801, s. 39; 1993, c. 398, s. 1; 1995, c. 400, s. 7; 2001-387, ss. 36, 37; 2005-268, s. 42; 2006-226, s. 16(c); 2006-264, s. 44(f).)

**Effect of Amendments. —**

Session Laws 2006-226, s. 16(c), effective August 10, 2006, substituted “memberships” for “shares” and deleted “or series” following “classes” in subsection (c).

Session Laws 2006-264, s. 44(f), effective August 27, 2006, substituted “memberships” for “shares” and deleted “or series” following “classes” in subsection (c).

**ARTICLE 16.*****Records and Reports.*****Part 1. Records.****§ 55A-16-02. Inspection of records by members.****CASE NOTES**

**Applied** in *Peninsula Prop. Owners Ass’n v. Crescent Res., LLC*, 171 N.C. App. 89, 614 S.E.2d 351, 2005 N.C. App. LEXIS 1165 (2005).

## Chapter 55B.

### Professional Corporation Act.

Sec.

55B-14. Types of professional services.

#### § 55B-14. Types of professional services.

(a) A professional corporation shall render only one specific type professional service, and such services as may be ancillary thereto, and shall not engage in any other business or profession; provided, however, such corporation may own real and personal property necessary or appropriate for rendering the type of professional services it was organized to render and it may invest in real estate, mortgages, stocks, bonds, and any other type of investments.

(b) Notwithstanding subsection (a) of this section, in the case of architectural, landscape architectural, engineering or land surveying, geological, and soil science services, as defined in Chapters 83A, 89A, 89C, 89E, and 89F respectively, one corporation may be authorized to provide such of these services where such corporation, and at least one corporate officer who is a stockholder thereof, is duly licensed by the licensing board of each such profession.

(c) A professional corporation may also be formed by and between or among:

- (1) A licensed psychologist and a physician practicing psychiatry to render psychotherapeutic and related services.
- (2) Any combination of a registered nurse, nurse practitioner, certified clinical specialist in psychiatric and mental health nursing, certified nurse midwife, and certified nurse anesthetist, to render nursing and related services that the respective stockholders are licensed, certified, or otherwise approved to provide.
- (3) A physician and a physician assistant who is licensed, registered, or otherwise certified under Chapter 90 of the General Statutes to render medical and related services.
- (4) A physician, or a licensed psychologist, or both, and a certified clinical specialist in psychiatric and mental health nursing, a licensed clinical social worker, a licensed marriage and family therapist, a licensed professional counselor, or each of them, to render psychotherapeutic and related services that the respective stockholders are licensed, certified, or otherwise approved to provide.
- (5) A physician and any combination of a nurse practitioner, certified clinical specialist in psychiatric and mental health nursing, or certified nurse midwife, registered or otherwise certified under Chapter 90 of the General Statutes, to render medical and related services that the respective stockholders are licensed, certified, or otherwise approved to provide.
- (6) A physician practicing anesthesiology and a certified nurse anesthetist to render anesthesia and related medical services that the respective stockholders are licensed, certified, or otherwise approved to provide.
- (7) A physician and an audiologist who is licensed under Article 22 of Chapter 90 of the General Statutes to render audiological and related medical services that the respective stockholders are licensed, certified, or otherwise approved to provide.
- (8) A physician practicing ophthalmology and an optometrist who is licensed under Article 6 of Chapter 90 of the General Statutes to render either or both of ophthalmic services and optometric and



related services that the respective stockholders are licensed, certified, or otherwise approved to provide.

- (9) A physician practicing orthopedics and a podiatrist who is licensed under Article 12A of Chapter 90 of the General Statutes to render either or both of orthopedic services and podiatric and related services that the respective stockholders are licensed, certified, or otherwise approved to provide. (1969, c. 718, s. 14; 1971, c. 196, s. 2; 1973, c. 1446, s. 9; 1985, c. 251; 1991, c. 205, s. 4; 1995, c. 382, s. 1; 1997-421, s. 1; 1997-500, s. 1; 1999-136, s. 1; 2000-115, s. 6; 2001-487, s. 40(e); 2003-117, s. 4; 2006-144, s. 3.1.)

**Effect of Amendments.** — Session Laws 2006-144, s. 3.1, effective July 19, 2006, added subdivision (c)(9).

## Chapter 57C.

### North Carolina Limited Liability Company Act.

#### Article 9A.

##### Conversion and Merger.

###### Part 1. Conversion to Limited Liability Company.

Sec.

57C-9A-02. Plan of conversion.

#### ARTICLE 3.

##### *Membership and Management.*

###### Part 3. Liability.

### § 57C-3-30. Liability to third parties of members, managers, directors, and executives; parties to actions; governing law.

#### CASE NOTES

**Personal Liability of Member.** — Regardless of whether G.S. 57C-3-30(b) restricted the circumstances in which a member of a limited liability company could be added as a party to a lawsuit, G.S. 57C-3-30(a) clearly anticipated that a member who was also a manager, director, executive, or any combination thereof might be made a defendant and become personally liable by reason of his own acts or conduct. *State ex rel. Cooper v. NCCS Loans, Inc.*, — N.C. App. —, 624 S.E.2d 371, 2005 N.C. App. LEXIS 2588 (2005).

Appeal filed by member of a limited liability company employer (LLC) was dismissed as the denial of summary judgment to the member and the grant of summary judgment to the LLC

and a co-worker under G.S. 97-9 did not create the possibility of inconsistent verdicts since the claims against the LLC and the co-worker were Woodson and Pleasant claims that had different elements and required different proofs than the negligence claim against the member; G.S. 57C-3-23 did not pertain to tort liability and G.S. 57C-3-30(a) controlled, and while the member was a the sole member-manager of the LLC and could not be held liable simply because it was the member-manager of the LLC, it could be personally liable for its own tortious conduct. *Hamby v. Profile Prods., L.L.C.*, — N.C. App. —, 632 S.E.2d 804, 2006 N.C. App. LEXIS 1835 (2006).

#### ARTICLE 9A.

##### *Conversion and Merger.*

###### Part 1. Conversion to Limited Liability Company.

### § 57C-9A-02. Plan of conversion.

(a) The converting business entity shall approve a written plan of conversion containing:

- (1) The name of the resulting domestic limited liability company into which the converting business entity shall convert;
- (1a) The name of the converting business entity, its type of business entity, and the state or country whose laws govern its organization and internal affairs;

- (2) The terms and conditions of the conversion; and
- (3) The manner and basis for converting the interests in the converting business entity into interests, obligations, or securities of the resulting domestic limited liability company or into cash or other property in whole or in part.

(a1) The plan of conversion may contain other provisions relating to the conversion.

(a2) The provisions of the plan of conversion, other than the provisions required by subdivisions (1) and (1a) of subsection (a) of this section, may be made dependent on facts objectively ascertainable outside the plan of conversion if the plan of conversion sets forth the manner in which the facts will operate upon the affected provisions. The facts may include any of the following:

- (1) Statistical or market indices, market prices of any security or group of securities, interest rates, currency exchange rates, or similar economic or financial data.
- (2) A determination or action by the converting business entity or by any other person, group, or body.
- (3) The terms of, or actions taken under, an agreement to which the converting business entity is a party, or any other agreement or document.

(b) The plan of conversion must be approved in accordance with the laws of the state or country governing the organization and internal affairs of the converting business entity.

(c) After a plan of conversion has been approved as provided in subsection (b) of this section, but before articles of organization for the resulting domestic limited liability company become effective, the plan of conversion may be amended or abandoned to the extent permitted by the laws that govern the organization and internal affairs of the converting business entity. (1999-369, s. 3.7; 2001-387, s. 94; 2005-268, s. 47; 2006-226, s. 16(d); 2006-264, s. 44(g).)

**Effect of Amendments. —**

Session Laws 2006-226, s. 16(d), effective August 10, 2006, substituted “(1a)” for “(2)” in the introductory language of subsection (a2).

Session Laws 2006-264, s. 44(g), effective August 27, 2006, also substituted “(1a)” for “(2)” in the introductory language of subsection (a2).



## Chapter 58.

### Insurance.

#### Article 2.

##### Commissioner of Insurance.

Sec.

- 58-2-25. Other deputies, actuaries, examiners and employees.
- 58-2-46. State of disaster; automatic stay of proof of loss requirements; premium and debt deferrals; loss adjustments for separate windstorm policies.
- 58-2-47. Incident affecting operations of the Department; stay of deadlines and deemer provisions.
- 58-2-150. Oath required for compliance with law.
- 58-2-240. Market conduct analysis, financial analysis, and related information not public record.
- 58-2-245. Access to employer taxpayer identification numbers contained in public documents.

#### Article 3.

##### General Regulations for Insurance.

- 58-3-191. Managed care reporting and disclosure requirements.

#### Article 7.

##### General Domestic Companies.

- 58-7-1. Application of this Chapter and general laws.
- 58-7-26. Asset or reduction from liability for reinsurance ceded by a domestic insurer to an assuming insurer not meeting the requirements of G.S. 58-7-21.
- 58-7-130. Dividends and distributions to stockholders.

#### Article 19.

##### Insurance Holding Company System Regulatory Act.

- 58-19-25. Registration of insurers.
- 58-19-30. Standards and management of an insurer within a holding company system.

#### Article 21.

##### Surplus Lines Act.

- 58-21-35. Duty to file and retain reports.
- 58-21-45. Evidence of the insurance; changes; penalty.

#### Article 30.

##### Insurers Supervision, Rehabilitation, and Liquidation.

Sec.

- 58-30-125. Notice to creditors and others.
- 58-30-180. Domiciliary liquidator's proposal to distribute assets.

#### Article 31.

##### Insuring State Property, Officials and Employees.

- 58-31-66. Public construction contract surety bonds.

#### Article 33.

##### Licensing of Agents, Brokers, Limited Representatives, and Adjusters.

- 58-33-95. Agents personally liable; representing unlicensed company prohibited; penalty.

#### Article 36.

##### North Carolina Rate Bureau.

- 58-36-4. Statistical organizations; licensing; recording and reporting; examination; suspension of license; financial disclosure.
- 58-36-95. Use of nonoriginal crash repair parts.

#### Article 37.

##### North Carolina Motor Vehicle Reinsurance Facility.

- 58-37-35. The Facility; functions; administration.

#### Article 40.

##### Regulation of Insurance Rates.

- 58-40-50. Statistical organizations.

#### Article 44.

##### Property Insurance Policies.

###### Part 1. Policy Provisions.

- 58-44-60. Notice to property insurance policyholder about flood, earthquake, mudslide, mudflow, and landslide insurance coverage.

###### Part 2. Mediation of Emergency or Disaster-Related Property Insurance Claims.

- 58-44-70. Purpose and scope.
- 58-44-75. Definitions.

Sec.

- 58-44-80. Notification of right to mediate.
- 58-44-85. Request for mediation.
- 58-44-90. Mediation fees.
- 58-44-95. Scheduling of mediation; qualification of mediator.
- 58-44-100. Conduct of the mediation conference.
- 58-44-105. Post mediation.
- 58-44-110. Nonparticipation in mediation program.
- 58-44-115. Commissioner's review.
- 58-44-120. Relation to Administrative Procedure Act.

#### **Article 47.**

##### **Workers' Compensation Self-Insurance.**

###### **Part 1. Employer Groups.**

- 58-47-140. Other provisions of this Chapter.

#### **Article 50.**

##### **General Accident and Health Insurance Regulations.**

###### **Part 1. Miscellaneous Provisions.**

- 58-50-40. Willful failure to pay group insurance premiums; willful termination of a group health plan; notice to persons insured; penalty; restitution; examination of insurance transactions.
- 58-50-46. [Recodified.]

###### **Part 5. Small Employer Group Health Insurance Reform.**

- 58-50-100. Title and reference.
- 58-50-110. Definitions.
- 58-50-120. [Repealed.]
- 58-50-125. Health care plans; formation; approval; offerings.
- 58-50-126. Alternative coverage permitted.
- 58-50-130. Required health care plan provisions.
- 58-50-135. Elections by carriers.
- 58-50-140. [Repealed.]
- 58-50-145. [Repealed.]
- 58-50-149. Limit on cessions to the Reinsurance Pool.
- 58-50-150. North Carolina Small Employer Health Reinsurance Pool.

#### **Article 58.**

##### **Life Insurance and Viatical Settlements.**

###### **Part 4. Miscellaneous Provisions.**

- 58-58-145. Group annuity contracts defined; requirements; issuance of individual certificates.

#### **Article 68.**

##### **Health Insurance Portability and Accountability.**

###### **Part A. Group Market Reforms.**

###### **SUBPART 2. Health Insurance Availability and Renewability**

Sec.

- 58-68-40. Guaranteed availability of coverage for employers in the small group market.

#### **Article 70.**

##### **Collection Agencies.**

###### **Part 1. Permit Procedures.**

- 58-70-5. Application to Commissioner for permit.
- 58-70-40. Restraining orders; criminal convictions; permit revocations; other permit requirements.

###### **Part 2. Operating Procedures.**

- 58-70-65. Remittance trust account.

#### **Article 71.**

##### **Bail Bondsmen and Runners.**

- 58-71-140. Registration of licenses and power of appointments by insurers.

#### **Article 84.**

##### **Fund Derived from Insurance Companies.**

- 58-84-1. (Repealed effective January 1, 2008 — See editor's note) Fire and lightning insurance report.
- 58-84-25. (Effective January 1, 2008 — See editor's note) Disbursement of funds by Insurance Commissioner.

#### **Article 86.**

##### **North Carolina Firemen's and Rescue Squad Workers' Pension Fund.**

- 58-86-55. Monthly pensions upon retirement.

#### **Article 87.**

##### **Volunteer Safety Workers Assistance.**

- 58-87-1. (Effective January 1, 2008 — See editor's note) Volunteer Fire Department Fund.

## ARTICLE 2.

*Commissioner of Insurance.***§ 58-2-1. Department established.**

## CASE NOTES

**Jurisdiction as to Self-insured Employer.** — Course of action by the North Carolina Department of Insurance as to a surety bond filed by a self-insured employer did not divest the North Carolina Industrial Commis-

sion of jurisdiction, which was conferred upon the Commission by statute, over a workers' compensation action. *Goodson v. P.H. Glatfelter Co.*, 171 N.C. App. 596, 615 S.E.2d 350, 2005 N.C. App. LEXIS 1315 (2005).

**§ 58-2-25. Other deputies, actuaries, examiners and employees.**

(a) The Commissioner shall appoint or employ such other deputies, actuaries, economists, financial analysts, financial examiners, licensed attorneys, rate and policy analysts, accountants, fire and rescue training instructors, market conduct analysts, insurance complaint analysts, investigators, engineers, building inspectors, risk managers, clerks and other employees that the Commissioner considers to be necessary for the proper execution of the work of the Department, at the compensation that is fixed and provided by the Department of Administration. If the Commissioner considers it to be necessary for the proper execution of the work of the Department to contract with persons, except to fill authorized employee positions, all of those contracts, except those provided for in Articles 36 and 37 and Part 2 of Article 44 of this Chapter, shall be made pursuant to the provisions of Article 3C of Chapter 143 of the General Statutes.

Whenever the Commissioner or any deputy or employee of the Department is requested or subpoenaed to testify as an expert witness in any civil or administrative action, the party making the request or filing the subpoena and on whose behalf the testimony is given shall, upon receiving a statement of the cost from the Commissioner, reimburse the Department for the actual time and expenses incurred by the Department in connection with the testimony.

(b) The minimum education requirements for financial analysts and examiners referred to in subsection (a) of this section are a bachelors degree, with the appropriate courses in accounting as defined in 21 NCAC 8A.0309, and other courses that are required to qualify the applicant as a candidate for the uniform certified public accountant examination, based on the examination requirements in effect at the time of graduation by the analyst or examiner from an accredited college or university. (1945, c. 383; 1981, c. 859, s. 94; 1987, c. 864, s. 20; 1989 (Reg. Sess., 1990), c. 1069, s. 20; 1991, c. 681, s. 1; 2000-122, s. 4; 2006-145, s. 4.)

**Editor's Note.** — Session Laws 2006-145, s. 6, contains a severability clause.

**Effect of Amendments.** — Session Laws 2006-145, s. 4, effective July 19, 2006, inserted

“and Part 2 of Article 44” following “Articles 36 and 37” near the end of the first paragraph of subsection (a).

**§ 58-2-46. State of disaster; automatic stay of proof of loss requirements; premium and debt deferrals; loss adjustments for separate windstorm policies.**

Whenever a state of disaster is proclaimed for the State or for an area within



the State under G.S. 166A-6 or whenever the President of the United States has issued a major disaster declaration for the State or for an area within the State under the Stafford Act, 42 U.S.C. § 5121, et seq., as amended:

- (1) The application of any provision in an insurance policy insuring real property and its contents that are located within the geographic area designated in the proclamation or declaration, which provision requires an insured to file a proof of loss within a certain period of time after the occurrence of the loss, shall be stayed for the time period not exceeding the expiration of the disaster proclamation or declaration and all renewals of the proclamation or 45 days, whichever is later.
- (2) As used in this subdivision, "insurance company" includes a service corporation, HMO, MEWA, surplus lines insurer, and the underwriting associations under Articles 45 and 46 of this Chapter. All insurance companies, premium finance companies, collection agencies, and other persons subject to this Chapter shall give their customers who reside within the geographic area designated in the proclamation or declaration the option of deferring premium or debt payments that are due during the time period covered by the proclamation or declaration. This deferral period shall be 30 days from the last day the premium or debt payment may be made under the terms of the policy or contract. This deferral period shall also apply to any statute, rule, or other policy or contract provision that imposes a time limit on an insurer, insured, claimant, or customer to perform any act during the time period covered by the proclamation or declaration, including the transmittal of information, with respect to insurance policies or contracts, premium finance agreements, or debt instruments when the insurer, insured, claimant, or customer resides or is located in the geographic area designated in the proclamation or declaration. Likewise, the deferral period shall apply to any time limitations imposed on insurers under the terms of a policy or contract or provisions of law related to individuals who reside within the geographic area designated in the proclamation or declaration. Likewise, the deferral period shall apply to any time limitations imposed on insurers under the terms of a policy or contract or provisions of law related to individuals who reside within the geographic area designated in the proclamation or declaration. The Commissioner may extend any deferral period in this subdivision, depending on the nature and severity of the proclaimed or declared disaster. No additional rate or contract filing shall be necessary to effect any deferral period.
- (3) With respect to health benefit plans, after a deferral period has expired, all premiums in arrears shall be payable to the insurer. If premiums in arrears are not paid, coverage shall lapse as of the date premiums were paid up, and preexisting conditions shall apply as permitted under this Chapter; and the insured shall be responsible for all medical expenses incurred since the effective date of the lapse in coverage.
- (4) In addition to the requirements of G.S. 58-45-35(e), for separate windstorm policies that are written by an insurer other than the Underwriting Association, losses shall be adjusted by the insurer that issued the property insurance and not by the insurer that issued the windstorm policy. The insurer that issued the windstorm policy shall reimburse the insurer that issued the property insurance for reasonable expenses incurred by that insurer in adjusting the windstorm losses. (2006-145, s. 3.)

**Editor's Note.** — Session Laws 2006-145, s. 7, made this section effective July 19, 2006.

Session Laws 2006-145, s. 6, contains a severability clause.

### **§ 58-2-47. Incident affecting operations of the Department; stay of deadlines and deemer provisions.**

Regardless of whether a state of disaster has been proclaimed under G.S. 166A-6 or declared under the Stafford Act, whenever an incident beyond the Department's reasonable control, including an act of God, insurrection, strike, fire, power outage, or systematic technological failure, substantially affects the daily business operations of the Department, the Commissioner may issue an order, effective immediately, to stay the application of any deadlines and deemer provisions imposed by law or rule upon the Commissioner or Department or upon persons subject to the Commissioner's jurisdiction, which deadlines and deemer provisions would otherwise operate during the time period for which the operations of the Department have been substantially affected. The order shall remain in effect for a period not exceeding 30 days. The order may be renewed by the Commissioner for successive periods not exceeding 30 days each for as long as the operations of the Department remain substantially affected, up to a period of one year from the effective date of the initial order. (2006-145, s. 3.)

**Editor's Note.** — Session Laws 2006-145, s. 7, made this section effective July 19, 2006.

Session Laws 2006-145, s. 6, contains a severability clause.

### **§ 58-2-150. Oath required for compliance with law.**

Before issuing a license to any insurance company to transact the business of insurance in this State, the Commissioner shall require, in every case, in addition to the other requirements provided for by law, that the company file with the Commissioner the affidavit of its president or other chief officer that it accepts the terms and obligations of this Chapter as a part of the consideration of the license. (1899, c. 54, s. 110; 1901, c. 391, s. 8; Rev., s. 4693; C.S., s. 6276; 1991, c. 720, s. 4; 2004-199, s. 20(a); 2005-215, s. 1; 2006-105, s. 1.1.)

**Editor's Note.** — Session Laws 2006-105, s. 4, is a severability clause.

13, 2006, inserted "a" following "Before issuing" and deleted "Articles 1 through 67 of" preceding "this Chapter as a part of the consideration."

**Effect of Amendments.** —

Session Laws 2006-105, s. 1.1, effective July

### **§ 58-2-240. Market conduct analysis, financial analysis, and related information not public record.**

(a) Notwithstanding Chapter 132 of the General Statutes, all market analysis, documents arising from market conduct action, and financial statement analysis work papers are confidential, are not open for public inspection, and are not discoverable or admissible in evidence in a civil action brought by a party other than the Department against a person regulated by the Department, its directors, officers, or employees, unless the court finds that the interests of justice require that the documents be discoverable or admissible in evidence or except as provided in G.S. 58-2-128 and G.S. 58-2-132(g) through (j). The Commissioner, however, may use market analysis, documents arising from market conduct action, and financial statement analysis work papers in the furtherance of any regulatory or legal action brought as part of the Commissioner's official duties.

(b) As used in this Article:



- (1) "Financial statement analysis" means a set of systems and procedures designed to provide relevant information derived from basic sources of data for the purpose of evaluating the risk of an insurer's insolvency.
- (1a) "Financial statement analysis work papers" means:
- a. Documents, programs, findings, and other information produced by persons employed or contracted by the Commissioner during and as part of the financial statement analysis of an insurer.
  - b. Documents, programs, findings, and other information disclosed by an entity to persons employed or contracted by the Commissioner in response to an inquiry from the Commissioner during and as part of the financial statement analysis of the insurer.
  - c. Documents, programs, findings, and other information obtained, during and as part of the financial statement analysis of an insurer, by persons employed or contracted by the Commissioner from or through any regulatory or law enforcement agency or the NAIC when the receipt of that information is conditioned upon the Commissioner maintaining the confidentiality of the information shared with the Commissioner.

"Financial statement analysis work papers" includes financial analysis programs and procedures; correspondence between persons employed or contracted by the Commissioner and the insurer during and as part of the financial statement analysis; memos, e-mails, and other correspondence, in any form, produced by persons employed or contracted by the Commissioner detailing findings or recommendations of the financial statement analysis; and the Actuarial Opinion Summary filed by an insurer as required by and in accordance with NAIC Annual Statement Instructions. "Financial statement analysis work papers" does not mean statements filed with the Commissioner under G.S. 58-2-165, CPA audit reports filed with the Commissioner under G.S. 58-2-205, or documents that constitute an initial filing and any supplemental filing necessary to complete a filing made by an insurer, independent of financial statement analysis.

- (1b) "Market analysis" means work product arising from a process whereby persons employed or contracted by the Commissioner collect and analyze information from filed schedules, surveys, required reports other than periodic reports specifically required by statute, and other sources in order to develop a baseline understanding of the marketplace and to identify patterns or practices of insurers that deviate significantly from the norm or that may pose a potential risk to the insurance consumer.
- (2) "Market conduct action" means any of the full range of activities, other than an examination that the Commissioner may initiate to assess and address the market practices of insurers, beginning with market analysis. Additional market conduct actions, including those taken subsequent to market analysis as a result of the findings of or indications from market analysis include: correspondence with an insurer; insurer interviews; information gathering; policy and procedure reviews; interrogatories; and review of insurer self-evaluation and compliance programs, including membership in a best-practice organization. The Commissioner's activities to resolve an individual consumer complaint or other report of a specific instance of misconduct are not market conduct actions for purposes of this section.
- (c) For purposes of subdivisions (b)(1) and (b)(1a) of this section only, the term "insurer" has the same meaning as in G.S. 58-30-10(14) and includes a:
- (1) Reciprocal that is or should be licensed under Article 15 of this Chapter.



- (2) Local government risk pool that chooses to operate under Article 23 of this Chapter.
- (3) Fraternal benefit society that is or should be licensed under Article 24 of this Chapter.
- (4) Professional employer organization that is or should be licensed under Article 89A of this Chapter.

(d) Nothing in this section limits public access to financial or actuarial information or calculations filed by an insurer or other entity for rating purposes, including rate filings, deviation filings, and loss cost filings. (2005-206, s. 1; 2006-105, s. 2.4.)

**Editor's Note. —**

Subdivisions (1) and (1a) were added by Session Laws 2006-105, s. 2.4, as subdivisions (3) and (4) and redesignated at the direction of the Revisor of Statutes. Subdivision (1) was redesignated as subdivision (1b) at the direction of the Revisor of Statutes.

Session Laws 2006-105, s. 4, is a severability clause.

**Effect of Amendments. —** Session Laws 2006-105, s. 2.4, effective July 13, 2006, in

subsection (a), substituted “statement analysis work papers” for “analysis documents, ratios, programs, findings, and other information in the custody of the Department” in the first sentence and rewrote the second sentence; in subdivision (b)(1), inserted “work product arising from” and substituted “persons” for “individuals”; made minor stylistic changes in subdivision (b)(2); and added subdivisions (b)(3) and (4), and subsections (c) and (d).

## § 58-2-245. Access to employer taxpayer identification numbers contained in public documents.

Notwithstanding G.S. 132-1.10(b)(5), the Department is not required to redact an employer taxpayer identification number on documents that may be made available to the general public. (2006-105, s. 2.5.)

**Editor's Note. —** Session Laws 2006-105, s. 4, is a severability clause.

Session Laws 2006-105, s. 6, made this section effective July 13, 2006.

## ARTICLE 3.

### *General Regulations for Insurance.*

## § 58-3-35. Stipulations as to jurisdiction and limitation of actions.

### CASE NOTES

#### **Validity of Limitation Not in Conflict with Statute. —**

An order dismissing a subcontractor's action to collect from a surety under the provisions of a payment bond was affirmed as the bond contained a one-year limitations period, and

the surety's obligations were limited by this period; the limitations period was not void as a violation of G.S. 58-3-35, which applied to insurance. *Beachcrete, Inc. v. Water St. Ctr. Assocs., L.L.C.*, 172 N.C. App. 156, 615 S.E.2d 719, 2005 N.C. App. LEXIS 1575 (2005).

## § 58-3-191. Managed care reporting and disclosure requirements.

(a) Each health benefit plan shall annually, on or before the first day of March of each year, file in the office of the Commissioner the following information for the previous calendar year:

- (1) The number of and reasons for grievances received from plan participants regarding medical treatment. The report shall include the number of covered lives, total number of grievances categorized by reason for the grievance, the number of grievances referred to the second level grievance review, the number of grievances resolved at each level and their resolution, and a description of the actions that are being taken to correct the problems that have been identified through grievances received. Every health benefit plan shall file with the Commissioner, as part of its annual grievance report, a certificate of compliance stating that the carrier has established and follows, for each of its lines of business, grievance procedures that comply with G.S. 58-50-62.
- (2) The number of participants and groups who terminated coverage under the plan for any reason. The report shall include the number of participants who terminated coverage because the group contract under which they were covered was terminated, the number of participants who terminated coverage for reasons other than the termination of the group under which they were enrolled, and the number of group contracts terminated.
- (3) The number of provider contracts that were terminated and the reasons for termination. This information shall include the number of providers leaving the plan and the number of new providers. The report shall show voluntary and involuntary terminations separately.
- (4) Data relating to the utilization, quality, availability, and accessibility of services. The report shall include the following:
  - a. Information on the health benefit plan's program to determine the level of network availability, as measured by the numbers and types of network providers, required to provide covered services to covered persons. This information shall include the plan's methodology for:
    1. Establishing performance targets for the numbers and types of providers by specialty, area of practice, or facility type, for each of the following categories: primary care physicians, specialty care physicians, nonphysician health care providers, hospitals, and nonhospital health care facilities.
    2. Determining when changes in plan membership will necessitate changes in the provider network.

The report shall also include: the availability performance targets for the previous and current years; the numbers and types of providers currently participating in the health benefit plan's provider network; and an evaluation of actual plan performance against performance targets.

  - b. The health benefit plan's method for arranging or providing health care services from nonnetwork providers, both within and outside of its service area, when network providers are not available to provide covered services.
  - c. Information on the health benefit plan's program to determine the level of provider network accessibility necessary to serve its membership. This information shall include the health benefit plan's methodology for establishing performance targets for member access to covered services from primary care physicians, specialty care physicians, nonphysician health care providers, hospitals, and nonhospital health care facilities. The methodology shall establish targets for:
    1. The proximity of network providers to members, as measured by member driving distance, to access primary care, specialty



care, hospital-based services, and services of nonhospital facilities.

2. Expected waiting time for appointments for urgent care, acute care, specialty care, and routine services for prevention and wellness.

The report shall also include: the accessibility performance targets for the previous and current years; data on actual overall accessibility as measured by driving distance and average appointment waiting time; and an evaluation of actual plan performance against performance targets. Measures of actual accessibility may be developed using scientifically valid random sample techniques.

- d. A statement of the health benefit plan's methods and standards for determining whether in-network services are reasonably available and accessible to a covered person, for the purpose of determining whether a covered person should receive the in-network level of coverage for services received from a nonnetwork provider.
  - e. A description of the health benefit plan's program to monitor the adequacy of its network availability and accessibility methodologies and performance targets, plan performance, and network provider performance.
  - f. A summary of the health benefit plan's utilization review program activities for the previous calendar year. The report shall include the number of: each type of utilization review performed, noncertifications for each type of review, each type of review appealed, and appeals settled in favor of covered persons. The report shall be accompanied by a certification from the carrier that it has established and follows procedures that comply with G.S. 58-50-61.
- (5) Aggregate financial compensation data, including the percentage of providers paid under a capitation arrangement, discounted fee-for-service or salary, the services included in the capitation payment, and the range of compensation paid by withhold or incentive payments. This information shall be submitted on a form prescribed by the Commissioner.

The name, or group or institutional name, of an individual provider may not be disclosed pursuant to this subsection. No civil liability shall arise from compliance with the provisions of this subsection, provided that the acts or omissions are made in good faith and do not constitute gross negligence, willful or wanton misconduct, or intentional wrongdoing.

(b) Disclosure requirements. — Each health benefit plan shall provide the following applicable information to plan participants and bona fide prospective participants upon request:

- (1) The evidence of coverage (G.S. 58-67-50), subscriber contract (G.S. 58-65-60, 58-65-140), health insurance policy (G.S. 58-51-80, 58-50-125, 58-50-126, 58-50-55), or the contract and benefit summary of any other type of health benefit plan;
- (2) An explanation of the utilization review criteria and treatment protocol under which treatments are provided for conditions specified by the prospective participant. This explanation shall be in writing if so requested;
- (3) If denied a recommended treatment, written reasons for the denial and an explanation of the utilization review criteria or treatment protocol upon which the denial was based;
- (4) The plan's formularies, restricted access drugs or devices as defined in G.S. 58-3-221, or prior approval requirements for obtaining prescrip-



tion drugs, whether a particular drug or therapeutic class of drugs is excluded from its formulary, and the circumstances under which a nonformulary drug may be covered; and

- (5) The plan's procedures and medically based criteria for determining whether a specified procedure, test, or treatment is experimental.

(b1) Effective March 1, 1998, insurers shall make the reports that are required under subsection (a) of this section and that have been filed with the Commissioner available on their business premises and shall provide any insured access to them upon request.

(c) For purposes of this section, "health benefit plan" or "plan" means (i) health maintenance organization (HMO) subscriber contracts and (ii) insurance company or hospital and medical service corporation preferred provider benefit plans as defined in G.S. 58-50-56. (1997-480, s. 1; 1997-519, s. 1.1; 2001-334, s. 2.2; 2001-446, s. 2.1; 2006-154, s. 13.)

**Effect of Amendments.** — Session Laws 2006-154, s. 13, effective July 23, 2006, inserted "58-50-126," preceding "58-50-55" in subdivision (b)(1).

## ARTICLE 6.

### *License Fees and Taxes.*

#### § 58-6-25. Insurance regulatory charge.

**Editor's Note.** —

Session Laws 2006-66, s. 1.2, provides: "This act shall be known as 'The Current Operations and Capital Improvements Appropriations Act of 2006'."

Session Laws 2006-66, s. 26.2, provides: "The percentage rate to be used in calculating the insurance regulatory charge under G.S. 58-6-25 is five and one-half percent (5.5%) for the 2006 calendar year."

Session Laws 2006-66, s. 28.3, provides: "Except for statutory changes or other provisions that clearly indicate an intention to have effects beyond the 2006 2007 fiscal year, the textual provisions of this act apply only to funds appropriated for, and activities occurring during, the 2006 2007 fiscal year."

Session Laws 2006-66, s. 28.6 is a severability clause.

## ARTICLE 7.

### *General Domestic Companies.*

#### § 58-7-1. Application of this Chapter and general laws.

The general provisions of law relative to the powers, duties, and liabilities of corporations apply to all incorporated domestic insurance companies where pertinent and not in conflict with other provisions of law relative to such companies or with their charters. All insurance companies of this State shall be governed by this Chapter, notwithstanding anything in their special charters to the contrary, provided notice of the acceptance of this Chapter is filed with the Commissioner. (1899, c. 54, s. 19; Rev., s. 4721; C.S., s. 6324; 1991, c. 720, s. 4; 2006-105, s. 1.2.)

**Editor's Note.** — Session Laws 2006-105, s. 4, is a severability clause.

**Effect of Amendments.** — Session Laws 2006-105, s. 1.2, effective July 13, 2006, deleted

"Articles 1 through 64 of" preceding "this Chapter" in the section heading and twice in the second sentence.

**§ 58-7-26. Asset or reduction from liability for reinsurance ceded by a domestic insurer to an assuming insurer not meeting the requirements of G.S. 58-7-21.**

(a) An asset or a reduction from liability for reinsurance ceded by a domestic insurer to an assuming insurer not meeting the requirements of G.S. 58-7-21 shall be allowed in an amount not exceeding the liabilities carried by the ceding insurer. The reduction shall be in the amount of funds held by or on behalf of the ceding insurer, including funds held in trust for the ceding insurer, under a reinsurance contract with the assuming insurer as security for the payment of obligations thereunder, if the security is held in the United States subject to withdrawal solely by, and under the exclusive control of, the ceding insurer; or, in the case of a trust, held in a qualified United States financial institution as defined in subsection (c) of this section. This security may be in the form of:

- (1) Cash;
- (2) Securities that are listed by the Securities Valuation Office of the NAIC and qualifying as admitted assets;
- (3) Clean, irrevocable, unconditional letters of credit, issued or confirmed by a qualified United States financial institution, as defined in subsection (b) of this section, effective no later than December 31 of the year for which the filing is being made, and in the possession of, or in trust for, the ceding company on or before the filing date of its annual statement. Letters of credit meeting applicable standards of issuer acceptability as of the dates of their issuance (or confirmation) shall, notwithstanding the issuing (or confirming) institution's subsequent failure to meet applicable standards of issuer acceptability, continue to be acceptable as security until their expiration, extension, renewal, modification or amendment, whichever occurs first; or
- (4) Any other form of security acceptable to the Commissioner.

(b) For purposes of subdivision (a)(3) of this section, a "qualified United States financial institution" means an institution that:

- (1) Is organized, or in the case of a United States office of a foreign banking organization licensed, under the laws of the United States or any of its states;
- (2) Is regulated, supervised, and examined by United States federal or state authorities having regulatory authority over banks and trust companies; and
- (3) Has been determined by either the Commissioner or the Securities Valuation Office of the NAIC to meet such standards of financial condition and standing as are considered necessary and appropriate to regulate the quality of financial institutions whose letters of credit will be acceptable to the Commissioner.

(c) A "qualified United States financial institution" means, for purposes of those provisions of this section specifying those institutions that are eligible to act as a fiduciary of a trust, an institution that:

- (1) Is organized, or in the case of a United States branch or agency office of a foreign banking organization licensed, under the laws of the United States or any of its states and has been granted authority to operate with fiduciary powers; and
- (2) Is regulated, supervised, and examined by federal or state authorities having regulatory authority over banks and trust companies.

(d) This section applies to all reinsurance cessions made on or after January 1, 1992, under reinsurance agreements that have an inception, anniversary, or



renewal date on or after January 1, 1992. (1991, c. 681, s. 22; 2001-223, s. 3.2; 2006-105, s. 1.3.)

**Editor's Note.** — Session Laws 2006-105, s. 2006-105, s. 1.3, effective July 13, 2006, added 4, is a severability clause.

**Effect of Amendments.** — Session Laws 2006-105, s. 1.3, effective July 13, 2006, added "effective" following "subsection (b) of this section" in subdivision (a)(3).

## § 58-7-130. Dividends and distributions to stockholders.

(a) Each domestic insurance company in North Carolina shall be restricted by the Commissioner from the payment of any dividends or other distributions to its stockholders whenever the Commissioner determines from examination of the company's financial condition that the payment of future dividends or other distributions would cause a hazardous financial condition, impair the financial soundness of the company or be detrimental to its policyholders, and those restrictions shall continue in force until the Commissioner specifically permits the payment of dividends or other distributions to stockholders by the company through a written authorization.

(b) A domestic stock insurance company shall not declare or pay dividends or other distributions to its stockholders from any source other than unassigned surplus without the Commissioner's prior written approval. For purposes of this section, "unassigned surplus" means an amount equal to the unassigned funds of a company as reflected in the company's most recent financial statement filed with the Commissioner under G.S. 58-2-165, including all or part of the surplus arising from unrealized capital gains or revaluation of assets.

(c) A transfer out of paid-in and contributed surplus to common or preferred capital stock will be permitted on a case-by-case basis, with the Commissioner's prior approval, depending on the necessity for a company to make the transfer.

(d) Nothing in this section and no action taken by the Commissioner in any way restricts the liability of stockholders under G.S. 58-7-125.

(e) Dividends and other distributions paid to stockholders are subject to the requirements and limitations of G.S. 58-19-25(d) and G.S. 58-19-30(c). (1945, c. 386; 1991, c. 720, s. 9; 2001-223, s. 5.2; 2002-187, s. 2.5; 2006-105, s. 3.1.)

**Editor's Note.** — Session Laws 2006-105, s. 2006-105, s. 3.1, effective December 31, 2006, 4, is a severability clause. rewrote subsection (b).

**Effect of Amendments.** — Session Laws

## ARTICLE 19.

### *Insurance Holding Company System Regulatory Act.*

## § 58-19-25. Registration of insurers.

(a) Every insurer that is licensed to do business in this State and that is a member of an insurance holding company system shall register with the Commissioner, except a foreign insurer subject to the registration requirements and standards adopted by statute or regulation in the jurisdiction of its domicile that are substantially similar to those contained in:

- (1) This section.
- (2) G.S. 58-19-30(a), G.S. 58-19-30(c), and G.S. 58-19-30(d).
- (3) G.S. 58-19-30(b) or a statutory or regulatory provision such as the following: Each registered insurer shall keep current the information required to be disclosed in its registration statement by reporting all



material changes or additions within 15 days after the end of the month in which it learns of each change or addition. The insurer shall also file a copy of its registration statement and any amendments to the statement in each state in which that insurer is authorized to do business, if requested by the insurance regulator of that state.

Any insurer that is subject to registration under this section shall register within 30 days after it becomes subject to registration, and an amendment to the registration statement shall be filed by April 1 of each year for the previous calendar year; unless the Commissioner for good cause shown extends the time for registration or filing, and then within the extended time. All registration statements shall contain a summary, on a form prescribed by the Commissioner, outlining all items in the current registration statement representing changes from the prior registration statement. The Commissioner may require any insurer that is a member of a holding company system that is not subject to registration under this section to furnish a copy of the registration statement or other information filed by the insurance company with the insurance regulator of its domiciliary jurisdiction.

(b) Every insurer subject to registration shall file the registration statement on a form prescribed by the Commissioner, which shall contain the following current information:

- (1) The bylaws, capital structure, general financial condition, ownership, and management of the insurer and any person controlling the insurer.
- (2) The identity and relationship of every member of the insurance holding company system.
- (3) The following agreements in force, and transactions currently outstanding or that have occurred during the last calendar year between such insurer and its affiliates:
  - a. Loans, other investments, or purchases, sales or exchanges of securities of the affiliates by the insurer or of the insurer by its affiliates.
  - b. Purchases, sales, or exchange of assets.
  - c. Transactions not in the ordinary course of business.
  - d. Guarantees or undertakings for the benefit of an affiliate that result in an actual contingent exposure of the insurer's assets to liability, other than insurance contracts entered into in the ordinary course of the insurer's business.
  - e. All management agreements, service contracts, and cost-sharing arrangements.
  - f. Reinsurance agreements.
  - g. Dividends and other distributions to shareholders.
  - h. Consolidated tax allocation agreements.
- (4) Any pledge of the insurer's stock, including stock of any subsidiary or controlling affiliate, for a loan made to any member of the insurance holding company system.
- (5) Other matters concerning transactions between registered insurers and any affiliates as may be included from time to time in any registration forms adopted or approved by the Commissioner.

(c) No information need be disclosed on the registration statement filed pursuant to subsection (b) of this section if such information is not material for the purposes of this section. Unless the Commissioner by rule or order provides otherwise, all sales, purchases, exchanges, loans or extensions of credit, investments, or guarantees involving one-half of one percent (1/2%) or less of an insurer's admitted assets as of the preceding December 31 are not material for the purposes of this section.

(d) Subject to G.S. 58-7-130(b) and G.S. 58-19-30(c), each domestic insurer shall report to the Commissioner all dividends and other distributions to

shareholders within five business days following the declaration thereof and at least 30 days before the payment thereof. The Commissioner may adopt rules to further the requirements of this section.

(e) Any person within an insurance holding company system subject to registration shall provide complete and accurate information to an insurer, where such information is reasonably necessary to enable the insurer to comply with the provisions of this Article.

(f) The Commissioner shall terminate the registration of any insurer that demonstrates that it no longer is a member of an insurance holding company system.

(g) The Commissioner may require or allow two or more affiliated insurers subject to registration under this section to file a consolidated registration statement.

(h) The Commissioner may allow an insurer that is authorized to do business in this State and that is part of an insurance holding company system to register on behalf of any affiliated insurer that is required to register under subsection (a) of this section and to file all information and material required to be filed under this section.

(i) The provisions of this section do not apply to any insurer, information, or transaction if and to the extent that the Commissioner by rule or order exempts the same from the provisions of this section.

(j) Any person may file with the Commissioner a disclaimer of affiliation with any authorized insurer, or such a disclaimer may be filed by such insurer or any member of an insurance holding company system. The disclaimer shall fully disclose all material relationships and bases for affiliation between such person and such insurer as well as the basis for disclaiming such affiliation. After a disclaimer has been filed, the insurer shall be relieved of any duty to register or report under this section that may arise out of the insurer's relationship with such person unless the Commissioner disallows such a disclaimer. The Commissioner shall disallow such a disclaimer only after furnishing all parties in interest with notice and opportunity to be heard and after making specific findings of fact to support such disallowance.

(k) The failure to file a registration statement or any summary of the registration statement thereto required by this section within the time specified for such filing is a violation of this section. (1989, c. 722, s. 1; 1991, c. 681, ss. 33, 34; 1993, c. 452, ss. 30-32; c. 504, s. 13; 1993 (Reg. Sess., 1994), c. 678, s. 14; 1995, c. 193, s. 26; 2001-223, s. 16.6; 2006-105, s. 3.2.)

**Editor's Note.** — Session Laws 2006-105, s. 2006-105, s. 3.2, effective December 31, 2006, 4, is a severability clause.

**Effect of Amendments.** — Session Laws

rewrote subsection (d).

## **§ 58-19-30. Standards and management of an insurer within a holding company system.**

(a) Transactions within a holding company system to which an insurer subject to registration is a party are subject to all of the following standards:

- (1) The terms shall be fair and reasonable.
- (2) Charges or fees for services performed shall be reasonable.
- (3) Expenses incurred and payment received shall be allocated to the insurer in conformity with customary insurance accounting practices consistently applied.
- (4) The books, accounts, and records of each party to all such transactions shall be so maintained as to clearly and accurately disclose the nature and details of the transactions, including such accounting information



as is necessary to support the reasonableness of the charges or fees to the respective parties.

- (5) The insurer's surplus as regards policyholders following any dividends or distributions to shareholder affiliates shall be reasonable in relation to the insurer's outstanding liabilities and adequate to its financial needs.

(b) The following transactions involving a domestic insurer and any person in its holding company system may not be entered into unless the insurer has notified the Commissioner in writing of its intention to enter into the transaction at least 30 days before the transaction, or such shorter period as the Commissioner permits, and the Commissioner has not disapproved it within that period:

- (1) Sales, purchases, exchanges, loans or extensions of credit, or investments, provided the transactions equal or exceed: (i) with respect to nonlife insurers, the lesser of three percent (3%) of the insurer's admitted assets or twenty-five percent (25%) of surplus as regards policyholders; (ii) with respect to life insurers, three percent (3%) of the insurer's admitted assets; each as of the preceding December 31.
- (2) Loans or extensions of credit to any person who is not affiliated, where the insurer makes the loans or extensions of credit with the agreement or understanding that the proceeds of the transactions, in whole or in substantial part, are to be used to make loans or extensions of credit to, to purchase assets of, or to make investments in, any affiliate of the insurer making the loans or extensions of credit provided the transactions equal or exceed: (i) with respect to nonlife insurers, the lesser of three percent (3%) of the insurer's admitted assets or twenty-five percent (25%) of surplus as regards policyholders; (ii) with respect to life insurers, three percent (3%) of the insurer's admitted assets; each as of the preceding December 31.
- (3) Reinsurance agreements or modifications to the agreements in which the reinsurance premium or a change in the insurer's liabilities equals or exceeds five percent (5%) of the insurer's surplus as regards policyholders, as of the preceding December 31, including those agreements that may require as consideration the transfer of assets from an insurer to a nonaffiliate, if an agreement or understanding exists between the insurer and nonaffiliate that any portion of the assets will be transferred to one or more affiliates of the insurer.
- (4) All management agreements, service contracts, guarantees, or cost-sharing arrangements.
- (5) Any material transactions, specified by rule, that the Commissioner determines may adversely affect the interests of the insurer's policyholders.

Nothing in this section authorizes or permits any transactions that, in the case of an insurer, not a member of the same holding company system, would be otherwise contrary to law. A domestic insurer may not enter into transactions that are part of a plan or series of like transactions with persons within the holding company system if the purpose of those separate transactions is to avoid the statutory threshold amount and thus avoid the review that would otherwise occur. If the Commissioner determines that such separate transactions were entered into over any 12-month period for that purpose, the Commissioner may exercise the Commissioner's authority under G.S. 58-19-50. The Commissioner, in reviewing transactions pursuant to this subsection, shall consider whether the transactions comply with the standards set forth in subsection (a) of this section and whether they may adversely affect the interests of policyholders. The Commissioner shall be notified within 30 days after any investment of a domestic insurer in any one corporation if, as a result



of the investment, the total investment in the corporation by the insurance holding company system exceeds ten percent (10%) of the corporation's voting securities.

(c) No domestic insurer shall pay any extraordinary dividend or make any other extraordinary distribution to its shareholders until (i) 30 days after the Commissioner has received notice of the declaration thereof and has not within that period disapproved the payment or (ii) the Commissioner has approved the payment within the 30-day period.

For the purposes of this section, an "extraordinary dividend" or "extraordinary distribution" includes any dividend or distribution of cash or other property, whose fair market value together with that of other dividends or distributions made within the preceding 12 months exceeds the greater of (i) ten percent (10%) of the insurer's surplus as regards policyholders as of the preceding December 31, or (ii) the net gain from operations of the insurer, if the insurer is a life insurer, or the net income, if the insurer is not a life insurer, not including realized capital gains, for the 12-month period ending the preceding December 31; but does not include pro rata distributions of any class of the insurer's own securities.

Notwithstanding any other provision of law, an insurer may declare an extraordinary dividend or distribution that is conditional upon the Commissioner's approval, and the declaration shall confer no rights upon shareholders until (i) the Commissioner has approved the payment of the dividend or distribution or (ii) the Commissioner has not disapproved the payment within the 30-day period referred to above.

(d) For the purposes of this Article, in determining whether an insurer's surplus as regards policyholders is reasonable in relation to the insurer's outstanding liabilities and adequate to its financial needs, all of the following factors, among others, shall be considered:

- (1) The size of the insurer as measured by its assets, capital and surplus, reserves, premium writings, insurance in force, and other appropriate criteria.
- (2) The extent to which the insurer's business is diversified among the several kinds of insurance.
- (3) The number and size of risks insured in each kind of insurance.
- (4) The extent of the geographic dispersion of the insurer's insured risks.
- (5) The nature and extent of the insurer's reinsurance program.
- (6) The quality, diversification, and liquidity of the insurer's investment portfolio.
- (7) The recent past and projected future trend in the size of the insurer's surplus as regards policyholders.
- (8) The surplus as regards policyholders maintained by other comparable insurers.
- (9) The adequacy of the insurer's reserves.
- (10) The quality and liquidity of investments in affiliates. The Commissioner may treat any such investment as a disallowed asset for purposes of determining the adequacy of surplus as regards policyholders whenever in his judgment such investment so warrants.
- (11) The quality of the insurer's earnings and the extent to which the reported earnings of the insurer include extraordinary items. (1989, c. 722, s. 1; 1991, c. 681, ss. 35, 36; c. 720, s. 18; 1993, c. 452, s. 33; 2001-223, s. 16.7; 2005-215, s. 14; 2006-105, ss. 3.3, 3.4.)

**Editor's Note.** — Session Laws 2006-105, s. 4, is a severability clause.

**Effect of Amendments.** —

Session Laws 2006-105, ss. 3.3 and 3.4, effective December 31, 2006, in the second para-

graph of subsection (c), substituted "greater" for "lesser" in the first sentence, and deleted the former last two sentences which read: "In determining whether a dividend or distribution is extraordinary, an insurer other than a life in-

suror may carry forward net income from the previous two calendar years that has not already been paid out as dividends. This carryforward shall be computed by taking the net income from the second and third preceding

calendar years, not including realized capital gains, less dividends paid in the second and immediate preceding calendar years" and added subdivision (d)(11).

## ARTICLE 21.

### *Surplus Lines Act.*

#### § 58-21-35. Duty to file and retain reports.

(a) Within 30 days after the placing of any surplus lines insurance, the surplus lines licensee shall file with the Commissioner a report in a format prescribed by the Commissioner regarding the insurance and including the following information:

- (1) The name of the insured.
- (2) The identity of the insurer or insurers.
- (3) A description of the subject and location of the risk.
- (4) The amount of premium charged for the insurance.
- (5) The amount of premium tax for the insurance.
- (6) The policy period.
- (7) The policy number.
- (7a) An acknowledged statement that the surplus lines licensee has complied with G.S. 58-21-15.
- (8) The name, address, telephone number, facsimile telephone number, and electronic mail address of the licensee, as applicable.
- (9) Any other relevant information the Commissioner may reasonably require.

(b) The licensee shall complete and retain a copy of the report in paper or electronic form as required by the Commissioner. The report required by this section and the quarterly report required by G.S. 58-21-80 shall be completed on a standardized form or forms prescribed by the Commissioner and are not public records under G.S. 132-1 or G.S. 58-2-100. (1985, c. 688, s. 1; 1987, c. 864, s. 35; 1993 (Reg. Sess., 1994), c. 678, s. 16; 1999-219, s. 6.1; 2006-105, s. 2.6.)

**Editor's Note.** — Session Laws 2006-105, s. 4, is a severability clause.

**Effect of Amendments.** — Session Laws 2006-105, s. 2.6, effective July 13, 2006, in the

catchline, deleted "reports" following "file" and substituted "reports" for "affidavits"; added subdivision (a)(7a); and rewrote subsection (b).

#### § 58-21-45. Evidence of the insurance; changes; penalty.

(a) As soon as surplus lines insurance has been placed, the producing broker or surplus lines licensee shall promptly deliver the policy to the insured. If the policy is not then available, the broker or licensee shall promptly deliver to the insured a certificate described in subsection (d) of this section, cover note, binder, or other evidence of insurance. The certificate described in subsection (d), cover note, binder, or other evidence of insurance shall be executed by the surplus lines licensee and shall show the description and location of the subject of the insurance, coverages including any material limitations other than those in standard forms, a general description of the coverages of the insurance, the premium and rate charged and taxes to be collected from the insured, and the name and address of the insured and surplus lines insurer or insurers and proportion of the entire risk assumed by each, and the name of the surplus lines licensee and the licensee's license number.



(b) No producing broker or surplus lines licensee shall issue or deliver any evidence of insurance or purport to insure or represent that insurance will be or has been written by any eligible surplus lines insurer, or a nonadmitted insurer pursuant to G.S. 58-21-25, unless he has authority from the insurer to cause the risk to be insured, or has received information from the insurer in the regular course of business that such insurance has been granted.

(c) If, after delivery of any such evidence of insurance there is any change in the identity of the insurers, or the proportion of the risk assumed by any insurer, or any other material change in coverage as stated in the producing broker's or surplus lines licensee's original evidence of insurance, or in any other material as to the insurance coverage so evidenced, the producing broker or surplus lines licensee shall promptly issue and deliver to the insured an appropriate substitute for or endorsement of the original document, accurately showing the current status of the coverage and the insurers responsible thereunder.

(d) As soon as reasonably possible after the placement of any such insurance the producing broker or surplus lines licensee shall deliver a copy of the policy or, if not available, a certificate of insurance to the insured to replace any evidence of insurance previously issued. Each certificate or policy of insurance shall contain or have attached thereto a complete record of all policy insuring agreements, conditions, exclusions, clauses, endorsements, or any other material facts that would regularly be included in the policy.

(e) Any surplus lines licensee or producing broker who fails to comply with the requirements of this section shall be subject to the penalties provided in G.S. 58-21-105.

(f) Every evidence of insurance negotiated, placed, or procured under the provisions of this Article issued by the surplus lines licensee shall bear the name of the licensee and the following legend in 12 point type and in contrasting color or in 12 point type and underlined and in bold print: "The insurance company with which this coverage has been placed is not licensed by the State of North Carolina and is not subject to its supervision. In the event of the insolvency of the insurance company, losses under this policy will not be paid by any State insurance guaranty or solvency fund." (1985, c. 688, s. 1; 2006-105, s. 2.7.)

**Editor's Note.** — Session Laws 2006-105, s. 4, is a severability clause.

**Effect of Amendments.** — Session Laws 2006-105, s. 2.7, effective July 13, 2006, in

subsection (f), substituted "12" for "10" preceding "point type" and "color or in 12 point type and underlined and in bold print:" for "color:" following "contrasting."

## ARTICLE 30.

### *Insurers Supervision, Rehabilitation, and Liquidation.*

#### § 58-30-125. Notice to creditors and others.

(a) Unless the Court otherwise directs, the liquidator shall give or cause to be given notice of the liquidation order as soon as possible:

- (1) By first-class mail and either by facsimile, electronic mail, or telephone to the insurance regulator of each jurisdiction in which the insurer is doing business;
- (2) By first-class mail to any domestic or foreign guaranty association that is or may become obligated as a result of the liquidation;
- (3) By first-class mail to all insurance agents of the insurer;
- (4) By first-class mail to all persons known or reasonably expected to have claims against the insurer, including all policyholders, at their last known addresses indicated by the records of the insurer; and



(5) By publication in a newspaper of general circulation in the county in which the insurer has its principal place of business and in such other locations as the liquidator deems to be appropriate.

(b) Notice to potential claimants under subsection (a) of this section shall require claimants to file with the liquidator their claims, together with proper proofs thereof under G.S. 58-30-190, on or before a date the liquidator specifies in the notice. All claimants have a duty to keep the liquidator informed of any changes of address. The liquidator need not require the following to file claims under this section:

(1) Persons claiming cash surrender values or other investment values in life insurance and annuities.

(2) Persons claiming unearned premiums on property or casualty insurance.

(c) If notice is given in accordance with this section, the distribution of assets of the insurer under this Article shall be conclusive with respect to all claimants, whether or not they receive notice. (1989, c. 452, s. 1; 2006-105, s. 1.4.)

**Editor's Note.** — Session Laws 2006-105, s. 4, is a severability clause.

**Effect of Amendments.** — Session Laws 2006-105, s. 1.4, effective July 13, 2006, substi-

tuted "facsimile, electronic mail" for "telecopier, telegram" in subdivision (a)(1); and rewrote subsection (b).

## § 58-30-180. Domiciliary liquidator's proposal to distribute assets.

(a) Within one year after a final determination of insolvency of an insurer by the Court, the liquidator shall make application to the Court for approval of a proposal to disburse assets out of marshalled assets, from time to time as such assets become available, to a domestic or foreign guaranty association having obligations because of such insolvency. If the liquidator determines that there are insufficient assets to disburse, the application required by this section shall be considered satisfied by a filing by the liquidator stating the reasons for this determination.

(b) Such proposal shall at least include provisions for:

(1) Reserving amounts for the payment of expenses of administration and the payment of claims of secured creditors, to the extent of the value of the security held, and claims falling within the priorities established in G.S. 58-30-220(1) and (4);

(2) Disbursement of the assets marshalled to date and subsequent disbursement of assets as they become available;

(3) Equitable allocation of disbursements to each of the domestic and foreign guaranty associations entitled thereto;

(4) The securing by the liquidator from each of the associations entitled to disbursements pursuant to this section of an agreement to return to the liquidator such assets, together with income earned on assets previously disbursed, as may be required to pay claims of secured creditors and claims falling within the priorities established in G.S. 58-30-220 in accordance with such priorities. No bond shall be required of any such association; and

(5) A full report to be made by each association to the liquidator accounting for all assets so disbursed to the association, all disbursements made therefrom, any interest earned by the association on such assets and any other matter as the Court directs.

(c) The liquidator's proposal shall provide for disbursements to the associations in amounts estimated at least equal to the claim payments made or to

be made thereby for which such associations could assert a claim against the liquidator; and shall further provide that if the assets available for disbursement from time to time do not equal or exceed the amount of such claim payments made or to be made by the association then disbursements shall be in the amount of available assets.

(d) The liquidator's proposal shall, with respect to an insolvent insurer writing life or health insurance or annuities, provide for disbursements of assets to any domestic or foreign guaranty association covering life or health insurance or annuities or to any other entity reinsuring, assuming, or guaranteeing policies or contracts of insurance under the acts creating such associations.

(e) Notice of such application shall be given to the association in and to the insurance regulators of each of the states. Any such notice shall be deemed to have been given when deposited in United States certified mail, first class postage prepaid, at least 30 days prior to submission of such application to the Court. Action on the application may be taken by the Court provided the above required notice has been given and provided further that the liquidator's proposal complies with subdivisions (b)(1) and (b)(2) of this section. (1989, c. 452, s. 1; 1995, c. 517, s. 13; 2006-105, s. 1.5.)

**Editor's Note.** — Session Laws 2006-105, s. 2006-105, s. 1.5, effective July 13, 2006, substituted "one year after" for "120 days of" in 4, is a severability clause.

**Effect of Amendments.** — Session Laws subsection (a).

## ARTICLE 31.

### *Insuring State Property, Officials and Employees.*

#### **§ 58-31-66. Public construction contract surety bonds.**

(a) Neither the State nor any county, city, or other political subdivision of the State, or any officer, employee, or other person acting on behalf of any such entity shall, with respect to any public building or construction contract, require any contractor, bidder, or proposer to procure a bid bond, payment bond, or performance bond from a particular surety, agent, producer, or broker.

(b)(1) Repealed by Session Laws 2004-203, s. 74(b), effective October 1, 2004.

(2) Repealed by Session Laws 2006-264, s. 7, effective August 27, 2006.

(c) Repealed by Session Laws 2004-203, s. 74(b), effective October 1, 2004. (2003-212, s. 27; 2004-203, s. 74(b); 2006-264, s. 7.)

**Effect of Amendments.** —

Session Laws 2006-264, s. 7, effective August 27, 2006, repealed subdivision (b)(2).

## ARTICLE 32.

### *Public Officers and Employees Liability Insurance Commission.*

#### **§ 58-32-15. Professional liability insurance for State officials.**

#### CASE NOTES

**Cited** in *Hooper v. North Carolina*, 379 F. Supp. 2d 804, 2005 U.S. Dist. LEXIS 19515 (M.D.N.C. Apr. 13, 2005).

## ARTICLE 33.

*Licensing of Agents, Brokers, Limited Representatives, and Adjusters.***§ 58-33-20. Representation.**

## CASE NOTES

**Liability of Insurance Broker for Agents' Conduct.** — Insurance and securities broker was not vicariously liable for the actions of an agent and subagent who led investors to sell their annuities offered by the broker and invest in an investment that lost money be-

cause the broker was not attempting to avoid paying benefits under an insurance policy, nor did the dispute involve the application or solicitation of insurance. *Estate of Redding v. Welborn*, 170 N.C. App. 324, 612 S.E.2d 664, 2005 N.C. App. LEXIS 1001 (2005).

**§ 58-33-95. Agents personally liable; representing unlicensed company prohibited; penalty.**

(a) Any person or entity who solicits, negotiates, or sells insurance or acts as a third-party administrator in this State for an unauthorized insurer:

- (1) Is the representative of that insurer and shall be strictly liable for any losses or unpaid claims if an unauthorized insurer fails to pay in full or in part any claim or loss within the provisions of any insurance contract sold, directly or indirectly, by or through that person or entity on behalf of the unauthorized insurer.
- (2) Shall be guilty of a Class 1 misdemeanor if the person or entity does not know that the insurer is an unauthorized insurer. Each solicitation, negotiation, or sale shall constitute a separate offense.
- (3) Shall be guilty of a Class H felony if the person or entity knew or should have known that the insurer is an unauthorized insurer. Each solicitation, negotiation, or sale shall constitute a separate offense.

(b) A civil action may be filed or a license revocation proceeding may be initiated under this section regardless of whether a criminal action is brought or a criminal conviction is obtained for the act alleged in the civil action or revocation proceeding.

(c) For the purposes of this section, the status of an entity or person as an "unauthorized insurer" shall be determined in accordance with Article 28 of this Chapter and, if applicable, Article 49 of this Chapter.

(d) As used in this section, "third-party administrator" means a person who performs administrative functions, including claims administration and payment, marketing, premium accounting, premium billing, coverage verification, underwriting authority, or certificate issuance in regard to any kind of insurance; but does not include the persons specified in G.S. 58-56-2(5)a. through (5)l. (1987, c. 629, s. 1; 1993, c. 539, s. 457; 1994, Ex. Sess., c. 24, s. 14(c); 2004-166, s. 1; 2006-105, s. 2.8.)

**Editor's Note.** — Session Laws 2006-105, s. 4, is a severability clause.

**Effect of Amendments.** —

Session Laws 2006-105, s. 2.8, effective July 13, 2006, inserted "or acts as a third-party administrator" in the introductory language in

subsection (a); deleted the former first sentence of subsection (c), which defined "negotiate," "sell" and "solicit," and substituted "For the purposes of" for "As used in" in the second sentence; and added subsection (d).



## ARTICLE 36.

*North Carolina Rate Bureau.***§ 58-36-4. Statistical organizations; licensing; recording and reporting; examination; suspension of license; financial disclosure.**

(a) For purposes of this Article:

- (1) "Statistical organization" means every person, other than an admitted insurer, whether located within or outside this State, who performs one or more of the following functions:
  - a. Prepares policy forms or makes underwriting rules incident to, but not including, the making of rates, rating plans, or rating systems.
  - b. Collects and furnishes to admitted insurers or statistical organizations loss or expense statistics or other statistical information and data and acts in an advisory rather than a rate-making capacity. No duly authorized attorney-at-law acting in the usual course of that person's profession shall be deemed to be a statistical organization.
  - c. Makes rates, rating plans or rating systems, or develops loss costs. Two or more insurers that act in concert for the purpose of making rates, rating plans or rating systems, or developing loss costs and that do not operate within the specific authorizations contained in this Article shall be deemed to be a statistical organization.
  - d. Collects data and statistics from insurers and provides reports from these statistics to the Commissioner for the purpose of fulfilling the statistical reporting obligations of those insurers."Statistical organization" shall not mean the North Carolina Rate Bureau, the North Carolina Motor Vehicle Reinsurance Facility, the North Carolina Insurance Underwriting Association, or the North Carolina Joint Underwriting Association.

- (2) "Statistical plan" means the document used by a statistical organization to set forth which data elements are to be reported to the statistical organization and to describe the format in which the data must be reported.

(b) No statistical organization shall conduct its operations in this State, and no insurer shall utilize the service of that organization for any purpose enumerated in this Article unless the organization has obtained a license from the Commissioner. No statistical organization shall refuse to supply any services for which it is licensed in this State to any insurer admitted to do business in this State and offering to pay the fair and usual compensation for the services. A statistical organization applying for a license shall include with its application:

- (1) A copy of its constitution, charter, articles of organization, agreement, association, or incorporation, and a copy of its bylaws, plan of operation, and any other rules or regulations governing the conduct of its business, all duly certified by the custodian of the originals thereof;
- (2) A list of its members and subscribers;
- (3) The name and address of one or more residents of this State upon whom notices, process affecting it, or orders of the Commissioner may be served;
- (4) A statement showing its technical qualifications for acting in the capacity for which it seeks a license; and

- (5) Any other relevant information and documents that the Commissioner may require.

If the Commissioner determines that the applicant and the natural persons through whom it acts are qualified to provide the services proposed and that all requirements of law are met, the Commissioner shall issue a license specifying the authorized activity of the applicant. The Commissioner shall not issue a license if the proposed activity would tend to create a monopoly or to lessen or to destroy price competition. Licenses issued pursuant to this section shall remain in effect until the licensee withdraws from the State or until the license is suspended or revoked. Any change in or amendment to any document required to be filed under this section shall be promptly filed with the Commissioner. Every statistical organization shall file a statistical plan with the Commissioner for approval for each line of insurance for which the organization requests to be licensed. The Commissioner may, in the Commissioner's discretion, modify the plan to collect additional types of data. No statistical organization shall engage in any unfair or unreasonable practice with respect to its activities.

(c) Statistical organizations licensed pursuant to subsection (b) of this section and admitted insurers are authorized to exchange information and experience data between and among themselves in this State and with statistical organizations and insurers in other states and may consult with them with respect to rate making and the application of rating systems.

(d) The Commissioner shall adopt or approve reasonable rules, including rules providing statistical plans, for use thereafter by all insurers in the recording and reporting of loss and expense experience, in order that the experience of those insurers may be made available to the Commissioner. The Commissioner may designate one or more statistical organizations to assist him or her in gathering and making compilations of the experience. All insurers, for lines of insurance that require data to be reported, shall report their data to one of the designated statistical organizations.

(e) The Commissioner shall, at least once every three years, make or cause to be made an examination of each statistical organization licensed pursuant to subsection (b) of this section. This examination shall relate only to the activities conducted pursuant to this Article and to the organizations licensed under this Article. The officers, manager, agents, and employees of any statistical organization may be examined at any time under oath and shall exhibit all books, records, accounts, documents, or agreements governing its method of operation. In lieu of any examination, the Commissioner may accept the report of an examination made by the insurance advisory official of another state, pursuant to the laws of that state.

(f) Subject to the requirements of this Article and of G.S. 58-2-70, the Commissioner may suspend or revoke the license of any statistical organization or impose a monetary penalty against any statistical organization where (i) the Commissioner has reason to believe that any statistical organization has violated any provision of this Chapter, or (ii) the statistical organization fails to comply with an order of the Commissioner within the time limited by the order, or within any extension thereof that the Commissioner may grant. The Commissioner shall not suspend the license of any statistical organization for failure to comply with an order until the time prescribed for an appeal from the order has expired or, if an appeal has been taken, until the order has been affirmed. The Commissioner may determine when a suspension of a license shall become effective, and the suspension shall remain in effect for the period fixed by the Commissioner unless the Commissioner modifies or rescinds the suspension, or until the order upon which the suspension is based is modified,



rescinded, or reversed. No license shall be suspended or revoked, and no monetary penalty shall be imposed except upon a written order of the Commissioner stating the Commissioner's findings, made after a hearing held upon not less than 10 days' written notice to the person or organization, and specifying the alleged violation.

(g) A statistical organization is considered an insurance company for purposes of the applicability of G.S. 58-6-7. (2005-210, s. 18; 2006-264, s. 45(b).)

**Effect of Amendments.** — Session Laws 2006-264, s. 45(b), effective October 1, 2006, added subsection (g).

## **§ 58-36-65. Classifications and Safe Driver Incentive Plan for nonfleet private passenger motor vehicle insurance.**

### **CASE NOTES**

**Cited in** *Shavitz v. City of High Point*, — N.C. App. —, 630 S.E.2d 4, 2006 N.C. App. LEXIS 1080 (2006).

## **§ 58-36-95. Use of nonoriginal crash repair parts.**

(a) As used in this section, the following definitions apply:

- (1) "Insurer" includes any person authorized to represent an insurer with respect to a claim.
- (2) "Nonoriginal crash repair part" refers to sheet metal and/or plastic parts — generally components of the exterior of a motor vehicle — that are not manufactured by or for the original equipment manufacturer of the vehicle.

(b) An insurer shall disclose to a claimant in writing, either on the estimate or on a separate document attached to the estimate, the following in no smaller than ten point type: "THIS ESTIMATE HAS BEEN PREPARED BASED ON THE USE OF AUTOMOBILE PARTS NOT MADE BY THE ORIGINAL MANUFACTURER. PARTS USED IN THE REPAIR OF YOUR VEHICLE MADE BY OTHER THAN THE ORIGINAL MANUFACTURER ARE REQUIRED TO BE AT LEAST EQUIVALENT IN TERMS OF FIT, QUALITY, PERFORMANCE, AND WARRANTY TO THE ORIGINAL MANUFACTURER PARTS THEY ARE REPLACING."

(c) It is a violation of G.S. 58-3-180 for an automobile repair facility or parts person to place a nonoriginal crash repair part, nonoriginal windshield, or nonoriginal auto glass on a motor vehicle and to submit an invoice for an original repair part.

(d) Any insurer or other person who has reason to believe that fraud has occurred under this section shall report that fraud to the Commissioner for further action pursuant to G.S. 58-2-160. (2003-395, s. 2; 2006-105, s. 1.6.)

**Editor's Note.** — Session Laws 2006-105, s. 4, is a severability clause.

**Effect of Amendments.** — Session Laws

2006-105, s. 1.6, effective July 13, 2006, substituted "58-3-180" for "58-2-180" preceding "for an automobile repair facility" in subsection (c).



## ARTICLE 37.

*North Carolina Motor Vehicle Reinsurance Facility.***§ 58-37-35. The Facility; functions; administration.**

(a) The operation of the Facility shall assure the availability of motor vehicle insurance to any eligible risk and the Facility shall accept all placements made in accordance with this Article, the plan of operation adopted pursuant thereto, and any amendments to either.

(b) The Facility shall reinsure for each coverage available in the Facility to the standard percentage of one hundred percent (100%) or lesser equitable percentage established in the Facility's plan of operation as follows:

- (1) For the following coverages of motor vehicle insurance and in at least the following amounts of insurance:
  - a. Bodily injury liability: thirty thousand dollars (\$30,000) each person, sixty thousand dollars (\$60,000) each accident;
  - b. Property damage liability: twenty-five thousand dollars (\$25,000) each accident;
  - c. Medical payments: one thousand dollars (\$1,000) each person; except that this coverage shall not be available for motorcycles;
  - d. Uninsured motorist: thirty thousand dollars (\$30,000) each person; sixty thousand dollars (\$60,000) each accident for bodily injury; twenty-five thousand dollars (\$25,000) each accident property damage (one hundred dollars (\$100.00) deductible);
  - e. Any other motor vehicle insurance or financial responsibility limits in the amounts required by any federal law or federal agency regulation; by any law of this State; or by any rule duly adopted under Chapter 150B of the General Statutes or by the North Carolina Utilities Commission.
- (2) Additional ceding privileges for motor vehicle insurance shall be provided by the Board of Governors up to the following:
  - a. Bodily injury liability: one hundred thousand dollars (\$100,000) each person, three hundred thousand dollars (\$300,000) each accident;
  - b. Property damage liability: fifty thousand dollars (\$50,000) each accident;
  - c. Medical payments: two thousand dollars (\$2,000) each person; except that this coverage shall not be available for motorcycles;
  - d. Underinsured motorist: one million dollars (\$1,000,000) each person and each accident for bodily injury liability; and
  - e. Uninsured motorist: one million dollars (\$1,000,000) each person and each accident for bodily injury and fifty thousand dollars (\$50,000) each accident for property damage (one hundred dollars (\$100.00) deductible).
- (2a) For persons who must maintain liability coverage limits above those available under subdivision (2) of this subsection in order to obtain or continue coverage under personal excess liability or personal "umbrella" insurance policies, additional ceding privileges for motor vehicle insurance shall be provided by the Board of Governors up to the following:
  - a. Bodily injury liability: two hundred fifty thousand dollars (\$250,000) each person, five hundred thousand dollars (\$500,000) each accident.
  - b. Property damage liability: one hundred thousand dollars (\$100,000) each accident.

- c. Medical payments: five thousand dollars (\$5,000) each person; except that this coverage shall not be available for motorcycles.
- d. Uninsured motorist: one hundred thousand dollars (\$100,000) each accident for property damage (one hundred dollars (\$100.00) deductible).

(3) Whenever the additional ceding privileges are provided as in G.S. 58-37-35(b)(2) for any component of motor vehicle insurance, the same additional ceding privileges shall be available to "all other" types of risks subject to the rating jurisdiction of the North Carolina Rate Bureau.

(c) The Facility shall require each member to adjust losses for ceded business fairly and efficiently in the same manner as voluntary business losses are adjusted and to effect settlement where settlement is appropriate.

(d) The Facility shall be administered by a Board of Governors. The Board of Governors shall consist of 12 members having one vote each from the classifications specified in this subsection and the Commissioner, who shall serve ex officio without vote. Each Facility insurance company member serving on the Board shall be represented by a senior officer of the company. Not more than one company in a group under the same ownership or management shall be represented on the Board at the same time. Five members of the Board shall be selected by the member insurers, which members shall be fairly representative of the industry. To insure representative member insurers, one each shall be selected from the following: the American Insurance Association (or its successors), the Property Casualty Insurers Association of America (or its successors), stock insurers not affiliated with those trade associations, nonstock insurers not affiliated with those trade associations, and the industry at large regardless of trade affiliation. The at-large insurer shall be selected by the insurer company members of the Board. The Commissioner shall appoint two members of the Board who are Facility insurance company members domiciled in this State. The Commissioner shall appoint five members of the Board who shall be fire and casualty insurance agents licensed in this State and actively engaged in writing motor vehicle insurance in this State. The term of office of the Board members shall be three years. All members of the Board of Governors shall serve until their successors are selected and qualified and the Commissioner may fill any vacancy on the Board from any of the classifications specified in this subsection until the vacancies are filled in accordance with this Article. The Board of Governors of the Facility shall also have as nonvoting members two persons who are not employed by or affiliated with any insurance company or the Department and who are appointed by the Governor to serve at the Governor's pleasure.

(e) The Commissioner and member companies shall provide for a Board of Governors. The Board of Governors shall elect from its membership a chair and shall meet at the call of the chair or at the request of four members of the Board of Governors. The chair shall retain the right to vote on all issues. Seven members of the Board of Governors shall constitute a quorum. The same member may not serve as chair for more than two consecutive years; provided, however, that a member may continue to serve as chair until a successor chair is elected and qualified.

(f) The Board of Governors shall have full power and administrative responsibility for the operation of the Facility. Such administrative responsibility shall include but not be limited to:

- (1) Proper establishment and implementation of the Facility.
- (2) Employment of a manager who shall be responsible for the continuous operation of the Facility and such other employees, officers and committees as it deems necessary.
- (3) Provision for appropriate housing and equipment to assure the efficient operation of the Facility.



- (4) Promulgation of reasonable rules and regulations for the administration and operation of the Facility and delegation to the manager of such authority as it deems necessary to insure the proper administration and operation thereof.
- (g) Except as may be delegated specifically to others in the plan of operation or reserved to the members, power and responsibility for the establishment and operation of the Facility is vested in the Board of Governors, which power and responsibility include but is not limited to the following:
  - (1) To sue and be sued in the name of the Facility. No judgment against the Facility shall create any direct liability in the individual member companies of the Facility.
  - (2) To receive and record cessions.
  - (3) To assess members on the basis of participation ratios established in the plan of operation to cover anticipated or incurred costs of operation and administration of the Facility at such intervals as are established in the plan of operation.
  - (4) To contract for goods and services from others to assure the efficient operation of the Facility.
  - (5) To hear and determine complaints of any company, agent or other interested party concerning the operation of the Facility.
  - (6) Upon the request of any licensed fire and casualty agent meeting any two of the standards set forth below as determined by the Commissioner within 10 days of the receipt of the application, the Facility shall contract with one or more members within 20 days of receipt of the determination to appoint such licensed fire and casualty agent as designated agents in accordance with reasonable rules as are established by the plan of operation. The standards shall be:
    - a. Whether the agent's evidence establishes that he has been conducting his business in a community for a period of at least one year;
    - b. Whether the agent's evidence establishes that he had a gross premium volume during the 13 months next preceding the date of his application of at least twenty thousand dollars (\$20,000) from motor vehicle insurance;
    - c. Whether the agent's evidence establishes that the number of eligible risks served by him during the 13 months next preceding the date of application was 200 or more;
    - d. Whether the agent's evidence establishes a growth in eligible risks served and premium volume during his years of service as an agent;
    - e. Whether the agent's evidence establishes that he made available to eligible risks premium financing or any other plan for deferred payment of premiums.

With respect to business produced by designated agents, adequate provision shall be made by the Facility to assure that such business is rated using Facility rates. All business produced by designated agents may be ceded to the Facility, except designated agents appointed before September 1, 1987, may place liability insurance policies with a voluntary carrier, provided that all policies written by the voluntary carrier are retained by the voluntary carrier unless ceded to the Facility using Facility rates. Designated agents must provide the Facility with a list of such policies written by the voluntary carrier at least annually, or as requested by the Facility, on a form approved by the Facility. If no insurer is willing to contract with any such agent on terms acceptable to the Board, the Facility shall license such agent to write directly on behalf of the Facility. However, for this purpose the



Facility does not act as an insurer, but acts only as the statutory agent of all of the members of the Facility, which shall be bound on risks written by the Facility's appointed agent. The Facility may contract with one or more servicing carriers and shall promulgate fair and reasonable underwriting procedures to require that business produced by Facility agents and written through those servicing carriers shall be rated using Facility rates. All business produced by Facility agents may be ceded to the Facility. Any designated agent who is disabled or retiring or the estate of any deceased designated agent may transfer the designation and the book of business to some other licensed fire and casualty agent meeting the requirements of this section and under rules established by the Facility, and a transfer from a designated agent appointed before September 1, 1987, shall entitle the transferee designated agent to place liability insurance policies with a voluntary carrier.

The Commissioner shall require, as a condition precedent to the issuance, renewal, or continuation of a resident agent's license to any designated agent to act for the company appointing such designated agent under contract with the Facility, that the designated agent file and thereafter maintain in force while so licensed a bond in favor of the State of North Carolina executed by an authorized corporate surety approved by the Commissioner, cash, mortgage on real property, or other securities approved by the Commissioner, in the amount of ten thousand dollars (\$10,000) for the use of aggrieved persons. Such bond, cash, mortgage, or other securities shall be conditioned on the accounting by the designated agent (i) to any person requesting the designated agent to obtain motor vehicle insurance for moneys or premiums collected in connection therewith, and (ii) to the company providing coverage with respect to any such moneys or premiums under contract with the Facility. Any such bond shall remain in force until the surety is released from liability by the Commissioner, or until the bond is cancelled by the surety. Without prejudice to any liability accrued prior to such cancellation, the surety may cancel the bond upon 30 days' advance notice in writing filed with the Commissioner.

No agent may be designated under this subdivision to any insurer that does not actively write voluntary market business.

- (7) To maintain all loss, expense, and premium data relative to all risks reinsured in the Facility, and to require each member to furnish such statistics relative to insurance reinsured by the Facility at such times and in such form and detail as may be required.
- (8) To establish fair and reasonable procedures for the sharing among members of any loss on Facility business that cannot be recouped under G.S. 58-37-40(e) and other costs, charges, expenses, liabilities, income, property and other assets of the Facility and for assessing or distributing to members their appropriate shares. The shares may be based on the member's premiums for voluntary business for the appropriate category of motor vehicle insurance or by any other fair and reasonable method.
- (9) To receive or distribute all sums required by the operation of the Facility.
- (10) To accept all risks submitted in accordance with this Article.
- (11) To establish procedures for reviewing claims practices of member companies to the end that claims to the account of the Facility will be handled fairly and efficiently.
- (12) To adopt and enforce all rules and to do anything else where the Board is not elsewhere herein specifically empowered which is other-

wise necessary to accomplish the purpose of the Facility and is not in conflict with the other provisions of this Article.

(h) Each member company shall authorize the Facility to audit that part of the company's business which is written subject to the Facility in a manner and time prescribed by the Board of Governors.

(i) The Board of Governors shall fix a date for an annual meeting and shall annually meet on that date. Twenty days' notice of such meeting shall be given in writing to all members of the Board of Governors.

(j) There shall be furnished to each member an annual report of the operation of the Facility in such form and detail as may be determined by the Board of Governors.

(k) Each member shall furnish statistics in connection with insurance subject to the Facility as may be required by the Facility. Such statistics shall be furnished at such time and in such form and detail as may be required but at least will include premiums charged, expenses and losses.

(l) The classifications, rules, rates, rating plans and policy forms used on motor vehicle insurance policies reinsured by the Facility may be made by the Facility or by any licensed or statutory statistical organization or bureau on its behalf and shall be filed with the Commissioner. The Board of Governors shall establish a separate subclassification within the Facility for "clean risks". For the purpose of this Article, a "clean risk" is any owner of a nonfleet private passenger motor vehicle as defined in G.S. 58-40-10, if the owner, principal operator, and each licensed operator in the owner's household have two years' driving experience as licensed drivers and if none of the persons has been assigned any Safe Driver Incentive Plan points under Article 36 of this Chapter during the three-year period immediately preceding either (i) the date of application for a motor vehicle insurance policy or (ii) the date of preparation of a renewal of a motor vehicle insurance policy. The filings may incorporate by reference any other material on file with the Commissioner. Rates shall be neither excessive, inadequate nor unfairly discriminatory. If the Commissioner finds, after a hearing, that a rate is either excessive, inadequate or unfairly discriminatory, the Commissioner shall issue an order specifying in what respect it is deficient and stating when, within a reasonable period thereafter, the rate is no longer effective. The order is subject to judicial review as set out in Article 2 of this Chapter. Pending judicial review of said order, the filed classification plan and the filed rates may be used, charged and collected in the same manner as set out in G.S. 58-40-45 of this Chapter. The order shall not affect any contract or policy made or issued before the expiration of the period set forth in the order. All rates shall be on an actuarially sound basis and shall be calculated, insofar as is possible, to produce neither a profit nor a loss. However, the rates made by or on behalf of the Facility with respect to "clean risks" shall not exceed the rates charged "clean risks" who are not reinsured in the Facility. The difference between the actual rate charged and the actuarially sound and self-supporting rates for "clean risks" reinsured in the Facility may be recouped in similar manner as assessments under G.S. 58-37-40(f). Rates shall not include any factor for underwriting profit on Facility business, but shall provide an allowance for contingencies. There shall be a strong presumption that the rates and premiums for the business of the Facility are neither unreasonable nor excessive.

(m) In addition to annual premiums, the rules of the Facility shall allow semiannual and quarterly premium terms. (1973, c. 818, s. 1; 1977, c. 710; c. 828, ss. 14-19; 1977, 2nd Sess., c. 1135; 1979, c. 676, ss. 1, 2; 1981, c. 776, ss. 2, 3; c. 776, ss. 2, 3; 1983, c. 416, ss. 3, 4; c. 690; 1985, c. 666, s. 49; 1985 (Reg. Sess., 1986), c. 1027, ss. 7, 19, 33, 43; 1987, c. 869, ss. 3, 4(1), (2), 15; 1989, c. 67; 1991, c. 469, s. 7; c. 562, s. 2; c. 709, s. 1; c. 720, s. 4; 1999-132, ss. 6.2, 8.3, 8.4, 8.7, 8.8; 1999-228, s. 8; 2001-236, s. 1; 2001-423, s. 3; 2002-185, s. 6;



2002-187, ss. 1.2, 1.3; 2005-210, s. 19; 2005-242, s. 1; 2006-105, s. 1.7; 2006-264, s. 83.)

**Editor's Note.** — Session Laws 2006-105, s. 4, is a severability clause.

**Effect of Amendments.** — Session Laws 2005-210, s. 19, as amended by Session Laws 2006-264, s. 83, effective October 1, 2005, substituted "statistical organization" for "rating

organization" in the first sentence of subsection (l).

Session Laws 2006-105, s. 1.7, effective July 13, 2006, substituted "accident" for "person" in subdivision (b)(1)b.

## ARTICLE 40.

### *Regulation of Insurance Rates.*

#### **§ 58-40-50. Statistical organizations.**

(a) No statistical organization shall conduct its operations in this State, and no insurer shall utilize the service of such organization for any purpose enumerated in G.S. 58-40-5 unless the organization has obtained a license from the Commissioner.

(b) No statistical organization shall refuse to supply any services for which it is licensed in this State to any insurer admitted to do business in this State and offering to pay the fair and usual compensation for the services.

(c) A statistical organization applying for a license shall include with its application:

- (1) A copy of its constitution, charter, articles of organization, agreement, association, or incorporation, and a copy of its bylaws, plan of operation, and any other rules or regulations governing the conduct of its business, all duly certified by the custodian of the originals thereof;
- (2) A list of its members and subscribers;
- (3) The name and address of one or more residents of this State upon whom notices, process affecting it, or orders of the Commissioner may be served;
- (4) A statement showing its technical qualifications for acting in the capacity for which it seeks a license; and
- (5) Any other relevant information and documents that the Commissioner may require.

(d) If the Commissioner determines that the applicant and the natural persons through whom it acts are qualified to provide the services proposed, and that all requirements of law are met, he shall issue a license specifying the authorized activity of the applicant. He shall not issue a license if the proposed activity would tend to create a monopoly or to lessen or to destroy price competition. Licenses issued pursuant to this section shall remain in effect until the licensee withdraws from the State or until the license is suspended or revoked.

(e) Any change in or amendment to any document required to be filed under this section shall be promptly filed with the Commissioner.

(f) Repealed by Session Laws 2005-210, s. 7, effective October 1, 2005.

(g) Every statistical organization shall file a statistical plan with the Commissioner for approval for each line of insurance for which the organization requests to be licensed. The Commissioner may, in the Commissioner's discretion, modify the plan to collect additional types of data.

(h) No statistical organization shall engage in any unfair or unreasonable practice with respect to its activities.

(i) A statistical organization is considered an insurance company for purposes of the applicability of G.S. 58-6-7. (1977, c. 828, s. 2; 2005-210, s. 7; 2006-264, s. 45(a).)



**Effect of Amendments. —**

Session Laws 2006-264, s. 45(a), effective October 1, 2006, added subsection (i).

**ARTICLE 44.*****Property Insurance Policies.*****Part 1. Policy Provisions.****§ 58-44-1. Terms and conditions must be set out in policy.**

**Editor's Note.** — Session Laws 2006-145, s. 1, effective July 19, 2006, substituted “Property Insurance Policies” for “Fire Insurance Policies” in the Article heading; and added the Part 1 heading.

**§ 58-44-60. Notice to property insurance policyholder about flood, earthquake, mudslide, mudflow, and landslide insurance coverage.**

(a) Every insurer that sells property insurance policies that do not provide coverage for the perils of flood, earthquake, mudslide, mudflow, or landslide shall, upon the issuance and renewal of each policy, identify to the policyholder which of these perils are not covered under the policy. The insurer shall print the following warning, citing which peril is not covered, in Times New Roman 16-point font or other equivalent font and include it in the policy on a separate page immediately before the declarations page:

“WARNING: THIS PROPERTY INSURANCE POLICY DOES NOT PROTECT YOU AGAINST LOSSES FROM [FLOODS], [EARTHQUAKES], [MUDSLIDES], [MUDFLOWS], [LANDSLIDES]. YOU SHOULD CONTACT YOUR INSURANCE COMPANY OR AGENT TO DISCUSS YOUR OPTIONS FOR OBTAINING COVERAGE FOR THESE LOSSES. THIS IS NOT A COMPLETE LISTING OF ALL OF THE CAUSES OF LOSSES NOT COVERED UNDER YOUR POLICY. YOU SHOULD READ YOUR ENTIRE POLICY TO UNDERSTAND WHAT IS COVERED AND WHAT IS NOT COVERED.”

(b) As used in this section, “insurer” includes an entity that sells property insurance under Articles 21, 45, or 46 of this Chapter. (2006-145, s. 2.)

**Editor's Note.** — Session Laws 2006-145, s. 7, makes this section effective January 1, 2007, and applicable to policies issued or renewed on or after that date. Session Laws 2006-145, s. 6, contains a severability clause.

**Part 2. Mediation of Emergency or Disaster-Related Property Insurance Claims.****§ 58-44-70. Purpose and scope.**

(a) This Part creates a nonadversarial alternative dispute resolution procedure for a facilitated claim resolution conference prompted by the critical need for effective, fair, and timely handling of insurance claims arising out of damages to residential property as the result of a disaster. This Part applies only if a state of disaster has been proclaimed for the State or for an area

within the State by the Governor under G.S. 166A-6; or if the President of the United States has issued a major disaster declaration for the State or for an area within the State under the Robert T. Stafford Disaster Relief and Emergency Assistance Act, 42 U.S.C. § 5121, et seq., as amended.

(b) The procedure established by this Part is available to all first-party claimants who have insurance claims resulting from damage to residential property occurring in this State. This Part does not apply to commercial insurance, motor vehicle insurance, or to liability coverage contained in property insurance policies.

(c) The Commissioner may designate a person, either within the Department or outside of the Department, as the Administrator or other functionary to carry out any of the Commissioner's duties under this Part. (2006-145, s. 1.)

**Editor's Note.** — Session Laws 2006-145, s. 6, contains a severability clause.

Session Laws 2006-145, s. 7, made this Part effective July 19, 2006.

## § 58-44-75. Definitions.

As used in this Part:

- (1) Administrator. — The Commissioner or the Commissioner's designee; and the term is used interchangeably with regard to the Commissioner's duties under this Part.
- (2) Disaster. — As defined in G.S. 166A-4(1).
- (3) Disputed claim. — Any matter on which there is a dispute as to the cause of loss or amount of loss, for which the insurer has denied payment, in part or whole, with respect to claims arising from a disaster. Unless the parties agree to mediate a disputed claim involving a lesser amount, a "disputed claim" involves the insured requesting one thousand five hundred dollars (\$1,500) or more to settle the dispute, or the difference between the positions of the parties is one thousand five hundred dollars (\$1,500) or more. "Disputed claim" does not include a dispute with respect to which the insurer has reported allegations of fraud, based on a referral to the insurer's special investigative unit, to the Commissioner. A disputed claim does not include one in which there has been a denial of coverage for the loss because of exclusions in the policy, terms in the policy, conditions in the policy, or nonexistence of the policy at the time of the loss.
- (4) Mediation. — As defined in G.S. 7A-38.1(b)(2).
- (5) Mediator. — A neutral person who acts to encourage and facilitate a resolution of a claim.
- (6) Party or parties. — The insured and his or her insurer, including a surplus lines insurer and the underwriting associations in Articles 45 and 46 of this Chapter, when applicable. (2006-145, s. 1.)

**Editor's Note.** — Session Laws 2006-145, s. 6, contains a severability clause.

## § 58-44-80. Notification of right to mediate.

(a) Insurers shall notify their insureds in this State who have claimed damage to their residential properties as a result of a disaster of their right to mediate disputed claims. This requirement applies to all disputed claims, including instances where checks have been issued by the insurer to the insured.

(b) The insurer shall mail a notice of the right to mediate disputed claims to an insured within five days after the time the insured or the Administrator notifies the insurer of a dispute regarding the insured's claim. The following apply:

- (1) If the insurer has not been notified of a disputed claim before the time an insurer notifies the insured that a claim has been denied in whole or in part, the insurer shall mail a notice of the right to mediate to the insured in the same mailing as the notice of denial.
- (2) The insurer is not required to send a notice of the right to mediate if a claim is denied because the amount of the claim is less than the insured's deductible.
- (3) The mailing that contains the notice of the right to mediate shall include any consumer brochure on mediation developed by the Commissioner.
- (4) Notification shall be in writing and shall be legible, conspicuous, and printed in at least 12-point type.
- (5) The first paragraph of the notice shall contain the following statement: "The General Assembly of North Carolina has enacted a law to facilitate fair and timely handling of residential property insurance claims arising out of disasters. The law gives you the right to attend a mediation conference with your insurer in order to settle any dispute you have with your insurer about your claim. An independent mediator, who has no connection with your insurer, will be in charge of the mediation conference."

(c) The notice shall also:

- (1) Include detailed instructions on how the insured is to request mediation, including name, address, and phone and fax numbers for requesting mediation through the Administrator.
- (2) Include the insurer's address and phone number for requesting additional information.
- (3) State that the Administrator will select the mediator. (2006-145, s. 1.)

**Editor's Note.** — Session Laws 2006-145, s. 6, contains a severability clause.

## § 58-44-85. Request for mediation.

(a) If an insured requests mediation before receipt of the notice of the right to mediate or if the date of the notice cannot be established, the insurer shall be notified by the Administrator of the existence of the dispute before the Administrator processes the insured's request for mediation. An insured must request mediation within 60 days after the denial of the claim; failure to request mediation within this time period shall only bar the right to demand mediation; it shall not prejudice any other legal right or remedy of the insured nor prohibit the insurer from voluntarily accepting the request for mediation.

(b) If an insurer receives a request for mediation, the insurer shall electronically transmit the request to the Administrator within three business days after receipt of the request. If the Department receives any requests, it shall electronically transmit those requests to the Administrator within three business days after receipt. The Administrator shall notify the insurer within 48 hours after receipt of a request that has been filed with the Department.

(c) In the insured's request for mediation, the insured shall provide the following information, if known:

- (1) Name, address, and daytime telephone number of the insured and location of the property if different from the address given.
- (2) The claim and policy number for the insured.
- (3) A brief description of the nature of the dispute.



- (4) The name of the insurer and the name, address, and phone number of the contact person for scheduling mediation.
- (5) Information with respect to any other policies of insurance that may provide coverage of the insured property for named perils such as flood, earthquake, or windstorm. (2006-145, s. 1.)

**Editor's Note.** — Session Laws 2006-145, s. 6, contains a severability clause.

### § 58-44-90. Mediation fees.

(a) The fees of the mediator and of the Administrator as established by the Commissioner shall be borne by the insurer. All other mediation costs, fees, or expenses shall be borne by the party incurring such costs, fees, or expenses unless otherwise provided in a settlement agreement.

(b) The Commissioner may establish fee schedules, through emergency rules, for fees to be paid to the Administrator, the mediator, and for timely and untimely mediation cancellations. (2006-145, s. 1.)

**Editor's Note.** — Session Laws 2006-145, s. 6, contains a severability clause.

### § 58-44-95. Scheduling of mediation; qualification of mediator.

(a) The Administrator shall select a mediator and schedule the mediation conference.

(b) In order to be approved, a mediator must be certified by the Dispute Resolution Commission under G.S. 7A-38.2; or, if not, shall be approved at the discretion of the Administrator only if the parties agree on the selected mediator and the proposed mediator is a licensed attorney in North Carolina in good standing with the North Carolina State Bar. A mediator shall not make an award or render a judgment as to the merits of the action. (2006-145, s. 1.)

**Editor's Note.** — Session Laws 2006-145, s. 6, contains a severability clause.

### § 58-44-100. Conduct of the mediation conference.

(a) The Commissioner may adopt rules, in addition to the provisions of this section and that are not in conflict with G.S. 7A-38.1 or the Rules Implementing Statewide Mediated Settlement Conferences in Superior Court Civil Actions adopted by the Supreme Court of North Carolina pursuant to G.S. 7A-38.1 and G.S. 7A-38.2, for the conduct of mediation conferences under this Part. The rules adopted by the Commissioner shall include a requirement of the mediator to advise the parties of the mediation process and their rights and duties in the process.

(b) All parties shall negotiate in good faith. A decision by an insurer to stand by a coverage determination shall not be considered a failure to negotiate in good faith. A party shall be determined to have not negotiated in good faith if the party or a person participating on the party's behalf, becomes unduly argumentative or adversarial or continuously disrupts or otherwise inhibits the negotiations, as determined by the mediator.

(c) The mediator shall terminate the negotiations if the mediator determines that either party is not negotiating in good faith, either party is unable

or unwilling to participate meaningfully in the process, or upon mutual agreement of the parties.

(d) The party responsible for causing termination shall be responsible for paying the mediator's fee and the administrative fee for any rescheduled mediation.

(e) The representative of the insurer attending the conference shall:

- (1) Bring, in paper or electronic medium, a copy of the policy and the entire claims file to the conference.
- (2) Know the facts and circumstances of the claim and be knowledgeable of the provisions of the policy.

(f) An insurer will be deemed to have failed to appear if the insurer's representative lacks authority to settle within the limits of the policy.

(g) The mediator shall be in charge of the conference and will establish and describe the procedures to be followed. The mediator shall conduct the conference in accordance with the standards of professional conduct for mediation adopted by the American Arbitration Association, the American Bar Association, the Society of Professionals in Dispute Resolution, and, where not inconsistent, with the Rules Implementing Statewide Mediated Settlement Conferences in Superior Court Civil Actions adopted by the Supreme Court of North Carolina pursuant to G.S. 7A-38.1 and G.S. 7A-38.2.

(h) All statements made and documents produced at a settlement conference shall be deemed settlement negotiations in anticipation of litigation. The provisions of G.S. 7A-38.1(j), (l), and (m) apply and are incorporated into this Part by reference.

(i) A party may move to disqualify a mediator for good cause at any time. The request shall be directed to the Administrator if the grounds are known before the mediation conference. Good cause consists of conflict of interest between a party and the mediator, inability of the mediator to handle the conference competently, or other reasons that would reasonably be expected to impair the conference. (2006-145, s. 1.)

**Editor's Note.** — Session Laws 2006-145, s. 6, contains a severability clause.

## § 58-44-105. Post mediation.

(a) Within five days after the conclusion of the conference, the mediator shall file with the Administrator a mediator's status report, on a form prescribed by the Administrator, indicating whether or not the parties reached a settlement.

(b) Mediation is nonbinding unless all the parties specifically agree otherwise in writing.

(c) If the parties reach a settlement, the mediator shall include a copy of the settlement agreement with the status report. Within three business days after the conclusion of the conference, the insurer shall disburse the settlement funds in accordance with the terms of the settlement agreement. The insured has three business days after receipt of the settlement funds within which to notify the Commissioner and the insurer of the insured's decision to rescind the settlement agreement, as long as the insured has not received the settlement funds by electronic means or has not cashed or deposited any check or draft disbursed to the insured in payment of the settlement funds.

(d) If a settlement agreement is reached and is not rescinded, it shall act as a release of all specific claims that were presented in the conference. Any subsequent claim under the policy shall be presented as a separate claim. (2006-145, s. 1.)

**Editor's Note.** — Session Laws 2006-145, s. 6, contains a severability clause.

### § 58-44-110. Nonparticipation in mediation program.

If the insured decides not to participate in this program or if the parties are unsuccessful at resolving the claim, the insured may choose to proceed under the appraisal process set forth in the insurance policy, by litigation, or by any other dispute resolution procedure available under North Carolina law. (2006-145, s. 1.)

**Editor's Note.** — Session Laws 2006-145, s. 6, contains a severability clause.

### § 58-44-115. Commissioner's review.

If the insured rescinds a settlement agreement in accordance with G.S. 58-44-105(c), the Commissioner may review the settlement agreement to determine if the agreement was fair to the parties to the agreement. If the Commissioner, upon review and within 10 business days after receiving notice of the rescission, deems that it was fair to the parties, the insured, upon notice from the Commissioner, may withdraw the rescission within five business days after receipt of notice from the Commissioner and reinstate the settlement agreement as if no rescission had taken place. The Commissioner's review and findings shall not be offered or accepted as evidence in any subsequent proceedings. (2006-145, s. 1.)

**Editor's Note.** — Session Laws 2006-145, s. 6, contains a severability clause.

### § 58-44-120. Relation to Administrative Procedure Act.

The applicable provisions of Chapter 150B of the General Statutes shall govern issues relating to mediation that are not addressed in this Part. The provisions of this Part shall govern in the event of any conflict with Chapter 150B of the General Statutes. (2006-145, s. 1.)

**Editor's Note.** — Session Laws 2006-145, s. 6, contains a severability clause.

## ARTICLE 47.

### *Workers' Compensation Self-Insurance.*

#### Part 1. Employer Groups.

### § 58-47-140. Other provisions of this Chapter.

The following provisions of this Chapter apply to workers' compensation self-insurance groups that are subject to this Article:

G.S. 58-1-10, 58-2-45, 58-2-50, 58-2-70, 58-2-100, 58-2-105, 58-2-155, 58-2-161, 58-2-180, 58-2-185, 58-2-190, 58-2-200, 58-3-71, 58-3-81, 58-3-100, 58-3-120, 58-6-25, 58-7-21, 58-7-26, 58-7-30, 58-7-33, 58-7-73, and Articles 13, 19, 30, 33, 34, and 63 of this Chapter. (1997-362, s. 3; 2005-215, s. 15; 2006-226, s. 17.)



**Effect of Amendments. —**

Session Laws 2006-226, s. 17, effective Au-

gust 10, 2006, deleted “apply to groups” at the end of the section.

## ARTICLE 48.

*Postassessment Insurance Guaranty Association.***§ 58-48-20. Definitions.**

## CASE NOTES

**Insurance Guarantee Association Liable for Covered Claim.** — Where an insurance carrier, through novation, became an employer’s insurer before a worker’s claim, where the worker’s claim arose out of the carrier’s coverage of the employer, and where the carrier later became insolvent and was liquidated, the work-

er’s claim was a “covered claim” pursuant to G.S. 58-48-20, and an insurance guarantee association became liable for all covered claims issued by the carrier. *Bowles v. BCJ Trucking Servs.*, 172 N.C. App. 149, 615 S.E.2d 724, 2005 N.C. App. LEXIS 1431 (2005), cert. denied, 360 N.C. 60, 623 S.E.2d 579 (2005).

## ARTICLE 50.

*General Accident and Health Insurance Regulations.*

## Part 1. Miscellaneous Provisions.

**§ 58-50-40. Willful failure to pay group insurance premiums; willful termination of a group health plan; notice to persons insured; penalty; restitution; examination of insurance transactions.**

(a) As used in this section and in G.S. 58-50-45:

- (1) “Group health insurance” means any policy described in G.S. 58-51-75, 58-51-80, or 58-51-90; any group insurance certificate or group subscriber contract issued by a service corporation pursuant to Articles 65 and 66 of this Chapter; any health care plan provided or arranged by a health maintenance organization pursuant to Article 67 of this Chapter; or any multiple employer welfare arrangement as defined in G.S. 58-49-30(a).
- (2) “Group health plan” means a single employer self-insured group health plan as defined in section 607(1) of the Employee Retirement Income Security Act of 1974, 29 U.S.C. § 1167(1), as amended.
- (3) “Insurance fiduciary” means any person, employer, principal, agent, trustee, or third-party administrator who is responsible for the payment of group health or group life insurance premiums or who is responsible for funding a group health plan.
- (4) “Premiums” includes contributions to a group health plan or to a multiple employer welfare arrangement.

(b) No insurance fiduciary shall:

- (1) Cause the cancellation or nonrenewal of group health or group life insurance and the consequential loss of the coverages of the persons insured by willfully failing to pay such premiums in accordance with the terms of a group health or group life insurance contract; or, in the case of a group health plan to which there are no premiums contributed, terminate the plan by willfully failing to fund the plan; and

- (2) Willfully fail to deliver, at least 45 days before the termination of the group health or group life insurance or group health plan, to all persons covered by the group policy or group health plan a written notice of the insurance fiduciary's intention to stop payment of premiums for the group life or health insurance or the insurance fiduciary's intention to cease funding of a group health plan.
- (c) Any insurance fiduciary who violates subsection (b) of this section shall be guilty of a Class H felony.
- (d) Repealed by Session Laws 1991, c. 644, s. 37.
- (e) Upon conviction under subsection (c) of this section the court shall order the insurance fiduciary to make full restitution to persons insured who incurred expenses that would have been covered by the group health insurance or group health plan or full restitution to beneficiaries of the group life insurance for death benefits that would have been paid if the coverage had not been terminated.
- (f) Insurance fiduciaries subject to this section shall be subject to the provisions of G.S. 58-2-200 with respect only to transactions involving group health or life insurance.
- (g) In the notice required by subsection (b) of this section, the insurance fiduciary shall also notify those persons of their rights to health insurance conversion policies under Article 53 of this Chapter and their rights to purchase individual policies under the federal Health Insurance Portability and Accountability Act of 1996 (HIPAA), Public Law 104-191, as amended, and Article 68 of this Chapter.
- (h) In the event of the insolvency of an employer or insurance fiduciary who has violated this section, any person specified in subsection (e) of this section shall have a lien upon the assets of the employer or insurance fiduciary for the expenses or benefits specified in subsection (e) of this section. With respect to personal property within the estate of the insolvent employer or insurance fiduciary, the lien shall have priority over unperfected security interests.
- (i) Upon the termination of a group health insurance contract by the insurer, the insurer shall notify every subscriber and certificate holder under the contract of the termination of the contract along with the certification required to be provided under G.S. 58-68-30(e). Upon the termination of a group health insurance contract by the insurance fiduciary, the insurance fiduciary shall notify every subscriber and certificate holder under the contract of the termination of the contract along with the certification required to be provided under G.S. 58-68-30(e).
- (j) This section shall not apply to the cessation of individual contributions made by any person covered by a group health or group life insurance policy or group health plan. (1985, c. 507, s. 1; 1989, c. 485, s. 51; 1989 (Reg. Sess., 1990), c. 1055, ss. 2, 3.1; 1991, c. 644, s. 37; 1993, c. 539, s. 1274; 1994, Ex. Sess., c. 24, s. 14(c); 2001-422, s. 1; 2006-105, s. 1.8.)

**Editor's Note.** — Session Laws 2006-105, s. 4, is a severability clause.

2006-105, s. 1.8, effective July 13, 2006, added the last sentence in subsection (i).

**Effect of Amendments.** — Session Laws

§ 58-50-46: Recodified as G.S. 108A-55.4 by Session Laws 2006-221, s. 9(a), effective January 1, 2007.

**Editor's Note.** — Session Laws 2006-66, s. 10.8, enacted G.S. 58-50-46; it was recodified as

G.S. 108A-55.4 by Session Laws 2006-221, s. 9(a), on the same date.



## Part 5. Small Employer Group Health Insurance Reform.

### § 58-50-100. Title and reference.

This section and G.S. 58-50-105 through G.S. 58-50-156 are known and may be cited as the North Carolina Small Employer Group Health Coverage Reform Act, referred to in those sections as “this Act”. (1991, c. 630, s. 1; 2006-105, s. 1.9.)

**Editor’s Note. —**

Session Laws 2006-105, s. 4, is a severability clause.

**Effect of Amendments. —** Session Laws

2006-105, s. 1.9, effective July 13, 2006, substituted “58-50-156” for “58-50-150.”

### § 58-50-110. Definitions.

As used in this Act:

- (1) Repealed by Session Laws 2001-334, s. 12.1, effective August 3, 2001.
- (1a) “Actuarial certification” means a written statement by a member of the American Academy of Actuaries or other individual acceptable to the Commissioner that a small employer carrier is in compliance with the provisions of G.S. 58-50-130, and to the extent applicable, the provisions of Article 68 of this Chapter, based upon the person’s examination, including a review of the appropriate records and of the actuarial assumptions and methods used by the small employer carrier in establishing premium rates for applicable health benefit plans.
- (1b) “Adjusted community rating” means a method used to develop carrier premiums which spreads financial risk across a large population and allows adjustments for the following demographic factors: age, gender, family composition, and geographic areas, as determined pursuant to G.S. 58-50-130(b).
- (2) Repealed by Session Laws 1993, c. 529, s. 3.3.
- (3) “Basic health care plan” means a health care plan for small employers that is lower in cost than a standard health care plan and is required to be offered by all small employer carriers pursuant to G.S. 58-50-125 and approved by the Commissioner in accordance with G.S. 58-50-125.
- (4) “Board” means the board of directors of the Pool.
- (5) “Carrier” means any person that provides one or more health benefit plans in this State, including a licensed insurance company, a prepaid hospital or medical service plan, a health maintenance organization (HMO), and a multiple employer welfare arrangement.
- (5a) “Case characteristics” means the demographic factors age, gender, family size, geographic location, and industry.
- (6), (7) Repealed by Session Laws 1993, c. 529, s. 3.3.
- (8) “Committee” means the Small Employer Carrier Committee as created by G.S. 58-50-120.
- (9) “Dependent” means the spouse or child of an eligible employee, subject to applicable terms of the health care plan covering the employee.
- (10) “Eligible employee” means an employee who works for a small employer on a full-time basis, with a normal work week of 30 or more hours, including a sole proprietor, a partner or a partnership, or an independent contractor, if included as an employee under a health care plan of a small employer; but does not include employees who work on a part-time, temporary, or substitute basis.
- (11) “Health benefit plan” means any accident and health insurance policy or certificate; nonprofit hospital or medical service corporation con-



tract; health, hospital, or medical service corporation plan contract; HMO subscriber contract; plan provided by a MEWA or plan provided by another benefit arrangement, to the extent permitted by ERISA, subject to G.S. 58-50-115. Health benefit plan does not include benefits described in G.S. 58-68-25(b).

- (12) "Impaired insurer" has the same meaning as prescribed in G.S. 58-62-20(6) or G.S. 58-62-16(8).
- (12a) "Industry" means a demographic factor used to reflect the financial risk associated with a specific industry.
- (13) Repealed by Session Laws 1993, c. 529, s. 3.3.
- (14) "Late enrollee" has the same meaning as defined in G.S. 58-68-30(b)(2); provided that the initial enrollment period shall be a period of at least 30 consecutive calendar days. In addition to the special enrollment provisions in G.S. 58-68-30(f), an eligible employee or dependent shall not be considered a late enrollee under a small employer health benefit plan if:
  - a. Repealed by Session Laws 1998-211, s. 9, effective November 1, 1998.
  - 1, 2. Repealed by Session Laws 1998-211, s. 9, effective November 1, 1998.
  - 3, 4. Repealed by Session Laws 1993, c. 529, s. 3.3.
  - b. The individual elects a different health benefit plan offered by the small employer during an open enrollment period;
  - c. Repealed by Session Laws 1998-211, s. 9, effective November 1, 1998.
  - d. A court has ordered coverage be provided for a spouse or minor child under a covered employee's health benefit plan and the request for enrollment for a spouse is made within 30 days after issuance of the court order. A minor child shall be enrolled in accordance with the requirements of G.S. 58-51-120; or
  - e. Repealed by Session Laws 1998-211, s. 9, effective November 1, 1998.
- (15) Repealed by Session Laws 1993, c. 529, s. 3.3.
- (16) "Pool" means the North Carolina Small Employer Health Reinsurance Pool created in G.S. 58-50-150.
- (17) "Preexisting-conditions provision" means a preexisting-condition provision as defined in G.S. 58-68-30.
- (18) "Premium" includes insurance premiums or other fees charged for a health benefit plan, including the costs of benefits paid or reimbursements made to or on behalf of persons covered by the plan.
- (19) "Rating period" means the calendar period for which premium rates established by a small employer carrier are assumed to be in effect, as determined by the small employer carrier.
- (20) "Risk-assuming carrier" means a small employer carrier electing to comply with the requirements set forth in G.S. 58-50-140.
- (21) "Reinsuring carrier" means a small employer carrier electing to comply with the requirements set forth in G.S. 58-50-145.
- (21a) "Self-employed individual" means an individual or sole proprietor who derives a majority of his or her income from a trade or business carried on by the individual or sole proprietor which results in taxable income as indicated on IRS form 1040, Schedule C or F and which generated taxable income in one of the two previous years.
- (22) "Small employer" means any individual actively engaged in business that, on at least fifty percent (50%) of its working days during the preceding calendar quarter, employed no more than 50 eligible employees, the majority of whom are employed within this State, and is

not formed primarily for purposes of buying health insurance and in which a bona fide employer-employee relationship exists. In determining the number of eligible employees, companies that are affiliated companies, or that are eligible to file a combined tax return for purposes of taxation by this State, shall be considered one employer. Subsequent to the issuance of a health benefit plan to a small employer and for the purpose of determining eligibility, the size of a small employer shall be determined annually. Except as otherwise specifically provided, the provisions of this Act that apply to a small employer shall continue to apply until the plan anniversary following the date the small employer no longer meets the requirements of this definition. For purposes of this Act, the term small employer includes self-employed individuals.

- (23) "Small employer carrier" means any carrier that offers health benefit plans covering eligible employees of one or more small employers.
- (24) "Standard health care plan" means a health care plan for small employers required to be offered by all small employer carriers under G.S. 58-50-125 and approved by the Commissioner in accordance with G.S. 58-50-125. (1991, c. 630, s. 1; 1993, c. 408, ss. 1, 2; c. 529, s. 3.3; 1993 (Reg. Sess., 1994), c. 569, s. 6; 1997-259, s. 2; 1998-211, s. 9; 2001-334, ss. 12.1, 12.2; 2006-154, ss. 5, 6.)

**Effect of Amendments.** — Session Laws 2006-154, ss. 5 and 6, effective July 23, 2006, in subdivision (5a), substituted "geographic loca-

tion, and industry" for "and geographic location"; and added subdivision (12a).

#### CASE NOTES

**Cited in** *Jacobs v. Physicians Weight Loss Ctr. of Am., Inc.*, 173 N.C. App. 663, 620 S.E.2d 232, 2005 N.C. App. LEXIS 2280 (2005).

### § 58-50-115. Health benefit plans subject to Act.

#### CASE NOTES

**Cited in** *Jacobs v. Physicians Weight Loss Ctr. of Am., Inc.*, 173 N.C. App. 663, 620 S.E.2d 232, 2005 N.C. App. LEXIS 2280 (2005).

**§ 58-50-120:** Repealed by Session Laws 2006-154, s. 9, effective July 23, 2006.

### § 58-50-125. Health care plans; formation; approval; offerings.

(a) To improve the availability and affordability of health benefits coverage for small employers, the Committee shall recommend to the Commissioner two plans of coverage, one of which shall be a basic health care plan and the second of which shall be a standard health care plan. Each plan of coverage shall be in two forms, one of which shall be in the form of insurance and the second of which shall be consistent with the basic method of operation and benefit plans of HMOs, including federally qualified HMOs. On or before January 1, 1992, the Committee shall file a progress report with the Commissioner. The Committee shall submit the recommended plans to the Commissioner for



approval within 180 days after the appointment of the Committee under G.S. 58-50-120. The Committee shall take into consideration the levels of health benefit plans provided in North Carolina, and appropriate medical and economic factors, and shall establish benefit levels, cost sharing, exclusions, and limitations. Notwithstanding subsection (c) of this section, in developing and approving the plans, the Committee and the Commissioner shall give due consideration to cost-effective and life-saving health care services and to cost-effective health care providers. The Committee shall file with the Commissioner its findings and recommendations, and reasons for the findings and recommendations, if it does not provide for coverage by any type of health care provider specified in G.S. 58-50-30. The recommended plans may include cost containment features such as, but not limited to: preferred provider provisions; utilization review of medical necessity of hospital and physician services; case management benefit alternatives; or other managed care provisions.

(a1) Both the basic health care plan and the standard health care plan provided for in subsection (a) of this section may have optional deductible and co-payment levels as may be determined by the small employer carrier, including high deductible options. A small employer carrier shall file any changes in deductibles or co-payment levels with the Commissioner for the Commissioner's approval prior to implementing the changes in this State. The Commissioner may periodically review and update the benefits provided by these plans to address trends in the small group market. The Commissioner shall consult with small employer carriers and representatives of the insurance agent and small employer communities as part of that periodic review.

(b) Repealed by Session Laws 2006-154, s. 9, effective July 23, 2006.

(c) Except as provided under Article 68 of this Chapter, the plans developed under this section are not required to provide coverage that meets the requirements of other provisions of this Chapter that mandate either coverage or the offer of coverage by the type or level of health care services or health care provider.

(d) As a condition of transacting business as a small employer carrier in this State, the carrier shall either offer small employers at least one basic and one standard health care plan or the alternative coverages provided in G.S. 58-50-126. Every small employer that elects to be covered under such a plan and agrees to make the required premium payments and to satisfy the other provisions of the plan shall be issued such a plan by the small employer carrier. The premium payment requirements used in connection with basic and standard health care plans may address the potential credit risk of small employers that elect coverage in accordance with this subsection by means of payment security provisions that are reasonably related to the risk and are uniformly applied.

If a small employer carrier offers coverage to a small employer, the small employer carrier shall offer coverage to all eligible employees of a small employer and their dependents. A small employer carrier shall not offer coverage to only certain individuals in a small employer group except in the case of late enrollees as provided in G.S. 58-50-130(a)(4b). A small employer carrier shall not modify any health benefit plan with respect to a small employer, any eligible employee, or dependent through riders, endorsements, or otherwise, in order to restrict or exclude coverage for certain diseases or medical conditions otherwise covered by the health benefit plan. In the case of an eligible employee or dependent of an eligible employee who, before the effective date of the plan, was excluded from coverage or denied coverage by a small employer carrier in the process of providing a health benefit plan to an eligible small employer, the small employer carrier shall provide an opportunity for the eligible employee or dependent of an eligible employee to enroll in the health benefit plan currently held by the small employer.



(e) Repealed by Session Laws 2006-154, s. 9, effective July 23, 2006.

(f) To the extent it is required under this section and G.S. 58-68-40, every small employer carrier shall fairly market all of its small group health benefit plans it offers on a guaranteed issue basis to all small employers in the geographic areas in which the carrier makes coverage available or provides benefits.

(g) Repealed by Session Laws 2006-154, s. 9, effective July 23, 2006.

(h) The provisions of subsection (d) of this section apply to every health benefit plan delivered, issued for delivery, renewed, or continued in this State or covering persons residing in this State on or after the date the plan becomes operational, as determined by the Commissioner. For purposes of this subsection, the date a health benefit plan is continued is the anniversary date of the issuance of the health benefit plan. (1991, c. 630, s. 1; c. 761, s. 10; 1993, c. 529, s. 3.6; 1997-259, ss. 3, 4; 2006-154, ss. 1, 2, 9, 10, 14.)

**Effect of Amendments.** — Session Laws 2006-154, ss. 1, 2, 9, 10, and 14, effective July 23, 2006, added subsection (a1); in subsection (d), in the first paragraph, rewrote the first sentence, and substituted “G.S. 58-50-130(a)(4b)” for “G.S. 58-50-130(a)(4)” in the second paragraph; repealed subsections (b), (e), and (g); in subsection (f), inserted “To the extent

it is required under this section and G.S. 58-68-40” and substituted “all of its small group health benefit plans it offers on a guaranteed issue basis” for “the basic and standard health care plan”; and substituted “subsection (d)” for “subsections (b), (d), and (g) and subdivision (e)(2)” near the beginning of subsection (h).

## § 58-50-126. Alternative coverage permitted.

(a) In General. — In the case of health insurance coverage offered in this State, a small employer carrier may elect to limit the coverage offered under G.S. 58-50-125(d) if the carrier offers at least two different policy forms of health insurance coverage and both policy forms meet all of the following:

- (1) The policy forms are designed for, made available or actively marketed to, and actually enroll self-employed individuals and other small employer groups.
- (2) The policy forms meet the requirements of either subsections (b) or (c) of this section, as elected by the small employer carrier.

(b) Choice of Most Popular Policy Forms. — The requirements of this section are met for health insurance coverage policy forms offered by a small employer carrier if the carrier offers the policy forms for small group health insurance coverage with the two highest premium volume numbers of all the policy forms offered by the carrier in this State or in applicable marketing or service areas in the period involved.

(c) Choice of Two Policy Forms with Representative Coverage. — The requirements of this section are met for health insurance coverage policy forms offered by a small employer carrier in the small group market if the small employer carrier offers both policy forms described in this subsection and each policy form includes benefits substantially similar to other small group health insurance coverage offered by the small employer carrier in this State.

- (1) Lower-level coverage policy form. — A policy form is deemed a lower-level coverage policy form if the actuarial value of the benefits under the coverage is at least eighty-five percent (85%), but not greater than one hundred percent (100%) of a weighted average, as described in subdivision (3) of this subsection.
- (2) Higher-level coverage policy form. — A policy form is deemed a higher-level coverage policy form if all of the following apply:
  - a. The actuarial value of the benefits under the coverage is at least fifteen percent (15%) greater than the actuarial value of the coverage described in subdivision (1) of this subsection offered by the small employer carrier.

- b. The actuarial value of the benefits under the coverage is at least one hundred percent (100%), but not greater than one hundred twenty percent (120%) of a weighted average, as described in subdivision (3) of this subsection.
- (3) Weighted average. — For the purposes of this subsection, a weighted average is the average actuarial value of the benefits provided by all the health insurance coverage issued, as elected by the small employer carrier, either by that small employer carrier or all small employer carriers in this State in the small group market during the previous year, not including coverage issued under this section, weighted by enrollment for the different coverage.
- (d) Election. — The small employer carrier elections of the policies to be offered under this section shall apply uniformly to all small employers in this State for that small employer carrier. The election shall be effective for a period of not less than two years.
- (e) Assumptions. — For the purposes of subsection (c) of this section, the actuarial value of benefits provided under small group insurance coverage shall be calculated based on a standardized population and a set of standardized utilization and cost factors.
- (f) Discontinuation of Basic or Standard Plans. — If a small employer carrier chooses to offer the plans under this section and discontinues coverage under the basic or standard health benefit plans provided for in G.S. 58-50-125, the carrier shall make available to the insured employer whose coverage is to be discontinued both of the plans offered under this section. New coverage made available under this section shall constitute replacement coverage and shall be rated in accordance with G.S. 58-50-130(b)(3).
- (g) Different Policy Forms. — For purposes of this section only, policy forms that have different cost-sharing arrangements or different riders shall be considered to be different policy forms. (2006-154, s. 3.)

**Editor's Note.** — Session Laws 2006-154, s. 15, made this section effective July 23, 2006.

## § 58-50-130. Required health care plan provisions.

- (a) Health benefit plans covering small employers are subject to the following provisions:
- (1) to (4) Repealed by Session Laws 1997-259, s. 5, effective July 14, 1997.
- (4a) A carrier may continue to enforce reasonable employer participation and contribution requirements on small employers applying for coverage; however, participation and contribution requirements may vary among small employers only by the size of the small employer group and shall not differ because of the health benefit plan involved. In applying minimum participation requirements to a small employer, a small employer carrier shall not consider employees or dependents who have qualifying existing coverage in determining whether an applicable participation level is met. "Qualifying existing coverage" means benefits or coverage provided under: (i) Medicare, Medicaid, and other government funded programs; or (ii) an employer-based health insurance or health benefit arrangement, including a self-insured plan, that provides benefits similar to or in excess of benefits provided under the basic health care plan.
- (4b) Late enrollees may only be excluded from coverage for the greater of 18 months or an 18-month preexisting-condition exclusion; however, if both a period of exclusion from coverage and a preexisting-condition exclusion are applicable to a late enrollee, the combined period shall not exceed 18 months. If a period of exclusion from coverage is



applied, a late enrollee shall be enrolled at the end of that period in the health benefit plan held at the time by the small employer.

- (5) Notwithstanding any other provision of this Chapter, no small employer carrier, insurer, subsidiary of an insurer, or controlled individual of an insurance holding company shall act as an administrator or claims paying agent, as opposed to an insurer, on behalf of small groups which, if they purchased insurance, would be subject to this section. No small employer carrier, insurer, subsidiary of an insurer, or controlled individual of an insurance holding company shall provide stop loss, catastrophic, or reinsurance coverage to small employers that does not comply with the underwriting, rating, and other applicable standards in this Act.
- (6) If a small employer carrier offers coverage to a small employer, the small employer carrier shall offer coverage to all eligible employees of a small employer and their dependents. A small employer carrier shall not offer coverage to only certain individuals in a small employer group except in the case of late enrollees as provided in G.S. 58-50-130(a)(4).
- (7), (8) Repealed by Session Laws 1997-259, s. 5.
- (9) The health benefit plan must meet the applicable requirements of Article 68 of this Chapter.
- (b) For all small employer health benefit plans that are subject to this section, the premium rates are subject to all of the following provisions:
  - (1) Small employer carriers shall use an adjusted-community rating methodology in which the premium for each small employer can vary only on the basis of the eligible employee's or dependent's age as determined under subdivision (6) of this subsection, the gender of the eligible employee or dependent, number of family members covered, or geographic area as determined under subdivision (7) of this subsection, or industry as determined under subdivision (9) of this subsection. Premium rates charged during a rating period to small employers with similar case characteristics for same coverage shall not vary from the adjusted community rate by more than twenty-five percent (25%) for any reason, including differences in administrative costs and claims experience.
  - (2) Rating factors related to age, gender, number of family members covered, geographic location, or industry may be developed by each carrier to reflect the carrier's experience. The factors used by carriers are subject to the Commissioner's review.
  - (3) A small employer carrier shall not modify the premium rate charged to a small employer or a small employer group member, including changes in rates related to the increasing age of a group member, for 12 months from the initial issue date or renewal date, unless the group is composite rated and composition of the group changed by twenty percent (20%) or more or benefits are changed. The percentage increase in the premium rate charged to a small employer for a new rating period shall not exceed the sum of all of the following:
    - a. The percentage change in the adjusted community rate as measured from the first day of the prior rating period to the first day of the new rating period.
    - b. Any adjustment, not to exceed fifteen percent (15%) annually, due to claim experience, health status, or duration of coverage of the employees or dependents of the small employer.
    - c. Any adjustment because of change in coverage or change in case characteristics of the small employer group.
- (4), (5) Repealed by Session Laws 1995, c. 238, s. 1.



- (6) Unless the small employer carrier uses composite rating, the small employer carrier shall use the following age brackets:

- a. Younger than 15 years;
- b. 15 to 19 years;
- c. 20 to 24 years;
- d. 25 to 29 years;
- e. 30 to 34 years;
- f. 35 to 39 years;
- g. 40 to 44 years;
- h. 45 to 49 years;
- i. 50 to 54 years;
- j. 55 to 59 years;
- k. 60 to 64 years;
- l. 65 years.

Carriers may combine, but shall not split, complete age brackets for the purposes of determining rates under this subsection. Small employer carriers shall be permitted to develop separate rates for individuals aged 65 years and older for coverage for which Medicare is the primary payor and coverage for which Medicare is not the primary payor.

- (7) A carrier shall define geographic area to mean medical care system. Medical care system factors shall reflect the relative differences in expected costs, shall produce rates that are not excessive, inadequate, or unfairly discriminatory in the medical care system areas, and shall be revenue neutral to the small employer carrier.

- (8) The Department may adopt rules to administer this subsection and to assure that rating practices used by small employer carriers are consistent with the purposes of this subsection. Those rules shall include consideration of differences based on all of the following:

- a. Health benefit plans that use different provider network arrangements may be considered separate plans for the purposes of determining the rating in subdivision (1) of this subsection, provided that the different arrangements are expected to result in substantial differences in claims costs.
- b. Except as provided for in sub-subdivision a. of this subdivision, differences in rates charged for different health benefit plans shall be reasonable and reflect objective differences in plan design, but shall not permit differences in premium rates because of the case characteristics of groups assumed to select particular health benefit plans.
- c. Small employer carriers shall apply allowable rating factors consistently with respect to all small employers.

- (9) In any case where the small employer carrier uses industry as a case characteristic in establishing premium rates, the rate factor associated with any industry classification divided by the lowest rate factor associated with any other industry classification shall not exceed 1.2.

(c) Repealed by Session Laws 1993, c. 529, s. 3.7.

(d) In connection with the offering for sale of any health benefit plan to a small employer, each small employer carrier shall make a reasonable disclosure, as part of its solicitation and sales materials, of the following and shall provide this information to the small employer upon request:

- (1) Repealed by Session Laws 1993, c. 529, s. 3.7.
- (2) Provisions concerning the small employer carrier's right to change premium rates and the factors other than claims experience that affect changes in premium rates.
- (3) Provisions relating to renewability of policies and contracts.

(4) Provisions affecting any preexisting conditions provision.

(5) The benefits available and premiums charged under all health benefit plans for which the small employer is eligible.

(e) Each small employer carrier shall maintain at its principal place of business a complete and detailed description of its rating practices and renewal underwriting practices, including information and documentation that demonstrate that its rating methods and practices are based upon commonly accepted actuarial assumptions and are in accordance with sound actuarial principles.

(f) Each small employer carrier shall file with the Commissioner annually on or before March 15 an actuarial certification certifying that it is in compliance with this Act and that its rating methods are actuarially sound. The small employer carrier shall retain a copy of the certification at its principal place of business.

(g) A small employer carrier shall make the information and documentation described in subsection (e) of this section available to the Commissioner upon request. Except in cases of violations of this Act, the information is proprietary and trade secret information and is not subject to disclosure by the Commissioner to persons outside of the Department except as agreed to by the small employer carrier or as ordered by a court of competent jurisdiction. Nothing in this section affects the Commissioner's authority to approve rates before their use under G.S. 58-65-60(e) or G.S. 58-67-50(c).

(h) The provisions of subdivisions (a)(1), (3), and (5) and subsections (b) through (g) of this section apply to health benefit plans delivered, issued for delivery, renewed, or continued in this State or covering persons residing in this State on or after January 1, 1992. The provisions of subdivisions (a)(2) and (4) of this section apply to health benefit plans delivered, issued for delivery, renewed, or continued in this State or covering persons residing in this State on or after the date the plan becomes operational, as designated by the Commissioner. For purposes of this subsection, the date a health benefit plan is continued is the anniversary date of the issuance of the health benefit plan. (1991, c. 630, s. 1; 1993, c. 408, s. 6; c. 529, ss. 3.2, 3.7; 1993 (Reg. Sess., 1994), c. 569, ss. 7, 8; c. 678, ss. 24, 25; 1995, c. 238, s. 1; c. 507, s. 23A.1(b); 1995 (Reg. Sess., 1996), c. 669, s. 1; 1997-259, ss. 5, 6; 1998-211, ss. 9.1, 10; 1999-132, s. 4.1; 2001-334, ss. 3, 12.3; 2006-154, s. 7.)

**Effect of Amendments.** — Session Laws 2006-154, s. 7, effective July 23, 2006, in subsection (b), substituted “the premium rates are subject to all of” for “premium rates for health benefit plans subject to this section are subject to” in the introductory language; in subdivision (b)(1), substituted “under subdivision (6)” for “in accordance with subdivision (6)” and inserted “or industry as determined under subdivision (9) of this subsection” in the first sentence, and

substituted “twenty-five percent (25%)” for “twenty-percent (20%)” in the second sentence; in subdivision (b)(2), inserted “or industry”; in the introductory paragraph of subdivisions (b)(3) and (b)(8), inserted “all of” near the end; in subdivision (b)(6), rewrote the introductory language and substituted “under this subsection” for “subsection (b) of this section”; rewrote subdivision (b)(7); added subdivision (b)(9); and made minor stylistic and punctuation changes.

## § 58-50-135. Elections by carriers.

(a) Repealed by Session Laws 2006-154, s. 9, effective July 23, 2006.

(b) A small employer carrier that stops participating as a reinsuring carrier shall pay a prorated assessment based upon business issued as a reinsuring carrier for any part of the year that an assessment is made under G.S. 58-50-150.

(c) Any small employer carrier that stops writing, administering, or otherwise providing health benefit plans to employers in this State shall continue to be governed by this Act with respect to business conducted under this Act that



was transacted before the effective date of termination and that remains in force. (1991, c. 630, s. 1; 1998-211, s. 11; 2006-154, ss. 9, 11.)

**Effect of Amendments.** — Session Laws 2006-154, ss. 9 and 11, effective July 23, 2006, repealed subsection (a), relating to election by

carrier to become risk-assuming or reinsuring; and rewrote subsection (b).

§ **58-50-140:** Repealed by Session Laws 2006-154, s. 9, effective July 23, 2006.

§ **58-50-145:** Repealed by Session Laws 2006-154, s. 9, effective July 23, 2006.

### § **58-50-149. Limit on cessions to the Reinsurance Pool.**

In addition to any individual or group previously reinsured in accordance with G.S. 58-50-150(g)(1), the Pool shall only reinsure a health benefit plan issued or delivered for original issue by a reinsuring carrier on or after October 1, 1995, if the health benefit plan provides coverage to a small employer with no more than 25 eligible employees, including self-employed individuals. Notwithstanding any other provision of law, the Pool shall cease to reinsure any individual or group on January 1, 2007. Reinsuring carriers as of that date shall continue to be governed by G.S. 58-50-135(b) and G.S. 58-50-150 until and through the termination of the Pool. (1995, c. 517, s. 29; 2006-154, s. 8.)

**Effect of Amendments.** — Session Laws 2006-154, s. 8, effective July 23, 2006, added the second and third sentences.

### § **58-50-150. North Carolina Small Employer Health Reinsurance Pool.**

(a) There is created a nonprofit entity to be known as the North Carolina Small Employer Health Reinsurance Pool. All carriers issuing or providing health benefit plans in this State from January 1, 1992, until the termination of the Pool, except any small employer carrier electing to be a risk-assuming carrier, are members of the Pool.

(b) The members shall select the initial Board, subject to the Commissioner's approval. The Board shall consist of five members. There shall be no more than two members of the Board representing any one carrier. In determining voting rights at the organizational meeting, each member shall be entitled to vote in person or by proxy. Voting rights shall be based on net group health benefit plan premium derived from small employer business. The Board shall at all times, to the extent possible, include at least one domestic insurance company licensed to transact accident and health insurance, one HMO, one nonprofit hospital or medical service plan. Four of the members of the Board shall be small employer carriers. In approving selection of the Board, the Commissioner shall assure that all members are fairly represented.

(c) If the initial Board is not elected at the organizational meeting, the Commissioner shall appoint the initial Board within 30 days of the organizational meeting.

(d) As used in this section, "plan of operation" includes articles, bylaws, and operating rules of the Pool. Within 180 days after the appointment of the initial Board, the Board shall submit to the Commissioner a plan of operation and any amendments necessary or suitable to assume the fair, reasonable, and equitable administration of the Pool. The Commissioner shall approve the plan of operation if it assures the fair, reasonable, and equitable administration of the



Pool and provides for the proportionate basis in accordance with the provisions of subsections (h) through (o) of this section. The plan of operation shall become effective upon approval in writing by the Commissioner consistent with the date on which the coverage under this section shall be made available. If the Board fails to submit a suitable plan of operation within 180 days after its appointment, or at any time thereafter fails to submit suitable amendments to the plan of operation, the Commissioner shall adopt and promulgate a plan of operation or amendment, as appropriate. The Commissioner shall amend any plan of operation he adopts, as necessary, after a plan of operation is submitted by the Board and approved by the Commissioner.

- (e) The plan of operation shall establish procedures for, among other things:
  - (1) Handling and accounting of assets and moneys of the Pool, and for an annual financial reporting to the Commissioner.
  - (2) Filling vacancies on the Board, subject to the Commissioner's approval.
  - (3) Selecting an administering carrier and setting forth the powers and duties of the administering carrier.
  - (4) Reinsuring risks in accordance with the provisions of this Act.
  - (5) Collecting assessments from members subject to assessment to provide for claims reinsured by the Pool and for administrative expenses incurred or estimated to be incurred during the period for which the assessment is made.
  - (6) Any additional matters in the Board's discretion.
- (f) The Pool has the general powers and authority granted under the laws of this State to insurance companies licensed to transact accident and health insurance except the power to issue coverage directly to enrollees, and, in addition, the specific authority to do all of the following:
  - (1) Enter into contracts that are necessary or proper to carry out the provisions and purposes of this Act, including the authority, with the Commissioner's approval, to enter into contracts with similar pools of other states for the joint performance of common administrative functions, or with persons or other organizations for the performance of administrative functions.
  - (2) Sue or be sued, including taking any legal actions necessary or proper for recovery of any assessments for, on behalf of, or against members.
  - (3) Take any legal action necessary to avoid the payment of improper, incorrect, or fraudulent claims against the Pool or the coverage reinsured by the Pool.
  - (4) Issue various reinsurance policies in accordance with the requirements of this section.
  - (5) Establish rules, conditions, and procedures pertaining to the reinsurance of members' risks by the Pool.
  - (6) Establish appropriate rates, rate schedules, rate adjustments, rate classifications, and any other actuarial functions appropriate to the Pool's operation.
  - (7) Assess members in accordance with the provisions of subsections (h) through (o) of this section; and make advance interim assessments that are reasonable and necessary for organizational and interim operating expenses. Any interim assessments shall be credited as offsets against any regular assessments due following the close of the Pool's fiscal year.
  - (8) Appoint from among members appropriate legal, actuarial, and other committees that are necessary to provide technical assistance in the operation of the Pool, policy, and other contract design, and any other function within the Pool's authority.
  - (9) Borrow money to effect the purposes of the Pool. Any notes or other evidence of indebtedness of the Pool not in default are legal investments for members and may be carried as admitted assets.

(g) Any member that elects to be a reinsuring carrier may cede, and the Pool shall reinsure the reinsuring carrier, subject to all of the following:

- (1) The Pool shall reinsure any basic and standard health care plan originally issued or delivered for original issue by a reinsuring carrier on or after January 1, 1992, under the requirements in G.S. 58-50-125(d). With respect to a basic or standard health care plan, the Pool shall reinsure the level of coverage provided and, with respect to other plans, the Pool shall reinsure the level of coverage provided in the basic or standard health care plan up to, but not exceeding, the level of coverage provided under either the basic or standard health care plans. Small group business of reinsuring carriers in force before January 1, 1992, may not be ceded to the Pool until January 1, 1995, and then only if and when the Board determines that sufficient funding sources are available.
- (2) The Pool shall reinsure eligible employees or their dependents or entire small employer groups according to the following:
  - a. With respect to eligible employees and their dependents who either (i) are employed by a small employer as of the date such employer's coverage by the member begins or (ii) are hired after the beginning of the employer's coverage by the member: The coverage may be reinsured within 60 days after the beginning of the eligible employees' or dependents' coverage under the plan.
  - b. With respect to eligible employees and their dependents, when the entire employer group is eligible for reinsurance: A small employer carrier may reinsure the entire employer group within 60 days after the beginning of the group's coverage under the plan.
  - c. With respect to any person reinsured, no reinsurance may be provided for a reinsured employee or dependent until five thousand dollars (\$5,000) in benefit payments have been made for services provided during a calendar year for that reinsured employee or dependent, which payments would have been reimbursed through the reinsurance in the absence of the five thousand dollar (\$5,000) deductible. The Boards shall review periodically the amount of the deductible and adjust it for inflation. In addition, the member shall retain ten percent (10%) of the next fifty thousand dollars (\$50,000) of benefit payments during a calendar year and the Pool shall reinsure the remainder; provided that the members' liability under this section shall not exceed ten thousand dollars (\$10,000) in any one calendar year with respect to any one person reinsured. The amount of the member's maximum liability shall be periodically reviewed by the Board and adjusted for inflation, as determined by the Board.
  - d. Reinsurance may be terminated for each reinsured employee or dependent on any plan anniversary.
  - e. Premium rates charged for reinsurance by the program to an HMO that is approved by the Secretary of Health and Human Services as a federally qualified health maintenance organization under 42 U.S.C. § 300 et seq., shall be reduced to reflect the restrictions and requirements of 42 U.S.C. § 300 et seq.
  - f. Every carrier subject to G.S. 58-50-130 shall apply its case management and claims handling techniques, including but not limited to utilization review, individual case management, preferred provider provisions, other managed care provisions or methods of operation, consistently with both reinsured and non-reinsured business.
  - g. Except as otherwise provided in this section, premium rates charged by the Pool for coverage reinsured by the Pool for that



classification or group with similar case characteristics and coverage shall be established as follows:

1. One and one-half times the rate established by the Pool with respect to the eligible employees and their dependents of a small employer, all of whose coverage is reinsured with the Pool and who are reinsured in accordance with this section.
2. Five times the rate established by the Pool with respect to an eligible employee or dependent who is reinsured in accordance with this section.
- (3) The Pool shall reinsure no more than the level of benefits provided in either the basic or standard health care plan established in accordance with G.S. 58-50-125.
- (4) The Pool may issue different types and levels of reinsurance coverage, including stop-loss coverage; and the reinsurance premium shall be adjusted to reflect the type and level of reinsurance coverage issued.
- (5) The reinsurance premium shall also be adjusted to reflect cost containment features of the plan of operation that have proven to be effective including, but not limited to: preferred provider provisions, utilization review of medical necessity of hospital and physician services, case management benefit alternatives, and other managed care provisions or methods of operation.

(h) Following the close of each fiscal year, the administering carrier shall determine the net premiums, the Pool expenses of administration, and the incurred losses for the year, taking into account investment income and other appropriate gains and losses. Health benefit plan premiums and benefits paid by a member that are less than an amount determined by the Board to justify the cost of collection shall not be considered for purposes of determining assessments. As used in this section, "net premiums" means health benefit plan premiums for insured plans but does not mean premiums or revenue received by a carrier for Medicare and Medicaid contracts.

(i) Any net losses for the year shall be recouped by assessments of members as follows:

- (1) The Board shall determine an equitable assessment formula to recoup assessments of members that takes into consideration both overall market share of small employer carriers that are members of the Pool and the share of new business of the small employer carriers assumed during the preceding calendar year. For the first three years of operation of the Pool, if an assessment is based on an adjustment made, the assessment shall not be less than fifty percent (50%) nor more than one hundred fifty percent (150%) of the amount it would have been if the assessment were based on the proportional relationship of the small employer carrier's total premiums for small employer coverage written in the year to the total premiums of small employer coverage written by all small employer carriers in this State in the year. The Board shall also determine whether the assessment base used to determine assessments shall be made on a transitional basis or shall be permanent. In no event shall assessments exceed four percent (4%) of the total health benefit plan premium earned in this State from health benefit plans covering small employers of members during the calendar year coinciding or ending during the fiscal year of the Pool. The Board may change the assessment formula, including an assessment adjustment formula, if applicable, from time to time as appropriate.
- (2) Health benefit plan premiums and benefits paid by a member that are less than an amount determined by the Board to justify the cost of collection shall not be considered for purposes of determining assessments. For the purposes of this section, health benefit plan premiums earned by MEWAs and other benefit arrangements, to the extent



permitted by ERISA, shall be established by adding paid health losses and administrative expenses.

(j) If the assessment level is inadequate, the Board may adjust reinsurance thresholds, retention levels, or consider other forms of reinsurance. After the first three full years of operations the Board shall report to the Commissioner on its experience, the effect on reinsurance and small group rates of individual ceding, and recommendations on additional funding sources, if needed. If legislative or other broader funding alternatives are not found, the Board may enter into negotiations with representatives of health care providers to resolve any deficit through reductions in future years' payment levels for reinsured plans. Any such recommendations shall take into account the findings of the actuarial study provided for in this subsection. An actuarial study shall be undertaken within the first three years of the Pool's operation to evaluate and measure the relative risks being assumed by differing types of small employer carriers as a result of this Act. The study shall be developed by three actuaries appointed by the Commissioner, with one representing risk assuming carriers, one representing reinsuring carriers, and one from within the Department.

(k) Subject to the approval of the Commissioner, the Board may make an adjustment to the assessment formula for any reinsuring carrier that is an HMO approved as a federally qualified HMO by the Secretary of Health and Human Services under 42 U.S.C. § 300 for restrictions placed on them other than those for which an adjustment has already been made in subsection (b)(2) or (b)(5) of this section that are not imposed on other small group carriers.

(l) If assessments exceed actual losses and administrative expenses of the Pool, the excess shall be held at interest and used by the Board to offset future losses or to reduce Pool premiums. As used in this subsection, "future losses" includes reserves for incurred but not reported claims.

(m) The Board shall determine annually each member's proportion of participation in the Pool based on financial statements and other reports that the Board considers to be necessary and requires that the member files with the Board. All carriers shall report, to the Board, claims payments made and administrative expenses incurred in this State on an annual basis and on a form prescribed by the Commissioner.

(n) The plan of operation shall provide for the imposition of an interest penalty for late payment of assessments.

(o) The Board may abate or defer, in whole or in part, the assessment of a member if, in the Board's opinion, payment of the assessment would endanger the member's ability to fulfill its contractual obligations. In the event an assessment against a member is abated or deferred in whole or in part, the amount by which the assessment is abated or deferred may be assessed against the other members in a manner consistent with the basis for assessments set forth in this section. The member receiving the abatement or deferment shall remain liable to the Pool for the deficiency.

(p) Neither the participation in the Pool as members, the establishment of rates, forms, or procedures, nor any other joint or collective action required by this Act shall be the basis of any legal action, criminal or civil liability, or penalty against the Pool or any of its members.

(q) Any person or member made a party to any action, suit, or proceeding because the person or member serves or served on the Board or on a committee or is or was an officer or employee of the Pool shall be held harmless and be indemnified by the Pool against all liability and costs, including the amounts of judgments, settlements, fines, or penalties, and expenses and reasonable attorneys' fees incurred in connection with the action, suit, or proceeding. However, the indemnification shall not be provided on any matter in which the person or member is finally adjudged in the action, suit, or proceeding to have committed a breach of duty involving gross negligence, dishonesty, willful

misfeasance, or reckless disregard of the responsibilities of service or office. Costs and expenses of the indemnification shall be prorated among and paid for by all members.

(r) The Pool is exempt from the taxes imposed by Article 8B of Chapter 105 of the General Statutes. (1991, c. 630, s. 1; 1993, c. 408, s. 7; 2005-223, s. 5; 2006-154, s. 12.)

<p><b>Effect of Amendments.</b> — Session Laws 2006-154, s. 12, effective July 23, 2006, in subsection (a), substituted “from”</p>	<p>for “on and after” and inserted “until the termination of the Pool” in the second sentence.</p>
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ARTICLE 51.

*Nature of Policies.*

§ 58-51-37. Pharmacy of choice.

CASE NOTES

<p><b>Summary Judgment.</b> — In an action brought against a weight loss center and other defendants, the trial court properly granted defendants full summary judgment on a client's claim that defendants violated G.S. 58-51-37,</p>	<p>which did not apply to contracts for medical and other services. <i>Jacobs v. Physicians Weight Loss Ctr. of Am., Inc.</i>, 173 N.C. App. 663, 620 S.E.2d 232, 2005 N.C. App. LEXIS 2280 (2005).</p>
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ARTICLE 58.

*Life Insurance and Viatical Settlements.*

Part 1. General Provisions.

§ 58-58-30. Soliciting agent represents the company.

CASE NOTES

<p><b>Liability of Insurance Broker for Agents' Conduct.</b> — Insurance and securities broker was not vicariously liable for the actions of an agent and subagent who led investors to sell their annuities offered by the broker and invest in an investment that lost money be-</p>	<p>cause the broker was not attempting to avoid paying benefits under an insurance policy, nor did the dispute involve the application or solicitation of insurance. <i>Estate of Redding v. Welborn</i>, 170 N.C. App. 324, 612 S.E.2d 664, 2005 N.C. App. LEXIS 1001 (2005).</p>
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Part 4. Miscellaneous Provisions.

§ 58-58-145. Group annuity contracts defined; requirements; issuance of individual certificates.

(a) Any policy or contract, except a joint, reversionary or survivorship annuity contract, whereby annuities are payable to more than one person, is a group annuity contract. The person, firm or corporation to whom or to which the contract is issued, is the holder of the contract. The term “annuitant” means any person to whom or which payments are made under the group annuity contract. No authorized insurer shall deliver or issue for delivery in this State any group annuity contract except upon a group of annuitants that

conforms to the following: under a contract issued to an employer, or to the trustee of a fund established by an employer or two or more employers in the same industry or kind of business, the stipulated payments on which shall be paid by the holder of the contract either wholly from the employer's funds or funds contributed by the employer, or partly from the funds and partly from funds contributed by the employees covered by such contract, and providing a plan of retirement annuities under a plan which permits all of the employees of such employer or of any specified class or classes thereof to become annuitants. Any such group of employees may include retired employees, and may include officers and managers as employees, and may include the employees of subsidiary or affiliated corporations of a corporation employer, and may include the individual proprietors, partners and employees of affiliated individuals and firms controlled by the holders through stock ownership, contract or otherwise.

(b) The insurer of a group annuity contract shall issue to the policyholder or to the annuitant directly, within 30 days of the annuitant's enrollment in the group annuity contract, an individual certificate for each annuitant which:

- (1) Identifies the annuity to which the annuitant is entitled.
- (2) States the name of the person to whom the annuity is payable.
- (3) Discloses all of the rights and obligations of the insurer, the policyholder, the annuitant, and the persons to whom the annuity is payable with respect to the group annuity contract.

G.S. 58-3-150 applies to the form of the individual certificate required by this subsection.

(c) Each group annuity contract shall include a provision that the insurer will issue to the policyholder within 30 days of the effective date of the contract, for delivery to each annuitant, an individual certificate setting forth the information described in subsection (b) of this section.

(d) This section does not apply to annuities used to fund:

- (1) An employee pension plan that is covered by the Employee Retirement Income Security Act of 1974 (ERISA);
- (2) A plan described in sections 401(a), 401(k), 403(b), or 457 of the Internal Revenue Code, where the plan, as defined in ERISA, is established or maintained by an employer;
- (3) A governmental or church plan defined in section 414 of the Internal Revenue Code or a deferred compensation plan of a state or local government or a tax-exempt organization under section 457 of the Internal Revenue Code; or
- (4) A nonqualified deferred compensation arrangement established or maintained by an employer or plan sponsor. (1947, c. 721; 1993, c. 506, s. 3; 2005-234, s. 3; 2006-105, s. 2.9.)

**Editor's Note.** — Session Laws 2006-105, s. 4, is a severability clause. Session Laws 2006-105, s. 2.9, effective July 13, 2006, added subsection (d).

**Effect of Amendments.** —

## ARTICLE 63.

### *Unfair Trade Practices.*

#### § 58-63-1. Declaration of purpose.

##### CASE NOTES

**Cited in** *Nelson v. Hartford Underwriters Ins. Co.*, — N.C. App. —, 630 S.E.2d 221, 2006 N.C. App. LEXIS 1185 (2006).



## § 58-63-10. Unfair methods of competition or unfair and deceptive acts or practices prohibited.

### CASE NOTES

**Cited in** *Nelson v. Hartford Underwriters Ins. Co.*, — N.C. App. —, 630 S.E.2d 221, 2006 N.C. App. LEXIS 1185 (2006).

## § 58-63-15. Unfair methods of competition and unfair or deceptive acts or practices defined.

### CASE NOTES

**Preemption by ERISA.** — Defendants' motion to strike references in plaintiff's complaint to G.S. 58-63-15(11) and G.S. 75-1.1 was granted because plaintiff's state claims were preempted by the Employee Retirement Income Security Act, 29 U.S.C.S. §§ 1001-1461; by incorporating those acts specified in G.S. 58-63-15(11), by including any acts considered "unethical" in the insurance industry and by providing trebled damages for violations, G.S. 75-1.1 provided for relief in addition to and outside of that available under 29 U.S.C.S. § 1132(a)(1)(B) and becomes that "separate vehicle" which was completely preempted and not saved under 29 U.S.C.S. § 1144(b)(2)(A). *Smith v. Jefferson Pilot Fin. Ins. Co.*, 367 F. Supp. 2d 839, 2005 U.S. Dist. LEXIS 6865 (M.D.N.C. 2005).

**Insurance Broker Held Not Vicariously Liable.** — Insurance and securities broker was properly granted summary judgment on investors' vicarious liability claims against the broker because, assuming arguendo that an agent and a subagent committed torts in selling investments to the investors, the investors could not show that the broker was vicariously liable for the torts as the agent and subagent were independent contractors of the broker, and the investors knew that the agent and the subagent were not acting as agents of the broker. *Estate of Redding v. Welborn*, 170 N.C. App. 324, 612 S.E.2d 664, 2005 N.C. App. LEXIS 1001 (2005).

**Violation As a Matter of Law.** — Insurance company which engaged in the act or practice of not attempting in good faith to effectuate prompt, fair, and equitable settlements of claims in which liability had become reasonably clear, G.S. 58-63-15(11)(f), also violated G.S. 75-1.1, as a matter of law, without the necessity of an additional showing of frequency indicating a "general business practice," and allegations to that effect sufficiently stated an unfair and deceptive trade practices (UDTP) claim; while insureds' claims for breach of contract, breach of fiduciary duty, and bad faith were barred by the three-year statute of limi-

tations, their UDTP claim was separate and distinct from the claims on the underlying insurance policy, was thus governed by the G.S. 75-16.2 four-year statute of limitations applicable to such claims, and was therefore timely. *Page v. Lexington Ins. Co.*, — N.C. App. —, 628 S.E.2d 427, 2006 N.C. App. LEXIS 862 (2006).

**Insurance Carrier Entitled to Summary Judgment.** — Homeowner's insurance carrier did not violate G.S. 58-63-15(11)(d) of the Unfair Claims Settlement Practices statute, N.C. Gen. Stat. ch. 58, art. 63, by failing to conduct a reasonable investigation when it commissioned a local engineering firm to report on a mold problem in the home of insureds because the purpose of the report was to determine whether mold was present and not to determine all its possible causes or the types of mold present; summary judgment was therefore properly granted to the carrier in the insureds' action under G.S. 75-1.1. *Nelson v. Hartford Underwriters Ins. Co.*, — N.C. App. —, 630 S.E.2d 221, 2006 N.C. App. LEXIS 1185 (2006).

Summary judgment was properly granted to a homeowners' insurance carrier on insureds' cause of action under G.S. 75-1.1 claiming that the carrier violated G.S. 58-63-15(11)(n) of the Unfair Claims Settlement Practices statute, N.C. Gen. Stat. ch. 58, art. 63, by failing to provide a reasonable explanation of the basis in the policy for denying their claim; the carrier grounded its denial on exclusions in the policy for mold and faulty workmanship, and the omission of the policy's issuance after the harm occurred as a third ground for denial did not make the explanation unreasonable, unfair, or deceptive. *Nelson v. Hartford Underwriters Ins. Co.*, — N.C. App. —, 630 S.E.2d 221, 2006 N.C. App. LEXIS 1185 (2006).

Summary judgment was properly granted to a homeowners' insurance carrier on insureds' cause of action under G.S. 75-1.1 claiming that the carrier violated G.S. 58-63-15(11)(a) of the Unfair Claims Settlement Practices statute, N.C. Gen. Stat. ch. 58, art. 63, by misrepresenting facts or insurance policy provisions relating

to their claim for mold damage in their home; coverages not mentioned in its letter denying the claim were not applicable to the claim, the letter expressly reserved the carrier's right to assert other rights or defenses, and the letter was not unethical or unscrupulous and did not have a tendency to deceive the insureds. *Nelson v. Hartford Underwriters Ins. Co.*, — N.C. App. —, 630 S.E.2d 221, 2006 N.C. App. LEXIS 1185 (2006).

Homeowner's insurance carrier did not violate G.S. 58-63-15(11)(e) of the Unfair Claims Settlement Practices statute, N.C. Gen. Stat.

ch. 58, art. 63, by failing to affirm or deny coverage of insureds' second claim based on mold damage in their house because the re-investigation was carried out in a reasonable amount of time and the insureds filed an action against the carrier shortly after the re-investigation report was concluded, providing little time for the carrier to respond; summary judgment was therefore properly granted to the carrier in the insureds' action under G.S. 75-1.1. *Nelson v. Hartford Underwriters Ins. Co.*, — N.C. App. —, 630 S.E.2d 221, 2006 N.C. App. LEXIS 1185 (2006).

## ARTICLE 68.

### *Health Insurance Portability and Accountability.*

#### Part A. Group Market Reforms.

#### SUBPART 2. Health Insurance Availability and Renewability.

### **§ 58-68-40. Guaranteed availability of coverage for employers in the small group market.**

#### (a) Issuance of Coverage in the Small Group Market. —

##### (1) In general. — Subject to subsections (c) through (f) of this section, each health insurer that offers health insurance coverage in the small group market in this State:

- a. Must accept every small employer that applies for the coverage; and
- b. Must accept for enrollment under the coverage every eligible individual who applies for enrollment during the period in which the individual first becomes eligible to enroll under the terms of the group health insurance plan and shall not place any restriction that is inconsistent with G.S. 58-68-35 on an eligible individual being a participant or beneficiary.

##### (2) Eligible individual defined. — For the purposes of this section, "eligible individual" means, with respect to a health insurer that offers health insurance coverage to a small employer in the small group market, such an individual in relation to the employer as shall be determined:

- a. In accordance with the terms of the plan,
- b. As provided by the health insurer under rules of the health insurer that are uniformly applicable in this State to small employers in the small group market, and
- c. In accordance with all applicable State laws governing the health insurer and the market.

#### (b) Special Rules for Network Plans. —

##### (1) In general. — In the case of a health insurer that offers health insurance coverage in the small group market through a network plan, the health insurer may:

- a. Limit the employers that may apply for coverage to those with eligible individuals who live, work, or reside in the service area for the network plan; and



- b. Within the service area of the network plan, deny coverage to the employers if the health insurer has demonstrated to the Commissioner that: (i) it will not have the capacity to deliver services adequately to enrollees of any additional groups because of its obligations to existing group contract holders and enrollees, and (ii) it is applying this subdivision uniformly to all employers without regard to the claims experience of those employers and their employees (and their dependents) or any health status-related factor relating to the employees and dependents.
- (2) 180-day suspension upon denial of coverage. — A health insurer, upon denying health insurance coverage in any service area in accordance with sub-subdivision (1)b. of this subsection, shall not offer coverage in the small group market within the service area for a period of 180 days after the date the coverage is denied.
- (c) Application of Financial Capacity Limits. —
  - (1) In general. — A health insurer may deny health insurance coverage in the small group market if the health insurer has demonstrated to the Commissioner that:
    - a. It does not have the financial reserves necessary to underwrite additional coverage; and
    - b. It is applying this subdivision uniformly to all employers in the small group market in the State consistent with this Chapter and without regard to the claims experience of those employers and their employees (and their dependents) or any health status-related factor relating to the employees and dependents.
  - (2) 180-day suspension upon denial of coverage. — A health insurer upon denying health insurance coverage in accordance with subdivision (1) of this subsection shall not offer coverage in the small group market in the State for a period of 180 days after the date the coverage is denied or until the health insurer has demonstrated to the Commissioner that the health insurer has sufficient financial reserves to underwrite additional coverage, whichever is later. The Commissioner may apply this subsection on a service-area-specific basis.
- (d) Exception to Requirement for Failure to Meet Certain Minimum Participation or Contribution Rules. —
  - (1) In general. — Subsection (a) of this section does not preclude a health insurer from establishing employer contribution rules or group participation rules for the offering of health insurance coverage in connection with a group health insurance plan in the small group market, as allowed under this Chapter.
  - (2) Rules defined. — For the purposes of subdivision (1) of this subsection:
    - a. “Employer contribution rule” means a requirement relating to the minimum level or amount of employer contribution toward the premium for enrollment of participants and beneficiaries; and
    - b. “Group participation rule” means a requirement relating to the minimum number of participants or beneficiaries that must be enrolled in relation to a specified percentage or number of eligible individuals or employees of an employer.
- (e) Exception for Coverage. — Subsection (a) of this section does not apply to:
  - (1) Health insurance coverage offered by a health insurer if the coverage is made available in the small group market only through one or more bona fide associations.
  - (2) A self-employed individual as defined in G.S. 58-50-110(21a), except as otherwise provided for the basic and standard health care plans or other plans under G.S. 58-50-126 under the North Carolina Small



Employer Group Health Coverage Reform Act. (1997-259, s. 1(c); 1999-132, s. 4.6; 2006-154, s. 4.)

**Effect of Amendments.** — Session Laws “or other plans under G.S. 58-50-126” in subdivision 2006-154, s. 4, effective July 23, 2006, inserted provision (e)(2).

## ARTICLE 70.

### *Collection Agencies.*

#### Part 1. Permit Procedures.

#### **§ 58-70-5. Application to Commissioner for permit.**

Any person, firm, corporation or association desiring to secure a permit as provided by G.S. 58-70-1, shall make application to the Commissioner of Insurance for each location at which such person, firm, corporation or association desires to carry on the collection agency business as hereinafter defined. Such applicant shall be entitled to a permit upon submission to the Commissioner of Insurance of the following:

(a) The name, trade name if any, street address, and telephone number of the applicant, including any home office address and telephone number, if different;

(b) If the applicant is a corporation,

- (1) A certified copy of the board of director's resolution authorizing the submission of the application;
- (2) An authenticated copy of the Articles of Incorporation and all amendments thereto;
- (3) An authenticated copy of the bylaws or other governing instruments;
- (4) If the applicant is a foreign corporation, a copy of the certificate of authority to transact business in this State issued by the North Carolina Secretary of State;

(b1) In addition to the information required by subsection (b) of this section, if the applicant is an alien corporation, the corporation must be owned or majority controlled ultimately by a parent entity incorporated or organized under the laws of the United States or any jurisdiction within the United States, and the alien corporation may only service accounts held by an affiliate or subsidiary of the same parent entity. For purposes of this subsection, “control” is defined by G.S. 58-19-5(2). Should the alien corporation be sold to an entity unrelated to the parent entity, notice shall be provided to the Department of the pending sale 30 days in advance of the sale. Provision of Form 8-K, properly filed with the Securities and Exchange Commission, shall be deemed compliance with the notice requirement of this subsection. In the event of a sale, the new parent entity shall provide evidence to the Department within 30 days of the sale of its and the alien corporation's compliance with the requirements of this section. In the event that the new parent entity does not provide the evidence within 30 days after the sale, the alien corporation's permit shall be automatically suspended until the Department is provided the evidence of compliance which is satisfactory to the Commissioner;

(c) If the applicant is a partnership, an authenticated copy of the then current partnership agreement;

(d) If the trade name is used, certificates showing that the trade name has been filed as required by G.S. 66-68;

(e) A surety bond as required by G.S. 58-70-20. In the case of an alien corporation, the surety bond requirements shall be double the amount set by G.S. 58-70-20;

(f) A completed statement by each stockholder owning ten percent (10%) or more of the applicant's outstanding voting stock and each partner, director, and officer actively engaged in the collection agency business, containing: the name of the collection agency, the name and address of the individual completing the form, the positions held by the individual, each conviction of any criminal offense and any criminal charges pending other than minor traffic violations of the individual, and the name and address of three people not related to the individual who can attest to the individual's reputation for honesty and fair dealings;

(g) A statement sworn to by an appropriate corporate officer, partner, or individual proprietor giving a description of the collection method to be employed in North Carolina;

(h) A statement certifying that there are no unsatisfied judgments against the applicant;

(i) A list of all telephone numbers assigned to, or to be used by the applicant in the operation of the collection agency;

(j) The appropriate permit fee as required by G.S. 58-70-35;

(k) A balance sheet as of the last day of the month prior to the date of submission of the application, certified true and correct by a corporate officer, partner, or proprietor, setting forth the current assets, fixed assets, current liabilities and positive net worth of the applicant;

(l) The address of the location at which the applicant will make those records of its collection agency business described in G.S. 58-70-25 available for inspection by the Commissioner of Insurance.

(m) A statement certifying that no officer, individual proprietor or partner of the applicant has been convicted of a felony involving moral turpitude, or any violation of any State or federal debt collection law.

(n) If the collection agency's office or records, as described in G.S. 58-70-25, are located outside of North Carolina, a statement sworn to by an appropriate corporate officer, partner, or individual proprietor consenting to and authorizing the reimbursement, to the Commissioner by the collection agency, of expenses incurred by the Commissioner in conducting routine examinations, audits, and in investigating written complaints against the collection agency or its employees. All reimbursements shall be paid to the Commissioner no more than 30 days after the date of billing. In the case of an alien corporation, the sworn statement must provide that the corporation will make available to the Commissioner for his inspection, in North Carolina, those records described in G.S. 58-70-25, at the expense of the corporation;

(o) If the applicant is a foreign corporation, a statement authorizing the Commissioner to be its agent for service of process, which shall be administered pursuant to the provisions of G.S. 58-16-30.

(p) In the case of an alien corporation, when the corporation is in violation of this Article, the parent entity must agree to cure the violation by the alien corporation.

(q) For purposes of this Article, the following definitions apply:

(1) "Alien corporation" means a company incorporated or organized under the laws of any jurisdiction outside of the United States.

(2) "Foreign corporation" means a company incorporated or organized under the laws of the United States or of any jurisdiction within the United States other than this State. (1931, c. 217, s. 2; 1943, c. 170; 1959, c. 1194, s. 2; 1969, c. 906, s. 2; 1979, c. 835; 1989, c. 441, ss. 2, 3; 2001-269, s. 1.1; 2006-134, s. 1.)

**Effect of Amendments.** — Session Laws 2006-134, s. 1, effective October 1, 2006, added subsection (b1); substituted "G.S. 58-70-20. In the case of an alien corporation, the surety bond

requirements shall be double the amount set by G.S. 58-70-20" for "G.S. 58-70-20" in subsection (e); added the third sentence in subsection (n); and added subsections (p) and (q).



## § 58-70-40. Restraining orders; criminal convictions; permit revocations; other permit requirements.

(a) When it appears to the Commissioner that any person has violated, is violating, or threatens to violate any provision of this Article, he may apply to the superior court of any county in which the violation has occurred, is occurring, or may occur for a restraining order and injunction to restrain such violation, or threatened violation. If upon application the court finds that any provision of this Article has been violated, is being violated, or a violation thereof is threatened, the court shall issue an order restraining and enjoining such violations; and such relief may be granted regardless of whether criminal prosecution is instituted under any provision of this Article.

(b) The conviction by a court of competent jurisdiction of any permittee for a violation of this Article shall automatically have the effect of suspending the permit of that permittee until such time that the permit is reinstated by the Commissioner. As used in this subsection, "conviction" includes an adjudication of guilt, a plea of guilty, and a plea of *nolo contendere*.

(c) In addition to the other qualifications for a permit under this Article, no collection agency shall be issued or be entitled to hold a permit if the Commissioner finds as to the applicant or permittee any one or more of the following conditions:

- (1) An individual proprietor, officer, or partner of the collection agency has been convicted of a felony involving moral turpitude, or any State or federal debt collection law.
- (2) There is an unsatisfied judgment which is not currently the subject of litigation against any partner, individual proprietor, or officer of the collection agency or against the collection agency.
- (3) There is any materially false or misleading information in the permit application.
- (4) The applicant has obtained or attempted to obtain the permit through misrepresentation or fraud.
- (5) There has been an adjudication that a partner, individual proprietor, or officer of the collection agency has violated any State or federal unfair trade practice law.
- (6) A partner, individual proprietor, or officer of the collection agency has violated or refused to comply with any provision of this Article or any order of the Commissioner.
- (7) Another jurisdiction has suspended or revoked a collection agency or similar license or permit of the collection agency.

(d) In the case of an alien corporation that has been issued a permit under this Article, in an action brought by the Commissioner, service of process upon the parent entity is sufficient service of process on the alien corporation. (1931, c. 217, s. 5; 1979, c. 835; 1989, c. 441, s. 9; 2006-134, s. 2.)

**Effect of Amendments.** — Session Laws 2006-134, s. 2, effective October 1, 2006, added subsection (d).

## Part 2. Operating Procedures.

## § 58-70-65. Remittance trust account.

(a) Each permit holder shall deposit, no later than two banking days after receipt, in a separate trust account in any bank located in North Carolina or in any other bank approved by the Commissioner, sufficient funds to pay all moneys due or owed to all collection creditors or forwarders. The funds shall



remain in the trust account until remitted to the creditor or forwarder, and shall not be commingled with any other operating funds. The trust account shall be used only for the purpose of:

- (1) Remitting to collection creditors or forwarders the proceeds to which they are entitled.
  - (2) Remitting to the collection agency the commission that is due the collection agency.
  - (3) Reimbursing consumers for overpayments.
  - (4) Making adjustments to the trust account balance for bank service charges.
- (b) No refund for overpayment by a debtor in an amount of less than one dollar (\$1.00) is required.

(c) Each permit holder located outside this State shall deposit in a separate trust account, designated for its North Carolina creditors, funds to pay all monies due or owing all collection creditors or forwarders located within this State. In the case of alien corporations that are permit holders, the trust account must be established with a bank located in the United States or in any bank approved by the Commissioner. (1979, c. 835; 1989, c. 441, s. 10; c. 770, s. 52; 1991, c. 644, s. 23; 1993 (Reg. Sess., 1994), c. 678, s. 31; 2006-134, s. 3.)

**Effect of Amendments.** — Session Laws 2006-134, s. 3, effective October 1, 2006, added the second sentence in subsection (c).

## ARTICLE 71.

### *Bail Bondsmen and Runners.*

#### **§ 58-71-140. Registration of licenses and power of appointments by insurers.**

(a) Before the date of the notice provided for in subsection (e) of this section, no professional bail bondsman shall become a surety on an undertaking unless he or she has registered his or her current license in the office of the clerk of superior court in the county in which he or she resides and a certified copy of the same with the clerk of superior court in any other county in which he or she shall write bail bonds.

(b) Before the date of the notice provided for in subsection (e) of this section, a surety bondsman shall register his or her current surety bondsman's license and a certified copy of his or her power of appointment with the clerk of superior court in the county in which the surety bondsman resides and with the clerk of superior court in any other county in which the surety bondsman writes bail bonds on behalf of an insurer.

(c) Before the date of the notice provided for in subsection (e) of this section, no runner shall become surety on an undertaking on behalf of a professional bondsman unless that runner has registered his or her current license and a certified copy of his or her power of attorney in the office of the clerk of superior court in the county in which the runner resides and with the clerk of superior court in any other county in which the runner writes bail bonds on behalf of the professional bondsman.

(c1) On or after the date of the notice provided for in subsection (e) of this section, all licensed professional bail bondsmen, surety bondsmen, and runners shall register in the statewide Electronic Bondsmen Registry in accordance with subsection (e) of this section.

(d) Professional bondsmen, surety bondsmen, and runners shall file with the clerk of court having jurisdiction over the principal an affidavit on a form

furnished by the Administrative Office of the Courts. The affidavit shall include, but not be limited to:

- (1) If applicable, a statement that the bondsman has not, nor has anyone for the bondsman's use, been promised or received any collateral, security, or premium for executing this appearance bond.
- (2) If promised a premium, the amount of the premium promised and the due date.
- (3) If the bondsman has received a premium, the amount of premium received.
- (4) If given collateral security, the name of the person from whom it is received and the nature and amount of the collateral security listed in detail.

(e) On or before October 1, 2006, the Administrative Office of the Courts shall establish a statewide Electronic Bondsmen Registry (Registry) for all licenses, powers of appointment, and powers of attorney requiring registration under this section. When the Registry is established, the Administrative Office of the Courts shall notify the Commissioner and the Commissioner shall notify all licensed professional bondsmen, surety bondsmen, runners, and qualified insurance companies of the Registry. On or after the date of that notice, a person may register as required under this section by maintaining a record of each required license, power of appointment, or power of attorney in the Registry. After a bondsman, surety bondsman, or runner has completed registration in the Registry, he or she is authorized to execute bail bonds pursuant to his or her registered license, power of appointment, or power of attorney in all counties so long as the registered license, power of appointment, or power of attorney remains in effect. (1963, c. 1225, s. 31; 1975, c. 619, s. 1; 1995 (Reg. Sess., 1996), c. 726, s. 19; 2001-269, s. 2.6; 2006-188, s. 1.)

**Effect of Amendments.** — Session Laws 2006-188, s. 1, effective August 3, 2006, inserted "Before the date of the notice provided

for in subsection (e) of this section" in subsections (a) through (c); and added subsections (c1) and (e).

## ARTICLE 84.

### *Fund Derived from Insurance Companies.*

#### **§ 58-84-1. (Repealed effective January 1, 2008 — See editor's note) Fire and lightning insurance report.**

Every insurance company doing business in a fire district in this State shall report to the Secretary of Revenue by March 15 of each year a just and true account of all premiums collected and received from all fire and lightning insurance business done within the limits of each fire district during the preceding calendar year and shall pay the tax levied in G.S. 105-228.5(d)(4). The Secretary of Revenue shall provide the Commissioner the reports filed pursuant to this section and shall credit the net proceeds of the tax to the Department of Insurance for disbursement pursuant to G.S. 58-84-25. (1907, c. 831, s. 1; 1919, c. 180; C.S., s. 6063; 1929, c. 286; 1989, c. 485, s. 63; 1995 (Reg. Sess., 1996), c. 747, s. 4; 2006-196, s. 6.)

**Section Repealed Effective January 1, 2008.** — Session Laws 2006-196, s. 6, repeals this section effective January 1, 2008, and applicable to proceeds credited to the Department of Insurance on or after January 1, 2008.

**Local Supplemental Firemen's Retirement Fund.** — Forsyth: 1969, c. 418; 1995, c. 160; Mount Airy: 2000-22, s. 1, 1995, c. 165, s. 1; city of Asheboro: 1985, c. 186; city of Asheville: 1979, 2nd Sess., c. 1315, amending 1979, c. 208;



city of Belhaven: 1981, c. 294; city of Burlington: 1969, c. 321; 1979, 2nd Sess., c. 1144; 1987, c. 612; city of Charlotte: 1947, c. 837; 1965, c. 210; city of Clinton: 1969, c. 177; 1973, c. 46; 1979, c. 264; city of Conover: 1977, c. 334; 1991, c. 260, s. 1; city of Durham: 1951, c. 576; 1973, c. 701; 1983, c. 463; 2002-114, ss. 1 and 2; 2003-325, ss. 1-3; city of Eden: 1977, c. 285; city of Fayetteville: 1979, c. 557, s. 8.3; 1987, c. 85; 1991, c. 149, s. 1, 2003-34, ss. 1, 2; city of Greensboro: 1953, c. 899; 1979, c. 289; 1983, c. 466; 1987, c. 178; 1993, c. 431, s. 1; city of Greenville: 1967, c. 570; city of Henderson: 1959, c. 810; 1969, c. 374; 1977, c. 133; 1981, c. 111; 1987, c. 173; 1991 (Reg. Sess., 1992), c. 897, s. 1; 2001-71; city of Hendersonville: 1981, c. 341; city of Hickory: 1985, c. 139; 1999-128, s. 1; city of Kings Mountain: 1979, c. 209; city of Lenoir: 1973, c. 1261; city of Lexington: 1981, c. 906, s. 6.1; 1983 c. 462; 1989 (Reg. Sess., 1990), c. 931; city of Lumberton: 1955, c. 100; 1973, c. 960; 1989, c. 357, c. 770; 1991 (Reg. Sess., 1992), c. 792; 1995 (Reg. Sess., 1996), c. 699; 2003-324, s. 1; city of Mayodan: 1985, c. 255; city of Monroe: 2000-35, s. 1; city of Mount Airy: 1995, c. 165, s. 1; 2000-22, s. 1; city of New Bern: 1969, c. 704; 1983, c. 551; city of Newton: 1969, c. 363; 1981, c. 298; 1983, c. 503; city of North Wilkesboro: 1969, c. 120; 1979, c. 366; city of Reidsville: 1979, c. 94; 1981 (Reg. Sess., 1982), c. 1235; 1989, c. 278; 1989 (Reg. Sess., 1990), c. 957, s. 1; 1977, c. 312; 1989, c. 247; city of Rocky Mount: 1969, c. 434; 1975, c. 353; 1983, c. 498; 1991, c. 497, s. 1; c. 761, s. 43; city of Sanford: 1991 (Reg. Sess., 1992), c. 798; city of Shelby: 1969, cc. 496, 552; 1985, c. 209; 1987 (Reg. Sess., 1988), c. 985; 1991 (Reg. Sess., 1992), c. 791; city of Washington: 1975, c. 418; city of Whiteville: 1971, c. 308; 1987 (Reg. Sess., 1988), c. 1018, s. 1; city of Williamston: 1985, c. 188; city of Wilmington: 1949, c. 684; 1973, c. 939; 1975, c. 247; 1983, cc. 504, 505, 906; 1987 (Reg. Sess., 1988), c. 904; city of Wilson: 1969, c. 138; 1995 (Reg. Sess., 1996), c. 678; city of Winston-Salem: 1973, c. 388; 1977, c. 15; 1979, c. 284; 1981, c. 647; 1983, c. 464; 1987, c. 508; 1989, c. 793; 1998-92; 2003-35; 2006-121; town

of Black Mountain: 1965, c. 672; town of Canton: 1979, 2nd Sess., c. 1105; town of Edenton: 1981, cc. 286, 996; town of Elkin: 1969, c. 169; 1971, c. 391; 1987, c. 740, ss. 1 and 5; town of Farmville: 1981, c. 533; town of Lillington: 1981, c. 285; town of Mebane: 1979, c. 183; town of Mount Airy: 1967, c. 302, s. 9; 1973, c. 121; town of North Wilkesboro: 1981, c. 287; 1987, c. 176; town of Selma: 1987, c. 614; town of Smithfield: 1973, c. 941; town of Tarboro: 1973, c. 261; 1985, c. 157; 1987, c. 609; town of Valdese: 1983, c. 501; town of Wadesboro: 1967, c. 596; town of Waynesville: 1981, c. 288; town of Wilkesboro: 1985, c. 131; 1999-56, s. 1; village of Kannapolis: 1971, c. 408; 1973, c. 216; 1975, c. 423; 1983, c. 497.

**Editor's Note.** — Session Laws 2006-196, s. 13, effective August, 3, 2006, provides: "The Revenue Laws Study Committee shall study the following issues:

"(1) The simplification of the additional tax imposed on insurance contracts on property coverage, as enacted in Section 3 of this act, and the distribution of the revenue generated by the tax. The study of this issue may include a recommendation on the percentage of revenue to be distributed to the firemen's local relief funds and the formula for making this distribution. The study may also consider the increasing difference between the amount of revenue available in the Volunteer Fire Department Fund for matching grants to purchase equipment and make capital improvements and the amount of grant requests received.

"(2) The authority of the Secretary of Revenue to require taxpayers to file consolidated returns. The study of this issue may include consideration of whether the State should require some corporations or all corporations to file a consolidated return.

"(3) The feasibility of replacing the State's current corporate income and franchise tax laws with a commercial activity tax based upon business gross receipts.

"(4) The administrative process for the review of disputed tax matters."

## **§ 58-84-25. (Effective January 1, 2008 — See editor's note) Disbursement of funds by Insurance Commissioner.**

The Insurance Commissioner shall deduct the sum of three percent (3%) from the tax proceeds credited to the Department pursuant to G.S. 105-228.5(d)(3) and pay the same over to the treasurer of the State Firemen's Association for general purposes. The Insurance Commissioner shall deduct the sum of two percent (2%) from the tax proceeds and retain the same in the budget of the Department of Insurance for the purpose of administering the disbursement of funds by the board of trustees in accordance with the provisions of G.S. 58-84-35. The Insurance Commissioner shall, pursuant to G.S. 58-84-50, credit the amount forfeited by nonmember fire districts to the



North Carolina State Firemen's Association. The Insurance Commissioner shall pay the remaining tax proceeds to the treasurer of each fire district on a per capita basis, using the most recent annual population estimates certified by the State Budget Officer. These funds shall be held by the treasurer as a separate and distinct fund. The fire district shall immediately pay the funds to the treasurer of the local board of trustees upon the treasurer's election and qualification, for the use of the board of trustees of the firemen's local relief fund in each fire district, which board shall be composed of five members, residents of the fire district as hereinafter provided for, to be used by it for the purposes provided in G.S. 58-84-35. (1907, c. 831, s. 5; C.S., s. 6067; 1925, c. 41; 1985 (Reg. Sess., 1986), c. 1014, s. 168; 1989, c. 485, s. 63; 1995 (Reg. Sess., 1996), c. 747, s. 7; 2006-196, s. 7.)

**Section Set Out Twice. —**

The section above is effective January 1, 2008. For the section as in effect until January 1, 2008, see the main volume.

**Editor's Note. —** Session Laws 2006-196, s. 13, provides: "The Revenue Laws Study Committee shall study the following issues:

"(1) The simplification of the additional tax imposed on insurance contracts on property coverage, as enacted in Section 3 of this act, and the distribution of the revenue generated by the tax. The study of this issue may include a recommendation on the percentage of revenue to be distributed to the firemen's local relief funds and the formula for making this distribution. The study may also consider the increasing difference between the amount of revenue available in the Volunteer Fire Department Fund for matching grants to purchase equipment and make capital improvements and the amount of grant requests received.

"(2) The authority of the Secretary of Reve-

nue to require taxpayers to file consolidated returns. The study of this issue may include consideration of whether the State should require some corporations or all corporations to file a consolidated return.

"(3) The feasibility of replacing the State's current corporate income and franchise tax laws with a commercial activity tax based upon business gross receipts.

"(4) The administrative process for the review of disputed tax matters."

**Effect of Amendments. —** Session Laws 2006-196, s. 7, effective January 1, 2008, and applicable to proceeds credited to the Department of Insurance on or after that date, substituted "G.S. 105-228.5(d)(3)" for "G.S. 105-228.5(d)(4)" in the middle of the first sentence and substituted "on a per capita basis, using the most recent annual population estimates certified by the State Budget Officer" for "in proportion to the amount of business done in the fire district" at the end of the fourth sentence.

## ARTICLE 86.

### *North Carolina Firemen's and Rescue Squad Workers' Pension Fund.*

#### § 58-86-55. Monthly pensions upon retirement.

Any member who has served 20 years as an "eligible fireman" or "eligible rescue squad worker" in the State of North Carolina, as provided in G.S. 58-86-25 and G.S. 58-86-30, and who has attained the age of 55 years is entitled to be paid a monthly pension from this fund. The monthly pension shall be in the amount of one hundred sixty-five dollars (\$165.00) per month. Any retired fireman receiving a pension shall, effective July 1, 2006, receive a pension of one hundred sixty-five dollars (\$165.00) per month.

Members shall pay ten dollars (\$10.00) per month as required by G.S. 58-86-35 and G.S. 58-86-40 for a period of no longer than 20 years. No "eligible rescue squad member" shall receive a pension prior to July 1, 1983. No member shall be entitled to a pension hereunder until the member's official duties as a fireman or rescue squad worker for which the member is paid compensation shall have been terminated and the member shall have retired as such according to standards or rules fixed by the board of trustees.

A member who is totally and permanently disabled while in the discharge of the member's official duties as a result of bodily injuries sustained or as a result of extreme exercise or extreme activity experienced in the course and scope of those official duties and who leaves the fire or rescue squad service because of this disability shall be entitled to be paid from the fund a monthly benefit in an amount of one hundred sixty-five dollars (\$165.00) per month beginning the first month after the member's fifty-fifth birthday. All applications for disability are subject to the approval of the board who may appoint physicians to examine and evaluate the disabled member prior to approval of the application, and annually thereafter. Any disabled member shall not be required to make the monthly payment of ten dollars (\$10.00) as required by G.S. 58-86-35 and G.S. 58-86-40.

A member who is totally and permanently disabled for any cause, other than line of duty, who leaves the fire or rescue squad service because of this disability and who has at least 10 years of service with the pension fund, may be permitted to continue making a monthly contribution of ten dollars (\$10.00) to the fund until the member has made contributions for a total of 240 months. The member shall upon attaining the age of 55 years be entitled to receive a pension as provided by this section. All applications for disability are subject to the approval of the board who may appoint physicians to examine and evaluate the disabled member prior to approval of the application and annually thereafter.

A member who, because his residence is annexed by a city under Part 2 or Part 3 of Article 4 of Chapter 160A of the General Statutes, or whose department is closed because of an annexation by a city under Part 2 or Part 3 of Article 4 of Chapter 160A of the General Statutes, or whose volunteer department is taken over by a city or county, and because of such annexation or takeover is unable to perform as a fireman or rescue squad worker of any status, and if the member has at least 10 years of service with the pension fund, may be permitted to continue making a monthly contribution of ten dollars (\$10.00) to the fund until the member has made contributions for a total of 240 months. The member upon attaining the age of 55 years and completion of such contributions shall be entitled to receive a pension as provided by this section. Any application to make monthly contributions under this section shall be subject to a finding of eligibility by the Board of Trustees upon application of the member.

The pensions provided shall be in addition to all other pensions or benefits under any other statutes of the State of North Carolina or the United States, notwithstanding any exclusionary provisions of other pensions or retirement systems provided by law. (1957, c. 1420, s. 1; 1959, c. 1212, s. 1; 1961, c. 980; 1971, c. 336; 1977, c. 926, s. 1; 1981, c. 1029, s. 1; 1983, c. 500, s. 2; c. 636, s. 24; 1985 (Reg. Sess., 1986), c. 1014, s. 49.1(b); 1987 (Reg. Sess., 1988), c. 1099, s. 1; 1991, c. 720, s. 48; 1993 (Reg. Sess., 1994), c. 653, s. 1; 1995, c. 507, s. 7.21A(g); 1997-443, s. 33.25(a); 1998-212, s. 28.21(a); 2000-67, s. 26.18; 2002-113, s. 1; 2002-126, s. 28.7; 2003-284, s. 30.19; 2004-124, s. 31.18; 2005-276, s. 29.26; 2006-66, s. 22.19.)

**Editor's Note. —**

Session Laws 2006-66, s. 1.2, provides: "This act shall be known as 'The Current Operations and Capital Improvements Appropriations Act of 2006'."

Session Laws 2006-66, s. 28.3, provides: "Except for statutory changes or other provisions that clearly indicate an intention to have effects beyond the 2006 2007 fiscal year, the textual provisions of this act apply only to funds appro-

priated for, and activities occurring during, the 2006 2007 fiscal year."

Session Laws 2006-66, s. 28.6 is a severability clause.

**Effect of Amendments. —**

Session Laws 2006-66, s. 22.19, effective July 1, 2006, in the first paragraph, substituted "July 1, 2006" for "July 1, 2005" in the last sentence; and substituted "one hundred sixty-five dollars (\$165.00)" for "one hundred sixty-



three dollars (\$163.00)" in the first and third paragraphs of the section.

## ARTICLE 87.

### *Volunteer Safety Workers Assistance.*

#### **§ 58-87-1. (Effective January 1, 2008 — See editor's note) Volunteer Fire Department Fund.**

(a) Fund. — The Volunteer Fire Department Fund is created as an interest-bearing, nonreverting fund in the Department to provide matching grants to volunteer fire departments to purchase equipment and make capital improvements. The Commissioner shall administer the Fund. Up to two percent (2%) of the Fund may be used for additional staff and resources to administer the Fund in each fiscal year.

(a1) Grant Program. — An eligible fire department may apply to the Commissioner for a grant under this section. In awarding grants under this section, the Commissioner must, to the extent possible, select applicants from all parts of the State based upon need. The Commissioner must award the grants on May 15 of each year subject to the following limitations:

- (1) The size of a grant may not exceed twenty thousand dollars (\$20,000);
- (2) The applicant shall match the grant on a dollar-for-dollar basis;
- (3) The grant may be used only for equipment purchases, payment of highway use taxes on those purchases, or capital expenditures necessary to provide fire protection services; and
- (4) An applicant may receive no more than one grant per fiscal year.

(b) Eligible Fire Department. — A fire department is eligible for a grant under this section if it meets all of the conditions of this subsection. No fire department may be declared ineligible for a grant solely because it is classified as a municipal fire department.

- (1) It serves a response area of 6,000 or less in population. In making the population determination, the Department must use the most recent annual population estimates certified by the State Budget Officer.
- (2) It consists entirely of volunteer members, with the exception that the unit may have paid members to fill the equivalent of three full-time paid positions.
- (3) It has been certified by the Department of Insurance.

(c) Report. — The Commissioner must submit a written report to the General Assembly within 60 days after the grants have been made. This report must contain the amount of the grant and the name of the recipient. (1987, c. 709, s. 1; 1987 (Reg. Sess., 1988), c. 1062, ss. 6-9; 1989, c. 770, s. 30; 1995, c. 507, s. 7.21A(k); 1998-212, s. 25(a); 1999-319, s. 1; 2004-203, s. 5(c); 2006-196, s. 8.)

#### **Section Set Out Twice. —**

The section above is effective January 1, 2008. For the section as in effect until January 1, 2008, see the main volume.

**Editor's Note.** — Session Laws 2006-196, s. 13, provides: "The Revenue Laws Study Committee shall study the following issues:

"(1) The simplification of the additional tax imposed on insurance contracts on property coverage, as enacted in Section 3 of this act, and the distribution of the revenue generated by the tax. The study of this issue may include a

recommendation on the percentage of revenue to be distributed to the firemen's local relief funds and the formula for making this distribution. The study may also consider the increasing difference between the amount of revenue available in the Volunteer Fire Department Fund for matching grants to purchase equipment and make capital improvements and the amount of grant requests received.

"(2) The authority of the Secretary of Revenue to require taxpayers to file consolidated



returns. The study of this issue may include consideration of whether the State should require some corporations or all corporations to file a consolidated return.

“(3) The feasibility of replacing the State’s current corporate income and franchise tax laws with a commercial activity tax based upon business gross receipts.

“(4) The administrative process for the review of disputed tax matters.”

**Effect of Amendments.** — Session Laws 2006-196, s. 8, effective January 1, 2008, and applicable to proceeds credited to the Department of Insurance on or after January 1, 2008, rewrote this section.

**Chapter 59.**  
**Partnership.**

ARTICLE 2.

*Uniform Partnership Act.*

Part 4. Relations of Partners to One Another.

**§ 59-52. Right to an account.**

CASE NOTES

**Cited** in *Brown v. Flowers*, — F. Supp. 2d —, 2005 U.S. Dist. LEXIS 23272 (M.D.N.C. Sept. 14, 2005).

## Chapter 59B.

### Uniform Unincorporated Nonprofit Association Act.

Sec.	Sec.
59B-1. Short title.	59B-9. Effect of judgment or order.
59B-2. Definitions.	59B-10. Disposition of personal property of inactive nonprofit association.
59B-3. Supplementary general principles of law and equity.	59B-11. Appointment of agent to receive service of process.
59B-4. Title to property; choice of law.	59B-12. Claim not abated by change.
59B-5. Real and personal property; nonprofit association as legatee, devisee, or beneficiary.	59B-13. Venue.
59B-6. Statement of authority as to real property.	59B-14. Uniformity of application and construction.
59B-7. Liability of members or other persons.	59B-15. Effect as to conveyances by trustees; prior deeds validated.
59B-8. Capacity to assert and defend; standing.	

#### § 59B-1. Short title.

This Chapter may be cited as the Uniform Unincorporated Nonprofit Association Act. (2006-226, s. 1.)

#### NORTH CAROLINA COMMENT

This Chapter is based upon the Uniform Unincorporated Nonprofit Association Act (hereinafter “Uniform Act”) and is the result of a study performed by the General Statutes

Commission, partly due to S.L. 2004-161, s. 7.1. The Commission filed its report with the General Assembly on May 11, 2006.

**Editor’s Note.** — Session Laws 2006-226, s. 34, makes this Chapter effective January 1, 2007.

Session Laws 2006-226, s. 5 is a severability clause.

Session Laws 2006-226, s. 6, provides: “This act does not affect an action or proceeding commenced or right accrued before this act takes effect.”

Session Laws 2006-226, s. 7, provides: “The Revisor of Statutes shall cause to be printed along with this act all relevant portions of the official comments to the Uniform Unincorporated Nonprofit Association Act and all explanatory comments of the drafters of this act as the Revisor deems appropriate.”

#### § 59B-2. Definitions.

In this Chapter:

- (1) “Member” means a person who, under the rules or practices of a nonprofit association, may participate in the selection of persons authorized to manage the affairs of the nonprofit association or in the development of policy of the nonprofit association.
- (2) “Nonprofit association” means an unincorporated organization, other than one created by a trust and other than a limited liability company, consisting of two or more members joined by mutual consent for a common, nonprofit purpose. However, joint tenancy, tenancy in common, or tenancy by the entireties does not by itself establish a nonprofit association, even if the co-owners share use of the property for a nonprofit purpose.
- (3) “Person” means an individual, corporation, limited liability company, business trust, estate, trust, partnership, association, joint venture,



government, governmental subdivision, agency, or instrumentality, or any other legal or commercial entity.

- (4) “State” means a state of the United States, the District of Columbia, the Commonwealth of Puerto Rico, or any territory or insular possession subject to the jurisdiction of the United States. (2006-226, s. 1.)

#### OFFICIAL COMMENT

1. With respect to relations external to a nonprofit association, whether a person is a member of the organization determines principally a member’s responsibility to third parties. Internally, whether a person is a member might determine specified rights and responsibilities, including access to facilities, voting, and obligation to pay dues. This Act is concerned only with determining whether a person is a member for purposes of external relations, such as liabilities to third parties on a contract of the nonprofit association. Therefore, “member” is defined in terms appropriate to these purposes. “Member” includes a person who has sufficient right to participate in the affairs of a nonprofit association so that under common law the person would be considered a co-principal and so liable for contract and tort obligations of the nonprofit association.

The definition may reach somewhat beyond decisions of some courts. Either participation in the selection of the leadership or in the development of policy is enough. Both are not required. This broad definition of member ensures that the insulation from liability is provided in all cases in which the common law might have imposed liability on a person, simply because the person was a member.

2. A fund-raising device commonly used by many nonprofit organizations is the membership drive. In most cases the contributors are not members for purposes of this Act. They are not authorized to “participate in the selection of persons authorized to manage the affairs of the nonprofit association or in the development of policy.” Simply because an association calls a person a member does not make the person a member under this Act.

Section 6 [G.S. 59B-7] nevertheless protects “a person considered to be a member by a nonprofit association” even though the person is not within the definition of member in paragraph (1) [see North Carolina Comment to G.S. 59B-7].

3. The role of a member in the affairs of an association is described as “may participate in the selection” instead of “may select or elect” the governing board and officers and “may participate ... in the development of policy” instead of “may determine” policy. This accommodates the Act to a great variation in practices and organizational structures. For example, some nonprofit associations permit the president or chair to name some members of the governing board, such as by naming the chairs of principal committees who are designated ex officio mem-

bers of the governing board. Similarly, the role in determination of policy is described in general terms. “Persons authorized to manage the affairs of the association” is used in the definition instead of president, executive director, officer, member of governing board, and the like. Given the wide variety of organizational structures of nonprofit associations to which this Act applies and the informality of some of them the more generic term is more appropriate.

4. “Person” instead of individual is used to make it clear that associations covered by this Act may have individuals, corporations, and other legal entities as members. Unincorporated nonprofit trade associations, for example, commonly have corporations as members. Some national and regional associations of local government officials and agencies have governmental units or agencies as members.

5. Paragraph (2) defines “nonprofit association.” The model American Bar Association acts deal with both for-profit and nonprofit corporations. Unincorporated, for-profit organizations are largely covered by the uniform partnership acts. The differences between for-profit and nonprofit unincorporated organizations are so significant that it would be impractical to cover both in a single act. Therefore, this Act deals only with nonprofit organizations.

6. A charitable trust is a form of an unincorporated nonprofit legal organization. It is, however, not a nonprofit association within this Act. To the extent that trust law does not supply an answer to a legal problem concerning a charitable trust, a court could look to this Act to develop by analogy a common law answer.

7. The term “nonprofit association” is used instead of “association” for several reasons. The risk that this Act when placed in a state’s code would be construed to apply to both nonprofit and for-profit associations should thus be avoided. Acts dealing with one kind of association when placed in a code have sometimes lost their identification and been inadvertently applied to the other kind where the term “association” alone was used. For example, the New York Joint-Stock Association Act of 1894 used the term “association,” which it defined to include only for-profit organizations. “Association” was held in 1938 to include an unincorporated political party and the act applied to it. *Richmond County v. Democratic Organization of Richmond County*, 1 NYS 2d 349 (1938). Subsequent decisions applied the act to other unincorporated nonprofit organizations. The

use of “nonprofit association” instead of merely “association” should also avoid the risk of this Act being improperly used to develop a common law rule by analogy from this Act to apply in a case involving a for-profit association. Roscoe Pound, *Common Law and Legislation*, 21 Harv. L. Rev. 383 (1908); Robert F. Williams, *Statutes as Sources of Law Beyond their Terms in Common Law Cases*, 50 Geo. Wash. L. Rev. 554 (1982). Legal issues concerning unincorporated for-profit associations that are not partnerships and so not controlled by a partnership act would be governed by a State’s other statutory or common law. Resort to one of the two partnership acts for the purposes of developing a common law rule by analogy would be appropriate. Resort for this purpose to this Act in the case of an unincorporated for-profit association would not be appropriate.

8. Two or more persons is the common statutory requirement to constitute an unincorporated nonprofit association. New Jersey, on the other hand, requires that there be seven or more members to be an association under its laws. This Act suggests the smaller number - two. Consideration was given to specifying “one” instead of “two.” For example, the developer of a condominium may have created a condominium association as an unincorporated nonprofit association. Before any units are sold the developer as owner of all units has all of the memberships in the association. Should it be treated as a nonprofit association under this Act from the beginning? It should not. Can one person be “joined by mutual consent for a common purpose?” To ask the question would seem to be to answer it. If the concern is to give the developer the entity protections provided by this Act, it is very likely that it already has some protection because it is a business corporation. Nevertheless, the number is placed in brackets, in part, to raise the question whether the number should be one or two or even a larger number.

The members must be joined together for a common purpose. Several States provide that they be “joined together for a **stated** common purpose” (emphasis added). Because of the in-

formality of many ad hoc associations, it is prudent not to impose the requirement that the common purpose be “stated.” Very probably, it is the small, informal, ad hoc associations and those third parties affected by them that most need this Act.

9. “Nonprofit” is not defined. A common definition - it is an association whose net gains do not inure to the benefit of its members and which makes no distribution to its members, except on dissolution - does not work for all nonprofit associations. Consumer cooperatives, for example, make distributions to their members; but they are not for-profit organizations. Those consumer cooperatives not organized under specific state or federal laws need the benefits of this Act.

It is instructive to note that the drafting committee for the ABA Model Nonprofit Corporation Act finally determined that it could not develop a satisfactory definition of nonprofit. Instead, the act contains rules, regulations, and procedures applicable separately to each of the three kinds of nonprofit corporation - public benefit, mutual benefit, and religious. It does not define the three kinds; it described what they can do and how they may function. Considering the corporation’s intended activities and the rules, regulations, and procedures applicable to each of the three different kinds of corporations, a choice is made. Having made a choice, the corporation is bound by the rules, regulations, and procedures prescribed for the kind of nonprofit corporation chosen.

10. The final sentence of paragraph (2) is adapted from Section 201(d)(1) of Uniform Partnership Act(1994). This stresses that more than common ownership and use is required. For example, that three families own a lake cottage and share its use does not make the three families a nonprofit association. Paragraph (2) precludes arrangements that are merely common ownership from being a nonprofit association under this Act.

11. The definition of “person” in paragraph (3) is a standard NCCUSL definition.

12. The definition of “State” in paragraph (4) is a standard NCCUSL definition.

### NORTH CAROLINA COMMENT

In subdivision (2), the General Statutes Commission added “and other than a limited liability company” to exclude limited liability companies from the Uniform Act’s definition of

“nonprofit association.” In subdivision (3), the Commission added “limited liability company” to expressly include limited liability companies in the Uniform Act’s definition of “person.”

## § 59B-3. Supplementary general principles of law and equity.

Principles of law and equity supplement this Chapter unless displaced by a particular provision of it. (2006-226, s. 1.)



**OFFICIAL COMMENT**

1. This section is adapted from Uniform Commercial Code Section 1-103[(b)]. The reference in Section 1-103[(b)] to “the law merchant” and its examples of supplementary rules, such as those of principal and agent and estoppel, were deleted as irrelevant or incomplete and unnecessary. This change in language does not manifest any change in substance.

2. This Act contains no rules concerning governance. However, recourse to rules of governance must be had to apply some of the Act’s rules. For example, whether a nonprofit association is liable under a contract made for it by an individual depends on whether the individual had the necessary authority to act as agent. Was the individual given the authority by

someone empowered by the nonprofit association to give the authority? To decide a case like this a court must resort to the rules of the nonprofit association or, if there are none applicable or none at all, to the common law or other statutory law of the jurisdiction.

3. Efforts were made to develop default internal rules of governance - applicable if an association had none or none that were applicable. This effort demonstrated the complexity and difficulty of fashioning rules that would reasonably fit a wide variety of nonprofit associations - large and small, public benefit, mutual benefit, and religious, and of short and indefinite duration. It was thought best to leave this question to other law of the jurisdiction.

**§ 59B-4. Title to property; choice of law.**

Real and personal property in this State may be acquired, held, encumbered, and transferred by a nonprofit association, whether or not the nonprofit association or a member has any other relationship to this State. (2006-226, s. 1.)

**OFFICIAL COMMENT**

This section is consistent with Restatement (Second) of Conflict of Laws Section 223 (1971). Section 3 makes a conveyance or devise of land located in a State that has adopted this Act effective even though it would not be effective

under the law of the State in which the nonprofit association has its principal office or other significant relationship. No relationship of the nonprofit association other than that the property is situated in the State is required.

**NORTH CAROLINA COMMENT**

The General Statutes Commission replaced the Uniform Act’s catchline “Territorial applica-

tion” with “Title to property; choice of law” as more descriptive.

**§ 59B-5. Real and personal property; nonprofit association as legatee, devisee, or beneficiary.**

(a) A nonprofit association is a legal entity separate from its members for the purposes of acquiring, holding, encumbering, and transferring real and personal property.

(b) A nonprofit association, in its name, may acquire, hold, encumber, or transfer an estate or interest in real or personal property.

(c) A nonprofit association may be a beneficiary of a trust or contract, a legatee, or a devisee.

(d) Any judgments and executions against a nonprofit association bind its real and personal property in like manner as if it were incorporated. (2006-226, s. 1.)

**OFFICIAL COMMENT**

1. Subsection (a) makes a nonprofit association a legal entity separate from its members for purposes of its dealing with real and personal property. This reverses the common law

view that a non-profit association was not a legal entity.

2. Subsection (b) is based on Section 3-102(8), Uniform Common Interest Act. It reverses the



common law rule. Inasmuch as an unincorporated nonprofit association was not a legal entity at common law, it could not acquire, hold, or convey real or personal property. Harold J. Ford, *Unincorporated Non-Profit Associations*, 1-45 (Oxford Univ. Press (1959); 15 A.L.R. 2d 1451 (1951); Warburton, *The Holding of Property by Unincorporated Associations*, Conveyancer 318 (September-October 1985).

3. This strict common law rule has been modified in various ways in most jurisdictions by courts and statutes. For example, courts have held that a gift by will or inter vivos transfer of real property to a nonprofit association is not effective to vest title in the nonprofit association but is effective to vest title in the officers of the association to hold as trustees for the members of the association. *Matter of Anderson's Estate*, 571 P. 2d 880 (Okla. App. 1977).

A New York statute specifies that a grant by will of real or personal property to an unincorporated association is effective if within three years after probate of the will the association incorporates. McKinney's N.Y. Estates, Powers, & Trust Law, Section 3-1.3 (1981).

California gives any "unincorporated society or association and every lodge or branch of any such association, and any labor organization" full right to acquire, hold, or transfer any "real estate and other property as may be necessary for the business purposes and objects of the

society," and acquire and hold any property not so necessary for 10 years. California Corporations Code, Title 3, Unincorporated Associations, Section 20001 (West 1991).

As is the case with many of the problems created by the view that an unincorporated association is not an entity the statutory solutions are often partial - limited to special circumstances and associations. Subsection (b) solves this problem for all nonprofit associations, for all kinds of transactions, and for both real and personal property.

4. Even if a nonprofit association's governing documents provide that it "may not acquire real property," subsection (b) makes effective a transfer of Blackacre to the association. A different result would obviously disrupt real estate titles. The remedy for this violation of internal rules lies not in preventing title from passing but, as with other organizations, in an action by members against their association and its appropriate officers to undo the transaction.

5. Subsection (c) is a necessary corollary of subsection (b) and, thus, it may be unnecessary. However, several States expressly provide that an unincorporated, nonprofit association may be a legatee, devisee, or beneficiary. See, for example, Md. Estates & Trusts Code Ann. Section 4-301 (1991). Therefore, it is desirable to continue this as an express rule. Subsection (c) applies to both trusts and contracts. Not all state statutes apply expressly to both.

#### NORTH CAROLINA COMMENT

The General Statutes Commission placed "in its name" in commas in subsection (b) and added subsection (d), which was adapted from

G.S. 1-69.1. Subsection (b) is consistent with the provisions of former G.S. 39-24 and former G.S. 39-25.

### § 59B-6. Statement of authority as to real property.

(a) A nonprofit association may execute and record a statement of authority to transfer an estate or interest in real property in the name of the nonprofit association.

(b) An estate or interest in real property in the name of a nonprofit association may be transferred by a person so authorized in a statement of authority recorded in the office of the register of deeds in the county in which a transfer of the property would be recorded.

(c) A statement of authority must be set forth in a document styled "affidavit" that contains all of the following:

- (1) The name of the nonprofit association.
- (2) Reserved for future codification purposes.
- (3) The street address, and the mailing address if different from the street address, of the nonprofit association, and the county in which it is located, or, if the nonprofit association does not have an address in this State, its address out-of-state.
- (4) That the association is an unincorporated nonprofit association.
- (5) The name or office of a person authorized to transfer an estate or interest in real property held in the name of the nonprofit association.

(6) That the association has duly authorized the member or agent executing the statement to do so.

(d) A statement of authority must be sworn to and subscribed in the same manner as an affidavit by a member or agent who is not the person authorized to transfer the estate or interest.

(e) The register of deeds shall collect a fee for recording a statement of authority in the amount authorized by G.S. 161-10(a)(1). The register of deeds shall index the name of the nonprofit association and the member or agent signing the statement of authority or any subsequent document relating thereto as Grantor and the name of the appointee as Grantee.

(f) An amendment, including a termination, of a statement of authority must meet the requirements for execution and recording of an original statement. Unless terminated earlier, a recorded statement of authority or its most recent amendment expires by operation of law five years after the date of the most recent recording.

(g) If the record title to real property is in the name of a nonprofit association and the statement of authority is recorded in the office of the register of deeds in the county in which a transfer of real property would be recorded, the authority of the person or officer named in a statement of authority is conclusive in favor of a person who gives value without notice that the person or officer lacks authority. (2006-226, s. 1.)

#### OFFICIAL COMMENT

1. This section is based on Uniform Partnership Act(1994) Section 303. California Corporations Code, Title 3, Unincorporated Associations, Section 20002 (West 1991), is similar.

2. A statement of authority need not be filed to conclude an acquisition of or to hold real property. It is concerned only with the sale, lease, encumbrance, and other transfer of an estate or interest in real property. For this, it should, but need not, be filed. The filing provides important documentation.

3. Inasmuch as the statement relates to the authority of a person to act for the association in transferring real property, subsection (b) requires that the statement be filed or recorded in the office where a transfer of the real property would be filed or recorded. This is usually the county in which the real estate is situated. This is where a title search concerning the real estate would be conducted. Uniform Partnership Act (1994) Section 303 provides for central filing, such as with the Secretary of State, but its statement of partnership authority concerns authority of partners generally, not just with respect to real estate.

4. "Filed" and "recorded" are bracketed to direct an enacting State to choose. In most jurisdictions "recorded" will be the appropriate choice.

5. Subsection (c)(2) [not enacted in North Carolina] deals with the problem caused by the similarity of names of small local nonprofit associations. There is no duplication of federal tax identification numbers. Therefore, any confusion of identity is avoided by this requirement.

Subsection (c)(3) may present a problem for small, ad-hoc nonprofit associations. They may have no fixed office address. They may meet in the homes of their leaders. However, if they distribute literature or file petitions they are likely to have a mailing address.

Subsection (c)(4) informs those relying on the statement of the precise character of the organization. Knowing that the organization is an unincorporated nonprofit association may cause the person dealing with the organization to act differently.

6. Subsection (c)(5) permits the statement to identify as the person who can act for the association one who holds a particular office, such as president. This designation relieves the association from the need to make additional filings on each change of officers. Under local title standards and practices the transferee and filing or recording office are likely to require a certificate of incumbency if the statement designates the holder of an office.

7. Subsection (d) is designed to reduce the risk of fraud and to reflect law and practice applicable to other organizations. It requires someone other than the person authorized to deal with the real property to execute the statement of authority on behalf of the nonprofit association. Whether the formalities of execution must conform to those of a deed or an affidavit is left for each State to determine.

8. Subsection (f) makes a statement inoperative five years after its most recent recording or filing. This prevents a statement whose recording or filing is unknown by the association's current leadership from being effective. Reli-



ance on a filing or recording this old is, in effect, not in good faith.

9. Subsection (g) is based on Uniform Partnership Act (1994) Section 303(h). Its obvious purpose is to protect good faith purchasers for value without notice who rely on the statement, including those who acquire a security interest in the real property. If the required signatures

on the statement, deed, or both are forgeries, the effect of them is not governed by Section 5(g). Instead, Section 2 applies and would invoke the other law of the State. In many States the deed would be a nullity. See Boyer, Hovenkamp, and Kurtz, *THE LAW OF PROPERTY*, An Introductory Survey (West Pub. Co. 4th ed. 1991).

### NORTH CAROLINA COMMENT

The General Statutes Commission inserted "of the register of deeds" in subsection (b) to identify the office in which a transfer of real property would be recorded.

The Commission made several changes in subsection (c). To assist the registers of deeds, the Commission modified the introductory language of the subsection by requiring a statement of authority to be set out in a document entitled "affidavit." The Commission deleted subdivision (2) (the Uniform Act's requirement for a federal tax identification number) due to concerns over identity theft and the belief that the requirement was not useful in any event. In subdivision (3), the Commission conformed the requirement for an address, in part, to similar requirements in this State's statutes regulating other entities. In subdivision (5), the Commission changed "title" to "office" in light of the references to "officer" in subsection (g) and G.S. 59B-13. The Commission added subdivision (6).

The Commission modified subsection (d) by requiring a statement of authority to be sworn

to and subscribed in the same manner as an affidavit and by narrowing the subsection to specify execution by a "member or agent" rather than a "person."

In subsection (e), the Commission identified the officer authorized to collect the fee for recording a statement of authority, made the collection of the fee mandatory rather than permissive, inserted the cross-reference to the recording fee "authorized by G.S. 161-10(a)(1)," and added indexing instructions.

In subsection (f), the Commission replaced the Uniform Act's references to "cancellation," "cancelled," and "is cancelled" with "termination," "terminated," and "expires."

In subsection (g), the Commission inserted the reference to the "register of deeds" to identify the office in which a transfer of real property would be recorded and added "or officer" for more precision.

## § 59B-7. Liability of members or other persons.

(a) A nonprofit association is a legal entity separate from its members for the purposes of determining and enforcing rights, duties, and liabilities.

(b) A person is not liable for the contract, tort, or other obligations of a nonprofit association merely because the person is a member, is authorized to participate in the management of the affairs of the nonprofit association, or is referred to as a "member" by the nonprofit association.

(c) Reserved for future codification purposes.

(d) A tortious act or omission of a member or other person for which a nonprofit association is liable is not imputed to a person merely because the person is a member of the nonprofit association, is authorized to participate in the management of the affairs of the nonprofit association, or is referred to as a "member" by the nonprofit association.

(e) A member of, or a person referred to as a "member" by, a nonprofit association may assert a claim against or on behalf of the nonprofit association. A nonprofit association may assert a claim against a member or a person referred to as a "member" by the nonprofit association. (2006-226, s. 1.)

### NORTH CAROLINA COMMENTARY

1. At common law a nonprofit association was not a legal entity separate from its members. Borrowing from the law of partnership, the

common law viewed a nonprofit association as an aggregate of its members. The members are co-principals. Subsection (a) changes that. It



makes a nonprofit association a legal entity separate from its members for purposes of contract and tort.

2. This Act does not deal with liability of members or other persons acting for a nonprofit association for their own conduct. With respect to contract and tort Section 6 leaves that to the other law of the jurisdiction enacting this Act.

3. Subsections (b) through (e) are applications to common cases of the basic principle in subsection (a). Because a nonprofit association is made a separate legal entity, its members are not co-principals. Consequently they are not liable on contracts or for torts for which the association is liable. Subsection (b) specifies that result with respect to contracts.

4. Subsection (b) applies the principle in subsection (a) to relieve members and others from vicarious liability for the contracts of a nonprofit association.

5. Subsections (a) and (b) eliminate a risk that existed under common law. An agent makes an implied warranty of authority to the other contracting party. If the purported principal does not exist, the agent obviously breaches the warranty. Because an unincorporated nonprofit association was not a legal entity; one purporting to act for it breached this implied warranty. *Smith & Edwards v. Golden Spike Little League*, 577 P. 2d 132, 134 (Utah 1978). Subsection (b) treats a nonprofit association as a legal entity; therefore, an agent who acts for it within her authority does not breach the warranty.

6. “**Merely**” because a person is a member does not make the person liable on an association’s contract. This formulation means that there are special circumstances that may result in liability. For example, a member may expressly become a party to a contract with the nonprofit association. Subsection (b) relieves members only of their vicarious liability. Liability for one’s own conduct is left to the other law of the jurisdiction.

An agent with authority from a nonprofit association who negotiates a contract without disclosing the agent’s representative status is liable on the contract. Under agency law an agent acting within the agent’s scope of authority for an undisclosed or partially disclosed principal is personally liable on the contract along with the principal, unless the other contracting party agrees not to hold the agent liable. Restatement (Second) Of Agency 320-322; Reuschlein and Gregory, *Agency & Partnership* 161-163 (West 2d ed. 1990).

Courts have pierced the corporate veil of nonprofit corporations. Comment, *Piercing the Nonprofit Corporation Veil*, 66 Marq. L. Rev. 134 (1984). Section 6 makes a nonprofit association a legal entity for these purposes. Therefore, as a matter of its other law a jurisdiction enacting this Act may appropriately apply this

doctrine to a nonprofit association. In *Macaluso v. Jenkins*, 95 Ill. App. 3d 461, 420 N.E.2d 251 (1981), the president of a nonprofit corporation was found to have so commingled its funds and assets with his own and those of a business corporation he controlled and have treated them as his own for his benefit that the corporate veil must be pierced to promote justice. He was found liable for a debt contracted in the name of the nonprofit corporation. See also Harry G. Henn & John R. Alexander, *Law of Corporations*, pp 344-352 (West 3d ed. 1983); Alfred F. Conard, *Corporations in Perspective*, pp 424-433 (Foundation Press, 1976).

7. An example of a partial statutory solution of members’ liability for contracts of a nonprofit association is California Corporations Code, Title 3, Nonprofit Associations, Section 21100 (West 1991). It relieves members from liability for “debts or liabilities contracted or incurred by the association in the acquisition of lands or leases or the purchase, leasing, designing, planning, architectural supervision, erection, contraction, repair, or furnishing of buildings or other structures, to be used for purposes of the association.” As noted earlier, partial and uncoordinated statutory solutions of common law problems are typical.

8. Subsection (c) [combined in this section into subsection (b)] applies the principle in subsection (a) to relieve members and others from liability for torts for which the nonprofit association is liable. Inasmuch as Section 6 [this section] provides that a member is not a co-principal, the member cannot be considered to be an employer of the employee who committed the tort. Again, only relief from vicarious liability is provided.

Liability of a member or other person who acts for the nonprofit association is governed by other law of the jurisdiction. That an employer is liable for a tort committed by its employee does not excuse the employee.

9. The immunity from vicarious liability provided by subsections (b) and (c) [combined in this section into subsection (b)] does not depend on the remedy sought. Whether it is for damages for breach of contract or tort, unjust enrichment, or the like the immunity is provided.

10. Since the mid 1980’s all States have enacted laws providing officers, board members, and other volunteers some protection from liability for their own negligence. The statutes vary greatly as to who is covered, for what conduct protection is given, and the conditions imposed for the freedom from liability. Some apply only to nonprofit corporations. State Liability Laws for Charitable Organizations and Volunteers (Nonprofit Risk Management & Insurance Institute, 1990); Developments, Nonprofit Corporations, 105 Harv. L. Rev. 1578, 1685-1696 (1992). This means that members and volunteers involved with unin-

corporated nonprofit associations do not obtain protection under those state statutes.”

The 1987 Texas act, for example, relieves directors, officers, and other volunteers from liability for simple negligence that causes death, damage, or injury if the volunteer acted in the scope of her duties for a charitable organization exempt under Internal Revenue Code Section 501(c)(3) or (4). The act also limits the amounts that may be recovered from an employee or the organization if the organization carries requisite liability insurance. The constitutionality of the provision relieving volunteers from liability has been questioned under Article I, Section 13 of the Texas Constitution - the Open Courts provision. Note, *The Constitutionality of the Charitable Immunity and Liability Act 1987*, 40 Baylor L. Rev. 657 (1988). Some statutes premise all relief upon the organization having specified liability insurance.

Section 6 [this section] does not affect these statutes. As noted earlier Section 6 [this section] deals only with vicarious liability. These statutes concern liability for one's own conduct.

11. Although not a concern of Section 6 [this section], perhaps it should be noted that nonprofit organizations have been held liable for tortious acts and omissions not only of employees but also of members. In *Guyton v. Howard*, 525 So. 2d 918 (Fl. App. 1988) a nonprofit organization was held liable for the negligence of members who acted for the organization in conducting an initiation that resulted in injury.

12. Subsection (d) applies the principle in subsection (a) to reverse the common law rule that the negligence of an employee of an association is imputed to its members. A member as co-principal was vicariously responsible for an employee's conduct within the scope of the employee's duties. Section 6, however, makes the nonprofit association a legal entity. Thus, a member is not a co-principal and the employee's negligence is not imputed to a member.

Because the employee's negligence is not imputed, the member's suit against the nonprofit association for negligence by the employee is not subject to the defense of contributory negligence.

Some courts treated large nonprofit associations as entities for some purposes and so did not impute the negligence of an employee to a member. Therefore, a member could recover from the association. *Marshall v. International Longshoreman's and Warehouseman's Union*, 57 Cal. 2d 781, 371 p. 2d 987 (1962); *Judson A. Crane, Liability of an Unincorporated Association for Tortious Injury to a Member*, 16 Vand L Rev 319, 323 (1963).

13. Subsection (e) applies the principle in subsection (a) to reverse the common law rule that a member may not sue the member's unincorporated nonprofit association. A mem-

ber as co-principal is logically a defendant as well as a plaintiff in such an action. The logic is that one may not sue oneself.

Subsection (a) makes an unincorporated nonprofit a legal entity. Therefore, a member is separate from the nonprofit association. There is thus no logical obstacle to either suing the other. A nonprofit association may, for example, sue a member for delinquent dues. See, for example, Section 6.13 ABA Nonprofit Corporation Act (1987)

14. The Texas Supreme Court recently overruled the common law rule and held that a member may sue the unincorporated nonprofit association of which the person is a member. *Cox v. Thee Evergreen Church*, 836 S.W.2d 167 (Tex. 1992). The court also overturned the Texas common law rule that the negligence of an employee is imputed to a member. The court referred to a statute authorizing a nonprofit association to sue and be sued and other Texas statutes giving entity status for limited purposes to unincorporated nonprofit associations. It did not, however, rely on them in overturning the historic common law rule. It simply found the old rule not suitable for present times. The court also followed recent developments in other courts.

15. Section 6 [this section] relieves from vicarious liability not only members but also certain others. Persons who are 'authorized to participate in the management of the affairs of the nonprofit association' are protected. Persons within this group - largely directors and officers, however denominated - are likely also to be members as defined in Section 1(1) [G.S. 59B-2(1)], and protected as such. If they are not members (i.e. not co-principals) they should not be found liable at common law. Section 6 [this section] extends protection to this group out of abundant caution. It is possible that a court might misapply the common law rationale for liability to hold a non-member manager vicariously liable. Section 6 [this section] prevents that somewhat remote possibility.

Section 6 [this section] also extends protection to a person who is not within the definition of "member" in Section 1(1) [G.S. 59B-2(1)] but is "considered to be a member by the nonprofit association." [see North Carolina Comment.] A person within this clause is one who does not have the relationship to the nonprofit association that would permit a finding under the common law that the person is a co-principal. Also the person is not a director, officer, or manager within the preceding phrase. That a person not within the two preceding phrases but within the third phrase might be found vicariously liable seems quite remote. Nevertheless, Section 6 [this section] accords this person protection.

As noted earlier, Section 6 [this section] concerns vicarious liability only. Liability for one's



own conduct is covered by other law of the enacting jurisdiction.

### NORTH CAROLINA COMMENT

The Uniform Act in this section provides protection for a nonprofit association's members from tort and contract liability based solely on membership status. The General Statutes Commission extended this protection to cover liability based solely on membership status for the nonprofit association's other legal obligations, such as taxes and penalties. The Commission restructured the section in the process.

Throughout this section, the Commission substituted the phrase "person referred to as a member" for the Uniform Act's phrase "person considered to be a member" to eliminate possi-

ble ambiguity created by the use of the word "consider." As the Official Comment makes clear, the phrase was intended to refer to persons who do not meet the definition of "member" but are referred to by the nonprofit association as "members" to recognize their contributions (such as a financial donation) to the association.

In subsection (e), the Commission expanded the Uniform Act's provision by changing "a claim against the nonprofit association" to "a claim against or on behalf of the nonprofit association."

## § 59B-8. Capacity to assert and defend; standing.

(a) A nonprofit association, in its name, may institute, defend, intervene, or participate in a judicial, administrative, or other governmental proceeding or in an arbitration, mediation, or any other form of alternative dispute resolution.

(b) A nonprofit association may assert a claim in its name on behalf of its members or persons referred to as "members" by the nonprofit association if one or more of them have standing to assert a claim in their own right, the interests the nonprofit association seeks to protect are germane to its purposes, and neither the claim asserted nor the relief requested requires the participation of a member or a person referred to as a "member" by the nonprofit association. (2006-226, s. 1.)

### OFFICIAL COMMENT

1. Subsection (a) broadly recognizes the right of a nonprofit association to participate as an entity in judicial, administrative, and governmental proceedings, and in arbitration and mediation on behalf of it and its members. It may sue and be sued. Many States have enacted statutes granting unincorporated associations these rights. Many have rejected the argument that these acts made an unincorporated nonprofit association a separate legal entity for other purposes.

2. Ohio Rev. Code Ann. Section 1745.01 (Baldwin 1991) provides that an unincorporated association may "sue or be sued as an entity under the name by which it is commonly known and called." This formulation has an element that subsection (a) does not have - a description of the association name to be used. Maryland requires that the unincorporated association have a "group name." Md. Estates & Trust Code Ann. Section 6-406(a) - (1991). As some of the informal nonprofit associations may not have fixed on a name but need the benefit of the rule, subsection (a) does not require that it have a name.

3. Subsection (b) describes an association's standing to represent the interests of its members in the proceeding. It is the federal standing rule. *Hunt v. Washington Apple Advertising Commn*, 432 U.S. 333, 343, 97 S. Ct. 2434, 53, L. Ed. 2d 383 (1977). A nonprofit association must meet the three requirements only if it seeks to represent the interest of its members. If the suit concerns only the nonprofit association's interests, subsection (b) does not apply.

4. If participation of individual members is required, the nonprofit association does not have standing. If the injury for which a claim is made or the remedy sought is different for different members, their participation through testimony and presenting other evidence is required. The typical case in which a nonprofit association has standing is where it seeks only a declaration, injunction, or some form of prospective relief for injury to its members. *Warth v. Seldin*, 422 U.S. 490, 515, 95 S. Ct. 2197, 45 L. Ed. 2d 343 (1975).

5. Subsection (b) does not require the nonprofit association to show that it suffered harm or has some interest to protect to have standing



to represent the interests of its members. *Warth v. Seldin*, 422 U.S. 490, 511 95 S. Ct. 2197, 45 L. Ed. 2d 343 (1975). Some States require an association to have an interest to protect which is separate from that of its members. One court found that the probable loss of members if it did not take action on their behalf was a sufficient interest to protect to give it standing to represent its members. This ap-

proach certainly diminishes greatly the burden of satisfying the requirement. States have further modified the old standing rule. Recently many States have adopted the three-pronged federal rule, which is the rule in subsection (b).

This section does not re-state rules of joinder because they will be governed by the jurisdiction's other law.

**NORTH CAROLINA COMMENT**

Subsection (a) replaces G.S. 1-169.1 for nonprofit associations.  
In subsection (b), the General Statutes Com-

mission added the references to persons referred to as "members" by the nonprofit association.

**§ 59B-9. Effect of judgment or order.**

A judgment or order against a nonprofit association is not by itself a judgment or order against a member, a person referred to as a "member" by the nonprofit association, or a person authorized to participate in the management of the affairs of the nonprofit association. (2006-226, s. 1.)

**OFFICIAL COMMENT**

1. This section is consistent with Restatement (Second) of Judgments, Section 61(2), which provides: "If under applicable law an unincorporated association is treated as a jural entity distinct from its members, a judgment for or against the association has the same effects with respect to the association and its members as a judgment for or against a corporation ...."
2. Section 8 [this section] applies not only to judgment[s] but also to orders, such as an award rendered in arbitration or an injunction.
3. Section 8 [this section] reverses the common law rule. Under the common law's aggregate view of an unincorporated association, members, as co-principals, were individually liable for obligations of the association.
4. Some States changed the common law rule

- by statute. Ohio, for example, provides that the property of an unincorporated association is subject to judgment, execution, and other process and that a money judgment against the association may be "enforced only against the association as an entity" and not "against a member." Ohio Rev. Code Ann., Section 1745.02 (Baldwin 1991).
5. That a judgment against a nonprofit association is also not a judgment against one authorized to manage the affairs of the association recognizes fully the entity status of a nonprofit association.
6. An obvious corollary of this section is that a judgment against a nonprofit association may not be satisfied against a member unless there is also a judgment against the member.

**NORTH CAROLINA COMMENT**

The General Statutes Commission added the reference to a person referred to as a "member" by a nonprofit association.

**§ 59B-10. Disposition of personal property of inactive nonprofit association.**

If a nonprofit association has been inactive for three years or longer, or a different period specified in a document of the nonprofit association, a person in possession or control of personal property of the nonprofit association may transfer custody of the property:

- (1) If a document of the nonprofit association or document of gift specifies a person to whom transfer is to be made under these circumstances, to that person; or
- (2) If no person is so specified, to a nonprofit association, nonprofit corporation, or other nonprofit entity pursuing broadly similar purposes, or to a government or governmental subdivision, agency, or instrumentality. (2006-226, s. 1.)

#### OFFICIAL COMMENT

1. Section 9 [this section] is not a dissolution rule. An inactive nonprofit association may not be one that has dissolved. It may have just stopped functioning and have taken no formal steps to dissolve. It might possibly be revived.

Section 9 [this section] gives a person in possession or control of personal property of a nonprofit association an opportunity to be relieved of responsibility for it. Compliance with the section provides a safe harbor.

2. "Inactive" is not defined. A nonprofit association that has accomplished its purpose, such as seeking approval in a school bond election, is very likely inactive. A nonprofit association that has stopped pursuing its purposes, collecting dues, holding elections of officers and board members, and conducting meetings, and has no employees would seem to be inactive.

"Inactive" does not describe a nonprofit association whose sole purpose is to act should a specific problem arise. That there has been no activity because the problem has not arisen does not make the standby organization "inactive."

A three year period of inactivity is suggested. It is unlikely that a nonprofit association that has been inactive for that period will begin functioning again. Thus, it is prudent to transfer custody of its assets to someone likely to make appropriate use of them. While it is unlikely that a nonprofit association would deal with this issue, if its document does provide a shorter or longer period, that period governs.

3. Section 9 [this section] applies only to personal property - tangible and intangible. Unclaimed property acts also apply to both kinds of personal property. All States have some form of unclaimed property act. Therefore, the relationship of these acts to this Act must be examined.

The Uniform Unclaimed Property Act (1995) applies to certain intangible and tangible personal property. If the property has been unclaimed by the owner for five or more years it is presumed abandoned. Intangible property, such as checking and savings accounts and uncollected dividends, is the main concern of these Acts. The obligor, such as a bank or other financial institution and corporation, is directed to report and turn over the property to the state administrator.

The only tangible personal property to which

the Uniform Unclaimed Property Act (1995) applies, according to Section 3, is that in "a safe deposit box or any other safekeeping repository." Many States have additional statutes that apply to property abandoned in airport, bus, and railroad lockers and the like. Tangible personal property of an inactive nonprofit association in the control or possession of a member or other person is not likely to be in these places. Therefore, overlap of this Act with the other state acts with respect to tangible personal property is likely to be very limited.

Property of an inactive nonprofit association is likely to be in the possession or control of a former member, board member, officer, or employee. Especially with respect to intangible property, their relation to the property is unlike that of those regulated by the unclaimed property acts. They are custodians or fiduciaries and not obligors. Those upon whom duties are imposed by the unclaimed property acts are obligors on such intangible property as bank accounts, money orders, life insurance policies, and utility deposits. The person acting under Section 9 is very unlikely to be in the position of an obligor on such intangible property. In summary, there appears to be limited overlap.

Other special statutes may apply, such as laws governing unexpended campaign funds. Texas, for example, permits a person to retain political contributions for six years after the person is no longer an office-holder or candidate. It gives the person six choices of transferees, including a "recognized tax exempt charitable organization formed for educational, religious or scientific purposes." Tex. Code Ann. Elections Section 251.012(d) and (e) (Vernon's 1986). Minnesota provides that if an unincorporated religious society "ceases to exist or to maintain its organization" title to its real and personal property vests in the "next higher governing or supervisory" body of the same denomination. Minn. Stat. Ann. Section 315.37 (West 1992).

4. It is the custody of and not the title to the property that is transferred. To whatever purpose the property was dedicated while in the hands of the transferor, it remains so dedicated in the hands of the transferee. Identification of the persons to whom the property may be transferred and *cy pres* principles recognize that the purpose to which the transferee may



put the property need not be precisely that to which it was initially dedicated. For example, the initial purpose may no longer be viable.

5. Section 9 [this section] does not address what should be done with real property of an inactive nonprofit association. This seems justified. A nonprofit association owning real property of significant value is unlikely to become inactive. In the rare case that it does, the assistance of a court may be obtained in making appropriate disposition of the real property, primarily to ensure good title.

6. To obtain a Section 501(c)(3) tax classification as a nonprofit association an association must specify a distribution of assets on dissolution that satisfies the Internal Revenue Code. To avoid the interpretation that Section 9 might be construed to override an approved distribution provision in an association's governing document the primacy of that distribution provision is expressly recognized in paragraph (1).

7. If there is no bylaw or other controlling document the person may transfer the custody of the personal property to another nonprofit organization or a government or governmental entity. The nonprofit organization need not have the same nonprofit purpose as the inactive one. It is enough that the transferee's purpose is "broadly similar." This requirement should not be construed narrowly. Otherwise, the risk of potential litigation over the transferor's choice will frustrate the section's purpose to provide a safe harbor.

There is no limitation with respect to the choice of a government or governmental entity.

8. Inasmuch as the transfer is made without consideration and the association almost certainly rendered insolvent, creditors of a nonprofit association would be protected by the Uniform Fraudulent Transfer Act Sections 4(a) and 5 [G.S. 39-23.4(a) and G.S. 39-23.5] and similar statutes. Whether they would also be protected if the transfer is made to the administrator of an unclaimed property statute depends on the terms of a jurisdiction's act. Uniform Unclaimed Property Act (1981) Sections 20 and 24 contemplate that a creditor may proceed against property in the hands of the administrator if the creditor claims an interest in the property, such as a security interest or judgment lien. It is less clear that Section 15 of the 1995 Act recognizes this action. However, a general creditor without some claim against the property would not be protected. It is unlikely that an inactive nonprofit association would have both unpaid creditors and a significant amount of property. Therefore, the two issues discussed above are unlikely to arise.

9. The person in possession or control is not required to give notice of the proposed transfer to anyone. An examination of to whom notice might reasonably be given reveals the difficulty with such a requirement. Almost by definition an inactive nonprofit association has no current members.

#### NORTH CAROLINA COMMENT

In subsection (a), the General Statutes Commission added the reference to "document of gift" to cover restricted gifts. In subsection (b),

the Commission added the reference to a nonprofit entity other than a nonprofit association or nonprofit corporation.

### § 59B-11. Appointment of agent to receive service of process.

(a) A nonprofit association may file in the office of the Secretary of State a statement appointing an agent authorized to receive service of process, notice, or demand required or permitted by law to be served on a nonprofit association.

(b) A statement appointing an agent must set forth all of the following:

- (1) The name of the nonprofit association.
- (2) Reserved for future codification purposes.
- (3) The street address, and the mailing address if different from the street address, of the nonprofit association, and the county in which it is located, or, if the nonprofit association does not have an address in this State, its address out-of-state.
- (4) The name of the person in this State authorized to receive service of process and the person's address, including the street address, in this State.

(c) A statement appointing an agent must be signed and acknowledged by a person authorized to manage the affairs of a nonprofit association. The statement must also be signed and acknowledged by the person appointed agent, who thereby accepts the appointment. The appointed agent may resign



by filing a resignation in the office of the Secretary of State and giving written notice to the nonprofit association at its last known address.

(d) The sole duty of the appointed agent to the nonprofit association is to forward to the nonprofit association at its last known address any notice, process, or demand that is served on the appointed agent.

(e) The Secretary of State is not an agent for service of any process, notice, or demand on any nonprofit association.

(f) The Secretary of State shall collect the following fees when the documents described in this subsection are delivered to the Secretary of State for filing:

Document	Fee
(1) Statement appointing an agent to receive service of process	\$5.00
(2) Amendment of statement appointing an agent	5.00
(3) Cancellation of statement appointing an agent	5.00
(4) Agent's statement of resignation	No fee
(g) An amendment to or cancellation of a statement appointing an agent to receive service of process must meet the requirements for execution of an original statement. (2006-226, s. 1.)	

OFFICIAL COMMENT

1. This section authorizes but does not require a nonprofit association to file a statement authorizing an agent to receive service of process. It is, of course, not the equivalent of filing articles of incorporation. However, some nonprofit associations may find it prudent to file. Filing may assure that the nonprofit association's leadership gets prompt notice of any lawsuit filed against it. Also, depending upon the jurisdiction's other laws, filing gives some public notice of the nonprofit association's existence and address.

2. Central filing with a state official is provided. This is where parties will seek information of this kind and where this is commonly publicly filed.

3. The format of this section is very much like Section 5 [G.S. 59B-6], which concerns a statement of authority with respect to property. Because one requires local and [the] other central filing they are not combined.

NORTH CAROLINA COMMENT

The General Statutes Commission modified this section in subsection (a) by adding the reference to "notice, or demand required or permitted by law to be served on a nonprofit association." In subsection (b), the Commission deleted the Uniform Act's requirement for a federal tax identification number due to concerns over identity theft and the belief that the requirement was not useful in any event and conformed the requirement for an address, in part, to similar requirements for the statutes

regulating other entities. The Commission modified subsection (c) by requiring that the agent give "written" notice of the agent's resignation to the nonprofit association "at its last known address." The Commission also added subsections (d) and (e) and substituted a fee schedule for the Uniform Act's fee provision. The filing fees in subsection (f) are the same as those for similar documents filed by nonprofit corporations and business entities.

§ 59B-12. Claim not abated by change.

A claim for relief against a nonprofit association does not abate merely because of a change in its members or persons authorized to manage the affairs of the nonprofit association. (2006-226, s. 1.)

OFFICIAL COMMENT

This provision reverses the common law rule of partnerships, which courts often extended to unincorporated nonprofit associations. Uniform Partnership Act (1994) Sections 29 and 31(4).

This Act's entity approach requires this change of the old common law rule. Similar provisions are found in many state statutes. See, for example, Ohio Rev. Code Ann., Corporations,

Section 1745.04 (Baldwin 1991); Md. Ann. Code art. 6-406(a)(2); and 12 Vt. Stat. Ann. Section 815 (Equity Pub. 1973). Uniform Partnership

Act (1994) adopts an entity approach and so changes the old rule. See Sections 603(a) 701, and 801 of 1994 Act.

## § 59B-13. Venue.

For purposes of venue, a nonprofit association is a resident of a county in which it has an office or maintains a place of operation or, if on due inquiry no office or place of operation can be found, in which any officer resides. (2006-226, s. 1.)

### OFFICIAL COMMENT

1. Venue, unlike service of process, is treated by statute. See for example Mont. Code Ann. Section 25-2-118(1) (1991); 28 USCA 1391. A criterion used by all States for fixing venue is the county of residence of the defendant. Most States specify as many as eight additional grounds for venue, including the county in which the real estate that is the subject of the suit is situated and the county in which the act causing, in whole or in part, the personal injury or other tort occurred. None of these additional criteria present a special problem with respect to an unincorporated nonprofit association.

2. If an aggregate view of a nonprofit association were taken, the association is resident in any county in which a member resides. See Wright, Miller, & Cooper, 15 *Federal Procedure & Practice* 3812 (1986). Conforming to the

entity view of an association, Section 12 rejects the common law view.

This section is bracketed because some States have already satisfactorily solved this problem.

States have by statute modified the common law rule. Illinois, for example, provides that “a voluntary unincorporated association sued in its own name is a resident of any county in which it has an office or if on due inquiry no office can be found, in which any officer resides.” Ill. Code Civ. Prac. Section 2-102(c).

3. Section 12 [this section] makes a nonprofit association a resident of any county . . . in which it has an office. If it has an office in five counties, for example, it may be sued in any of the five counties.

...

### NORTH CAROLINA COMMENT

The General Statutes Commission modified this section by expanding a nonprofit association’s residence for venue purposes to include the county in which the nonprofit association maintains a place of operation or in which any officer resides.

Section 13 of the Uniform Act (Summons and complaint; service on whom) was omitted as unnecessary.

## § 59B-14. Uniformity of application and construction.

This Chapter shall be applied and construed to effectuate its general purpose to make uniform the law with respect to the subject of this Chapter among states enacting it. (2006-226, s. 1.)

## § 59B-15. Effect as to conveyances by trustees; prior deeds validated.

(a) Nothing in this Chapter changes the law with reference to the holding and conveyance of land by the trustees of churches under Chapter 61 of the General Statutes where the land is conveyed to and held by the trustees.

(b) All deeds executed before January 1, 2007, in conformity with former G.S. 39-24 and former G.S. 39-25 are declared to be sufficient to pass title to real estate. (1939, c. 133, ss. 3, 4; 2006-226, s. 2(b).)

## NORTH CAROLINA COMMENT

This section is not in the Uniform Act. It is derived from former G.S. 39-26 and former G.S. 39-27.

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**Editor's Note.** — This section was formerly numbered G.S. 39-24 and 39-25. It was recodified as G.S. 59B-15 by Session Laws 2006-226, s. 2(b).

Session Laws 2006-226, s. 5 is a severability clause.

Session Laws 2006-226, s. 6, provides that: "This act does not affect an action or proceeding commenced or right accrued before this act takes effect."

Session Laws 2006-226, s. 7, provides that: "The Revisor of Statutes shall cause to be printed along with this act all relevant portions of the official comments to the Uniform Unincorporated Nonprofit Association Act and all explanatory comments of the drafters of this act as the Revisor deems appropriate."

**Effect of Amendments.** — Session Laws 2006-226, s. 2(b), effective January 1, 2007, rewrote this section.



## Chapter 62.

### Public Utilities.

#### Article 9.

#### Acquisition and Condemnation of Property.

Sec.

62-182.1. Access to dedicated public right-of-way.

#### Article 10.

#### Transportation in General.

62-212. Indemnity agreements in motor carrier transportation contracts.

#### Article 14.

#### Fees and Charges.

Sec.

62-302. (Effective until July 1, 2007) Regulatory fee.

62-302. (Effective July 1, 2007) Regulatory fee.

### ARTICLE 1.

#### *General Provisions.*

### § 62-2. Declaration of policy.

#### CASE NOTES

**Cited** in State ex rel. Utils. Comm'n v. Carolina Power & Light Co., 359 N.C. 516, 614 S.E.2d 281, 2005 N.C. LEXIS 648 (2005).

### ARTICLE 3.

#### *Powers and Duties of Utilities Commission.*

### § 62-30. General powers of Commission.

#### CASE NOTES

**Regulatory Condition was Authorized.** — Where G.S. 62-30 and 62-32(b) gave the Utility Commission “all powers necessary” to regulate public utilities to ensure the citizens of North Carolina were provided with reasonable service, a regulatory condition was authorized because the regulation’s purpose was to ensure

the supply of electricity to retail customers. State ex rel. Utils. Comm’n v. Carolina Power & Light Co., — N.C. App. —, 622 S.E.2d 169, 2005 N.C. App. LEXIS 2590 (2005).

**Cited** in State ex rel. Utils. Comm’n v. Carolina Power & Light Co., 359 N.C. 516, 614 S.E.2d 281, 2005 N.C. LEXIS 648 (2005).

### § 62-32. Supervisory powers; rates and service.

#### CASE NOTES

**Regulatory Condition Authorized.** — Where G.S. 62-30 and 62-32(b) gave the Utility Commission “all powers necessary” to regulate public utilities to ensure the citizens of North Carolina were provided with reasonable service, a regulatory condition was authorized

because the regulation’s purpose was to ensure the supply of electricity to retail customers. State ex rel. Utils. Comm’n v. Carolina Power & Light Co., — N.C. App. —, 622 S.E.2d 169, 2005 N.C. App. LEXIS 2590 (2005).

**Cited** in State ex rel. Utils. Comm’n v. Caro-

lina Power & Light Co., 359 N.C. 516, 614 S.E.2d 281, 2005 N.C. LEXIS 648 (2005).

## § 62-33. Commission to keep informed as to utilities.

### CASE NOTES

**Cited** in State ex rel. Utils. Comm'n v. Carolina Power & Light Co., 359 N.C. 516, 614 S.E.2d 281, 2005 N.C. LEXIS 648 (2005).

## § 62-42. Compelling efficient service, extensions of services and facilities, additions and improvements.

### CASE NOTES

**Cited** in State ex rel. Utils. Comm'n v. Carolina Power & Light Co., 359 N.C. 516, 614 S.E.2d 281, 2005 N.C. LEXIS 648 (2005).

### ARTICLE 4.

#### *Procedure before the Commission.*

## § 62-79. Final orders and decisions; findings; service; compliance.

### CASE NOTES

#### **Findings Held Sufficient. —**

Commission's order was sufficient to allow the appellate court to determine the issues of jurisdiction, i.e. violation of the commerce clause, supremacy of federal law, and statutory

authorization. State ex rel. Utils. Comm'n v. Carolina Power & Light Co., — N.C. App. —, 622 S.E.2d 169, 2005 N.C. App. LEXIS 2590 (2005).

### ARTICLE 6.

#### *The Utility Franchise.*

## § 62-110.1. Certificate for construction of generating facility; analysis of long-range needs for expansion of facilities.

### CASE NOTES

#### **Scope of Commission's Authority and Jurisdiction. —**

Because the North Carolina Utilities Commission had authority to conduct a pre-sale review of proposed contracts involving sales of electricity by a utility to wholesale customers in

interstate commerce under G.S. 62-110.1(a), (c), (d), its actions were not preempted by 16 U.S.C.S. §§ 824(a), (b)(1), 824e(a), (d), 824d(a), (c). State ex rel. Utils. Comm'n v. Carolina Power & Light Co., 359 N.C. 516, 614 S.E.2d 281, 2005 N.C. LEXIS 648 (2005).

## ARTICLE 7.

*Rates of Public Utilities.***§ 62-133.6. Environmental compliance costs recovery.****Editor's Note. —**

Session Laws 2006-79, s. 12, amended Session Laws 2002-4, s. 11, to change the date on which the Environmental Management Commission shall begin reporting annually its findings and recommendations to the General Assembly and the Environmental Review Commission from 1 September 2005 until 1 September 2007.

Session Laws 2005-442, ss. 1 through 12, as amended by Session Laws 2006-73, s. 1, provide as follows: "Commission Established; Membership. - The Legislative Commission on Global Climate Change is hereby established. The Commission shall consist of 34 members as follows:

"(1) Nine members appointed by the President Pro Tempore of the Senate.

"(2) Nine members appointed by the Speaker of the House of Representatives.

"(3) The President of Duke Power or the President's designee.

"(4) The President of Progress Energy or the President's designee.

"(5) The President of the North Carolina Citizens for Business and Industry or the President's designee.

"(6) The President of the Manufacturers and Chemical Industry Council of North Carolina or the President's designee.

"(7) The President of the North Carolina Farm Bureau Federation or the President's designee.

"(8) The President of the North Carolina Forestry Association or the President's designee.

"(9) The Southeast Regional Director of Environmental Defense or the Regional Director's designee.

"(10) The Executive Director of the Southern Alliance for Clean Energy or the Executive Director's designee.

"(11) The Executive Director of the North Carolina Coastal Federation or the Executive Director's designee.

"(12) The Executive Director of the North Carolina Conservation Council or the Executive Director's designee.

"(13) The Dean of the Nicholas School of the Environment and Earth Sciences, Duke University, or the Dean's designee.

"(14) The Dean of the College of Agriculture and Life Sciences at North Carolina State University or the Dean's designee.

"(15) The Dean of the School of Agriculture

and Environmental Sciences at North Carolina Agricultural and Technical State University or the Dean's designee.

"(16) The Director of the Carolina Environmental Program at the University of North Carolina at Chapel Hill or the Director's designee.

"(17) The Distinguished Research Professor (with expertise in sea level change), Department of Geology at East Carolina University.

"(18) The North Carolina State Climatologist.

"Cochairs. - The Commission shall have two cochairs, one designated by the President Pro Tempore of the Senate and one designated by the Speaker of the House of Representatives from among their respective appointees. The Commission shall meet upon the call of the cochairs.

"Quorum. - A quorum of the Commission shall consist of 18 members.

"Vacancies. - Any vacancy on the Commission shall be filled by the original appointing authority.

"Purpose and Duties. - The Commission shall have the following purposes and duties:

"(1) The Commission shall conduct an in-depth examination of issues related to global climate change. This examination shall include all of the following:

"a. A review of current scientific literature on the possible natural and anthropogenic causes of global climate change.

"b. A review of actions taken by the federal government and by other states to address global warming.

"c. An examination of the emissions of greenhouse gases from within the State and the extent to which reductions in the emissions of these gases in the State, region, nation, and worldwide could be expected to affect global climate change.

"d. An evaluation of the economic opportunities for the State that may result from international, national, and State action to address global climate change and the emerging carbon market.

"e. The potential impacts of global climate change on the citizens, natural resources, and economy of the State, including agriculture, travel and tourism, recreation, coastal real estate, insurance, and other economic sectors.

"f. The costs of any action taken by the State to address global climate change on individuals, individual households, local governments,



businesses, educational institutions, agricultural operations, the State government, and other institutions and economic sectors.

"The benefits of any action taken by or within the State or other states and at the national or international levels to address global climate change on individuals, individual households, local governments, businesses, educational institutions, agricultural operations, the State government, and other institutions and economic sectors.

"(2) If, in the course of its examination, the Commission determines that it would be appropriate and desirable for the State to establish a global warming pollutant reduction goal, the Commission may develop a recommended global warming pollutant reduction goal for the State.

"(3) In conducting its examination of global climate change, the Commission shall consider and integrate the findings and recommendations of the study of issues related to the development and implementation of standards and plans to control emissions of carbon dioxide required by Section 13 of S.L. 2002-4.

"(4) Based on its examination of global climate change, the Commission shall develop findings and recommendations, including any legislative proposals it determines to be appropriate, for consideration by the General Assembly.

"Additional Duties. - The Commission may work cooperatively with other state and national governments to organize a forum on global climate change, including its causes,

impacts, challenges, and opportunities in the southeastern United States. The Commission may also work cooperatively with other State agencies with respect to the agencies' areas of responsibilities regarding greenhouse gas emissions and climate change.

"Expenses of Members. - Members of the Commission shall receive per diem, subsistence, and travel allowances in accordance with G.S. 120-3.1, 138-5, or 138-6, as appropriate.

"Staff. - Upon the prior approval of the Legislative Services Commission, the Legislative Services Officer shall assign professional staff to the Commission to aid in its work.

"Consultants. - The Commission may hire consultants to assist with the study as provided in G.S. 120-32.02(b).

"Meetings. - The Commission may meet in the Legislative Building or the Legislative Office Building upon the approval of the Legislative Services Commission.

"Reports. - The Commission shall submit an interim report to the General Assembly and the Environmental Review Commission no later than 15 January 2007 and may submit interim reports at other times at its discretion. The Commission shall submit a final report, including any findings and recommendations, to the General Assembly and the Environmental Review Commission on or before 15 April 2008, at which time the Commission shall terminate.

"Funding. - From funds appropriated to the General Assembly, the Legislative Services Commission shall allocate funds for the purpose of conducting the study provided for in this Part."

## ARTICLE 9.

### *Acquisition and Condemnation of Property.*

#### **§ 62-182.1. Access to dedicated public right-of-way.**

When any map or plat of a subdivision, recorded as provided in G.S. 47-30 and G.S. 136-102.6, reflects the dedication of a public street or other public right-of-way, the dedicated public street or public right-of-way shall, upon recordation of the map or plat, become immediately available for use by any public utility, telephone membership corporation organized under G.S. 117-30, or cable television system to install, maintain, and operate lines, cables, or facilities for the provision of service to the public. No public utility, telephone membership corporation organized under G.S. 117-30, or cable television system shall place or erect any line, cable, or facility in, over, or upon a street or right-of-way in a subdivision that is intended to become a public street or public right-of-way, until a map or plat of the subdivision has been recorded as provided in G.S. 47-30 and G.S. 136-102.6, and except in accordance with procedures established by the Department of Transportation, Division of Highways, for accommodating utilities or cable television systems on highway rights-of-way. Upon recordation of a map or plat of a subdivision as provided in G.S. 47-30 and G.S. 136-102.6, no liability shall attach to the developer of the property as a result of any activity of a public utility, telephone membership

corporation organized under G.S. 117-30, or cable television system occurring in the dedicated public street or public right-of-way. Nothing in this section shall relieve the developer of the property of responsibilities under G.S. 136-102.6. (2005-286, s. 1; 2006-259, s. 15.)

**Effect of Amendments.** — Session Laws 2006-259, s. 15, effective August 23, 2006, inserted “telephone membership corporation or-

ganized under G.S. 117-30,” throughout this section.

## ARTICLE 10.

### *Transportation in General.*

#### **§ 62-212. Indemnity agreements in motor carrier transportation contracts.**

(a) A provision, clause, covenant, or agreement contained in, collateral to, or affecting a motor carrier transportation contract that purports to indemnify, defend, or hold harmless, or has the effect of indemnifying, defending, or holding harmless the promisee from or against any liability for loss or damage resulting from the negligence or intentional acts or omission of the promisee is against the public policy of this State and is void and unenforceable.

(b) The following definitions apply in this section:

(1) Motor carrier transportation contract. — A contract, agreement, or understanding covering at least one of the following:

- a. The transportation of property for compensation or hire by the motor carrier.
- b. Entrance on property by the motor carrier for the purpose of loading, unloading, or transporting property for compensation or hire.
- c. A service incidental to activity described in sub-subdivision a. or b. of this subdivision, including storage of property.

(2) Promisee. — The person with whom the motor carrier enters into a motor carrier transportation contract and any agents, employees, servants, or independent contractors who are directly responsible to that person, except for motor carriers party to a motor carrier transportation contract with the person, and the motor carrier’s agents, employees, servants, or independent contractors directly responsible to the motor carrier.

(c) Nothing contained in this section affects a provision, clause, covenant, or agreement where the motor carrier indemnifies or holds harmless the contract’s promisee against liability for damages to the extent that the damages were caused by and resulted from the negligence of the motor carrier, its agents, employees, servants, or independent contractors who are directly responsible to the motor carrier.

(d) Notwithstanding the other provisions contained in this section, the term “motor carrier transportation contract”, as defined in this section, shall not include the Uniform Intermodal Interchange and Facilities Access Agreement administered by the Intermodal Association of North America, or other agreements providing for the interchange, use or possession of intermodal chassis, containers, trailers, or other intermodal equipment that contain substantially the same indemnity provision as the provision contained in the Uniform Intermodal Interchange and Facilities Access Agreement. (2005-185, s. 1; 2006-264, s. 45.5(a).)



**Effect of Amendments.** — Session Laws after October 1, 2005, substituted “affects” for 2006-264, s. 45.5(a), effective October 1, 2005, “effects” near the beginning of subsection (c). and applicable to contracts entered into on or

## ARTICLE 14.

### *Fees and Charges.*

#### **§ 62-302. (Effective until July 1, 2007) Regulatory fee.**

(a) **Fee Imposed.** — It is the policy of the State of North Carolina to provide fair regulation of public utilities in the interest of the public, as provided in G.S. 62-2. The cost of regulating public utilities is a burden incident to the privilege of operating as a public utility. Therefore, for the purpose of defraying the cost of regulating public utilities, every public utility subject to the jurisdiction of the Commission shall pay a quarterly regulatory fee, in addition to all other fees and taxes, as provided in this section. The fees collected shall be used only to pay the expenses of the Commission and the Public Staff in regulating public utilities in the interest of the public.

It is also the policy of the State to provide limited oversight of certain electric membership corporations as provided in G.S. 62-53. Therefore, for the purpose of defraying the cost of providing the oversight authorized by G.S. 62-53 and G.S. 117-18.1, each fiscal year each electric membership corporation whose principal purpose is to furnish or cause to be furnished bulk electric supplies at wholesale as provided in G.S. 117-16 shall pay an annual fee as provided in this section.

(b) **Public Utility Rate.** —

- (1) Repealed by Session Laws 2000-140, s. 56, effective July 21, 2000.
- (2) The public utility regulatory fee for each fiscal year shall be the greater of (i) a percentage rate, established by the General Assembly, of each public utility’s North Carolina jurisdictional revenues for each quarter or (ii) six dollars and twenty-five cents (\$6.25) each quarter.

When the Commission prepares its budget request for the upcoming fiscal year, the Commission shall propose a percentage rate of the public utility regulatory fee. For fiscal years beginning in an odd-numbered year, that proposed rate shall be included in the budget message the Governor submits to the General Assembly pursuant to G.S. 143-11. For fiscal years beginning in an even-numbered year, that proposed rate shall be included in a special budget message the Governor shall submit to the General Assembly. The General Assembly shall set the percentage rate of the public utility regulatory fee by law.

The percentage rate may not exceed the amount necessary to generate funds sufficient to defray the estimated cost of the operations of the Commission and the Public Staff for the upcoming fiscal year, including a reasonable margin for a reserve fund. The amount of the reserve may not exceed the estimated cost of operating the Commission and the Public Staff for the upcoming fiscal year. In calculating the amount of the reserve, the General Assembly shall consider all relevant factors that may affect the cost of operating the Commission or the Public Staff or a possible unanticipated increase or decrease in North Carolina jurisdictional revenues.

- (3) If the Commission, the Public Staff, or both experience a revenue shortfall, the Commission shall implement a temporary public utility regulatory fee surcharge to avert the deficiency that would otherwise occur. In no event may the total percentage rate of the public utility



**G.S. 62-302 is set out twice. See notes.**

regulatory fee plus any surcharge established by the Commission exceed twenty-five hundredths percent (0.25%).

- (4) As used in this section, the term "North Carolina jurisdictional revenues" means all revenues derived or realized from intrastate tariffs, rates, and charges approved or allowed by the Commission or collected pursuant to Commission order or rule, but not including tap-on fees or any other form of contributions in aid of construction.

(b1) Electric Membership Corporation Rate. — The electric membership corporation regulatory fee for each fiscal year shall be a dollar amount as established by the General Assembly by law.

When the Commission prepares its budget request for the upcoming fiscal year, the Commission shall propose the amount of the electric membership corporation regulatory fee. For fiscal years beginning in an odd-numbered year, the proposed amount shall be included in the budget message the Governor submits to the General Assembly pursuant to G.S. 143-11. For fiscal years beginning in an even-numbered year, the proposed amount shall be included in a special budget message the Governor shall submit to the General Assembly.

The amount of the electric membership corporation regulatory fee proposed by the Commission may not exceed the amount necessary to defray the estimated cost of the operations of the Commission and the Public Staff for the regulation of the electric membership corporations in the upcoming fiscal year, including a reasonable margin for a reserve fund. The amount of the reserve may not exceed the estimated cost of the Commission and the Public Staff for the regulation of the electric membership corporations for the upcoming fiscal year.

(c) When Due. — The electric membership corporation regulatory fee imposed under this section shall be paid in quarterly installments. The fee is due and payable to the Commission on or before the 15th day of the second month following the end of each quarter.

The public utility regulatory fee imposed under this section is due and payable to the Commission on or before the 15th day of the second month following the end of each quarter. Every public utility subject to the public utility regulatory fee shall, on or before the date the fee is due for each quarter, prepare and render a report on a form prescribed by the Commission. The report shall state the public utility's total North Carolina jurisdictional revenues for the preceding quarter and shall be accompanied by any supporting documentation that the Commission may by rule require. Receipts shall be reported on an accrual basis.

If a public utility's report for the first quarter of any fiscal year shows that application of the percentage rate would yield a quarterly fee of twenty-five dollars (\$25.00) or less, the public utility shall pay an estimated fee for the entire fiscal year in the amount of twenty-five dollars (\$25.00). If, after payment of the estimated fee, the public utility's subsequent returns show that application of the percentage rate would yield quarterly fees that total more than twenty-five dollars (\$25.00) for the entire fiscal year, the public utility shall pay the cumulative amount of the fee resulting from application of the percentage rate, to the extent it exceeds the amount of fees, other than any surcharge, previously paid.

(d) Use of Proceeds. — A special fund in the office of State Treasurer, the Utilities Commission and Public Staff Fund, is created. The fees collected pursuant to this section and all other funds received by the Commission or the Public Staff, except for the clear proceeds of civil penalties collected pursuant to G.S. 62-50(d) and the clear proceeds of funds forfeited pursuant to G.S.

**G.S. 62-302 is set out twice. See notes.**

62-310(a), shall be deposited in the Utilities Commission and Public Staff Fund. The Fund shall be placed in an interest bearing account and any interest or other income derived from the Fund shall be credited to the Fund. Moneys in the Fund shall only be spent pursuant to appropriation by the General Assembly.

The Utilities Commission and Public Staff Fund shall be subject to the provisions of the Executive Budget Act except that no unexpended surplus of the Fund shall revert to the General Fund. All funds credited to the Utilities Commission and Public Staff Fund shall be used only to pay the expenses of the Commission and the Public Staff in regulating public utilities in the interest of the public as provided by this Chapter and in regulating electric membership corporations as provided in G.S. 117-18.1.

The clear proceeds of civil penalties collected pursuant to G.S. 62-50(d) and the clear proceeds of funds forfeited pursuant to G.S. 62-310(a) shall be remitted to the Civil Penalty and Forfeiture Fund in accordance with G.S. 115C-457.2. (1989, c. 787, s. 1; 1998-215, s. 126; 1999-180, s. 5; 2000-140, s. 56.)

**Section Set Out Twice.** — The section above is effective until July 1, 2007. For the section as amended July 1, 2007, see the following section, also numbered G.S. 62-302.

**Editor's Note.** —

Session Laws 2006-66, s. 1.2, provides: "This act shall be known as 'The Current Operations and Capital Improvements Appropriations Act of 2006'."

Session Laws 2006-203, s. 126, provides: "This act becomes effective July 1, 2007, and applies to the budget for the 2007-2009 biennium and each subsequent biennium thereafter. Prosecutions for offenses committed before the effective date of this act are not abated or affected by this act, and the statutes that would be applicable but for this act remain applicable to those prosecutions."

Session Laws 2006-66, s. 26.1(a), provides: "The percentage rate to be used in calculating

the public utility regulatory fee under G.S. 62-302(b)(2) is twelve-hundredths of one percent (0.12%) for each public utility's North Carolina jurisdictional revenues earned during each quarter that begins on or after July 1, 2006."

Session Laws 2006-66, s. 26.1(b), provides: "The electric membership corporation regulatory fee imposed under G.S. 62-302(b1) for the 2006-2007 fiscal year is two hundred thousand dollars (\$200,000)."

Session Laws 2006-66, s. 28.3, provides: "Except for statutory changes or other provisions that clearly indicate an intention to have effects beyond the 2006 2007 fiscal year, the textual provisions of this act apply only to funds appropriated for, and activities occurring during, the 2006 2007 fiscal year."

Session Laws 2006-66, s. 28.6 is a severability clause.

**§ 62-302. (Effective July 1, 2007) Regulatory fee.**

(a) **Fee Imposed.** — It is the policy of the State of North Carolina to provide fair regulation of public utilities in the interest of the public, as provided in G.S. 62-2. The cost of regulating public utilities is a burden incident to the privilege of operating as a public utility. Therefore, for the purpose of defraying the cost of regulating public utilities, every public utility subject to the jurisdiction of the Commission shall pay a quarterly regulatory fee, in addition to all other fees and taxes, as provided in this section. The fees collected shall be used only to pay the expenses of the Commission and the Public Staff in regulating public utilities in the interest of the public.

It is also the policy of the State to provide limited oversight of certain electric membership corporations as provided in G.S. 62-53. Therefore, for the purpose of defraying the cost of providing the oversight authorized by G.S. 62-53 and G.S. 117-18.1, each fiscal year each electric membership corporation whose principal purpose is to furnish or cause to be furnished bulk electric supplies at wholesale as provided in G.S. 117-16 shall pay an annual fee as provided in this section.



**G.S. 62-302 is set out twice. See notes.****(b) Public Utility Rate. —**

- (1) Repealed by Session Laws 2000-140, s. 56, effective July 21, 2000.
- (2) The public utility regulatory fee for each fiscal year shall be the greater of (i) a percentage rate, established by the General Assembly, of each public utility's North Carolina jurisdictional revenues for each quarter or (ii) six dollars and twenty-five cents (\$6.25) each quarter.

When the Commission prepares its budget request for the upcoming fiscal year, the Commission shall propose a percentage rate of the public utility regulatory fee. For fiscal years beginning in an odd-numbered year, that proposed rate shall be included in the budget message the Governor submits to the General Assembly pursuant to G.S. 143C-3-5. For fiscal years beginning in an even-numbered year, that proposed rate shall be included in a special budget message the Governor shall submit to the General Assembly. The General Assembly shall set the percentage rate of the public utility regulatory fee by law.

The percentage rate may not exceed the amount necessary to generate funds sufficient to defray the estimated cost of the operations of the Commission and the Public Staff for the upcoming fiscal year, including a reasonable margin for a reserve fund. The amount of the reserve may not exceed the estimated cost of operating the Commission and the Public Staff for the upcoming fiscal year. In calculating the amount of the reserve, the General Assembly shall consider all relevant factors that may affect the cost of operating the Commission or the Public Staff or a possible unanticipated increase or decrease in North Carolina jurisdictional revenues.

- (3) If the Commission, the Public Staff, or both experience a revenue shortfall, the Commission shall implement a temporary public utility regulatory fee surcharge to avert the deficiency that would otherwise occur. In no event may the total percentage rate of the public utility regulatory fee plus any surcharge established by the Commission exceed twenty-five hundredths percent (0.25%).
- (4) As used in this section, the term "North Carolina jurisdictional revenues" means all revenues derived or realized from intrastate tariffs, rates, and charges approved or allowed by the Commission or collected pursuant to Commission order or rule, but not including tap-on fees or any other form of contributions in aid of construction.

**(b1) Electric Membership Corporation Rate. —** The electric membership corporation regulatory fee for each fiscal year shall be a dollar amount as established by the General Assembly by law.

When the Commission prepares its budget request for the upcoming fiscal year, the Commission shall propose the amount of the electric membership corporation regulatory fee. For fiscal years beginning in an odd-numbered year, the proposed amount shall be included in the budget message the Governor submits to the General Assembly pursuant to G.S. 143C-3-5. For fiscal years beginning in an even-numbered year, the proposed amount shall be included in a special budget message the Governor shall submit to the General Assembly.

The amount of the electric membership corporation regulatory fee proposed by the Commission may not exceed the amount necessary to defray the estimated cost of the operations of the Commission and the Public Staff for the regulation of the electric membership corporations in the upcoming fiscal year, including a reasonable margin for a reserve fund. The amount of the reserve may not exceed the estimated cost of the Commission and the Public Staff for



**G.S. 62-302 is set out twice. See notes.**

the regulation of the electric membership corporations for the upcoming fiscal year.

(c) When Due. — The electric membership corporation regulatory fee imposed under this section shall be paid in quarterly installments. The fee is due and payable to the Commission on or before the 15th day of the second month following the end of each quarter.

The public utility regulatory fee imposed under this section is due and payable to the Commission on or before the 15th day of the second month following the end of each quarter. Every public utility subject to the public utility regulatory fee shall, on or before the date the fee is due for each quarter, prepare and render a report on a form prescribed by the Commission. The report shall state the public utility's total North Carolina jurisdictional revenues for the preceding quarter and shall be accompanied by any supporting documentation that the Commission may by rule require. Receipts shall be reported on an accrual basis.

If a public utility's report for the first quarter of any fiscal year shows that application of the percentage rate would yield a quarterly fee of twenty-five dollars (\$25.00) or less, the public utility shall pay an estimated fee for the entire fiscal year in the amount of twenty-five dollars (\$25.00). If, after payment of the estimated fee, the public utility's subsequent returns show that application of the percentage rate would yield quarterly fees that total more than twenty-five dollars (\$25.00) for the entire fiscal year, the public utility shall pay the cumulative amount of the fee resulting from application of the percentage rate, to the extent it exceeds the amount of fees, other than any surcharge, previously paid.

(d) Use of Proceeds. — A special fund in the office of State Treasurer, the Utilities Commission and Public Staff Fund, is created. The fees collected pursuant to this section and all other funds received by the Commission or the Public Staff, except for the clear proceeds of civil penalties collected pursuant to G.S. 62-50(d) and the clear proceeds of funds forfeited pursuant to G.S. 62-310(a), shall be deposited in the Utilities Commission and Public Staff Fund. The Fund shall be placed in an interest bearing account and any interest or other income derived from the Fund shall be credited to the Fund. Moneys in the Fund shall only be spent pursuant to appropriation by the General Assembly.

The Utilities Commission and Public Staff Fund shall be subject to the provisions of the State Budget Act except that no unexpended surplus of the Fund shall revert to the General Fund. All funds credited to the Utilities Commission and Public Staff Fund shall be used only to pay the expenses of the Commission and the Public Staff in regulating public utilities in the interest of the public as provided by this Chapter and in regulating electric membership corporations as provided in G.S. 117-18.1.

The clear proceeds of civil penalties collected pursuant to G.S. 62-50(d) and the clear proceeds of funds forfeited pursuant to G.S. 62-310(a) shall be remitted to the Civil Penalty and Forfeiture Fund in accordance with G.S. 115C-457.2. (1989, c. 787, s. 1; 1998-215, s. 126; 1999-180, s. 5; 2000-140, s. 56; 2006-203, s. 18.)

**Section Set Out Twice.** — The section above is effective July 1, 2007. For the section as in effect until July 1, 2007, see the previous section, also numbered G.S. 62-302.

**Editor's Note.** — Session Laws 2006-66, s. 1.2, provides: "This act shall be known as 'The

Current Operations and Capital Improvements Appropriations Act of 2006'."

Session Laws 2006-66, s. 26.1(a), provides: "The percentage rate to be used in calculating the public utility regulatory fee under G.S. 62-302(b)(2) is twelve-hundredths of one per-

cent (0.12%) for each public utility's North Carolina jurisdictional revenues earned during each quarter that begins on or after July 1, 2006."

Session Laws 2006-66, s. 26.1(b), provides: "The electric membership corporation regulatory fee imposed under G.S. 62-302(b1) for the 2006-2007 fiscal year is two hundred thousand dollars (\$200,000)."

Session Laws 2006-66, s. 28.3, provides: "Except for statutory changes or other provisions that clearly indicate an intention to have effects beyond the 2006 2007 fiscal year, the textual provisions of this act apply only to funds appropriated for, and activities occurring during, the 2006 2007 fiscal year."

Session Laws 2006-66, s. 28.6 is a severability clause.

Session Laws 2006-203, s. 126, provides, in part: "Prosecutions for offenses committed before July 1, 2007, are not abated or affected by this act, and the statutes that would be applicable but for this act remain applicable to those prosecutions."

**Effect of Amendments.** — Session Laws 2006-203, s. 18, effective July 1, 2007, and applicable to the budget for the 2007-2009 biennium and each subsequent biennium thereafter, substituted "G.S. 143C-3-5" for "G.S. 143-11" in the first undesignated paragraphs following the second paragraph of subdivision (b)(2) and subsection (b1); and substituted "State Budget Act" for "Executive Budget Act" in the first sentence of the second paragraph of subsection (d).

## Chapter 62A.

# Public Safety Telephone Service and Wireless Telephone Service.

### Article 2.

#### Wireless Telephone Service.

Sec.

62A-22. Wireless 911 Board.

### ARTICLE 2.

#### *Wireless Telephone Service.*

### § 62A-22. Wireless 911 Board.

(a) There is created a Wireless 911 Board ("Board"), consisting of 13 members as follows:

- (1) Two members appointed by the Governor, one upon the recommendation of the North Carolina League of Municipalities and one upon the recommendation of the North Carolina Association of County Commissioners;
- (2) Five members appointed by the General Assembly upon the recommendation of the Speaker of the House of Representatives, one of whom shall be a sheriff, three representing CMRS providers licensed to do business in North Carolina and one representing the North Carolina Chapter of the Association of Public Safety Communications Officials (APCO);
- (3) Five members appointed by the General Assembly upon the recommendation of the President Pro Tempore of the Senate, one of whom shall be a chief of police, two representing CMRS providers licensed to do business in North Carolina, one representing local exchange carriers licensed to do business in North Carolina, and one representing the North Carolina Chapter of the National Emergency Number Association (NENA); and
- (4) The State Chief Information Officer or the Chief Information Officer's designee, who shall serve as the chair.

A quorum of the Board shall consist of seven members. The Board shall meet upon the call of the chair.

(b) Each member shall serve a term of four years and may be appointed to no more than two successive terms. Members shall remain in office until their successors are appointed and qualified. Vacancies shall be filled in the same manner as the original appointment.

(b1) G.S. 14-234 shall apply to members, officers, and employees of the Board. Members, officers, and employees of the Board shall disclose any interest, direct or indirect, they have in any firm or corporation interested in contracting with the Board, and the nature of that interest shall be included in the Board's minutes. A member, officer, or employee of the Board shall not participate in decisions involving parties with whom they have a conflict of interest.

(b2) The Governor may remove any member for misfeasance, malfeasance, or nonfeasance in accordance with G.S. 143B-13(d).

(c) There is established with the Treasurer the Wireless Fund into which the Board shall deposit all revenues derived from the service charge levied on



CMRS connections in the State and collected pursuant to G.S. 62A-23. The Wireless Fund shall be a separate fund restricted to the uses set forth in this Article.

(d) **(Effective until July 1, 2007)** Consistent with the provisions of G.S. 143-3.2, the Board shall disburse the revenues remitted to the Wireless Fund in the manner set forth in G.S. 62A-25. The Board shall establish procedures for disbursement of these revenues and advise the CMRS providers and eligible counties of such procedures within 60 days after all members are appointed pursuant to G.S. 62A-22(a).

(d) **(Effective July 1, 2007)** Consistent with the provisions of G.S. 143B-426.40G, the Board shall disburse the revenues remitted to the Wireless Fund in the manner set forth in G.S. 62A-25. The Board shall establish procedures for disbursement of these revenues and advise the CMRS providers and eligible counties of such procedures within 60 days after all members are appointed pursuant to G.S. 62A-22(a).

(e) The Board shall serve without compensation, but members of the Board shall receive per diem, subsistence, and travel allowances at the rate established in G.S. 138-5. (1998-158, s. 1; 2001-487, s. 21(a); 2005-439, s. 2; 2006-66, s. 6.19(a); 2006-203, s. 19; 2006-221, s. 3A; 2006-259, s. 40(a).)

**Subsection (d) Set Out Twice.** — The first version of subsection (d) set out above is effective until July 1, 2007. The second version of subsection (d) set out above is effective July 1, 2007.

**Editor's Note.** —

Session Laws 2006-66, s. 6.19(a), as added by Session Laws 2006-221, s. 3A, substituted G.S. 143B-426.39E for G.S. 143B-426.39B, which had been substituted for "G.S. 143-3.2" by Session Laws 2006-203, s. 19. The reference to G.S. 143B-426.39E has been changed to G.S. 143B-426.40G at the direction of the Revisor of Statutes.

Session Laws 2006-66, s. 1.2, provides: "This act shall be known as 'The Current Operations and Capital Improvements Appropriations Act of 2006.'"

Session Laws 2006-66, s. 28.3, provides: "Except for statutory changes or other provisions that clearly indicate an intention to have effects beyond the 2006-2007 fiscal year, the textual provisions of this act apply only to funds appropriated for, and activities occurring during, the 2006-2007 fiscal year."

Session Laws 2006-66, s. 28.6 is a severability clause.

Session Laws 2006-203, s. 126, provides, in part: "Prosecutions for offenses committed before the effective date of this act are not abated or affected by this act, and the statutes that would be applicable but for this act remain applicable to those prosecutions."

Session Laws 2006-259, s. 40(a), which made identical changes to those made by Session Laws 2006-66, s. 6.19(a) as added by Session Laws 2006-221, s. 3A, was repealed, pursuant to the terms of Session Laws 2006-259, s. 40(i) upon Session Laws 2006-221 becoming law.

**Effect of Amendments.** —

Session Laws 2006-66, s. 6.19(a), as added by Session Laws 2006-221, s. 3A, effective July 1, 2007, in subsection (d), substituted "G.S. 143B-426.39E" for "G.S. 143B-426.39B" which had been substituted for "G.S. 143-3.2" by Session Laws 2006-203, s. 19. See Editor's note.

Session Laws 2006-203, s. 19, effective July 1, 2007, and applicable to the budget for the 2007-2009 biennium and each biennium thereafter, substituted "G.S. 143B-426.39B" for "G.S. 143-3.2" in subsection (d).

**Chapter 63.**  
**Aeronautics.**

**ARTICLE 1.**

*Municipal Airports.*

**§ 63-3. Counties authorized to establish airports.**

**CASE NOTES**

**Applied** in Time Warner Entertainment-Advance/Newhouse P'ship v. Carteret-Craven Elec. Mbrshp. Corp., — F. Supp. 2d —, 2006

U.S. Dist. LEXIS 64195 (E.D.N.C. Aug. 11, 2006).

## Chapter 66.

### Commerce and Business.

#### Article 11.

##### Government in Business.

Sec.

66-58. Sale of merchandise or services by governmental units.

#### Article 26.

##### Farm Machinery Agreements.

66-181. Usage of trade.

#### Article 40.

##### Uniform Electronic Transactions Act.

66-313. Scope.

66-326. Transferable records.

#### Article 41.

##### Manufacturing Redevelopment Districts.

66-341. Purpose.

66-342. Establishment; criteria.

66-343. Qualified immunity for third-party claims; enforcement of environmental requirements.

Sec.

66-344. Assignment of liability.

66-345. Manufacturing redevelopment districts: transfer of property to a subsequent manufacturer.

66-346. Donation and transfer of the district; transfer to the State.

#### Article 42.

##### State Franchise for Cable Television Service.

66-350. Definitions.

66-351. State franchising authority.

66-352. Award of franchise and commencement of service.

66-353. Annual service report.

66-354. General filing and report requirements.

66-355. Effect on existing local franchise agreement.

66-356. Service standards and requirements.

66-357. Availability and use of PEG channels.

66-358. Transmission of PEG channels.

66-359. PEG channel grants.

66-360. Service to public building.

## ARTICLE 11.

### *Government in Business.*

#### § 66-58. Sale of merchandise or services by governmental units.

(a) Except as may be provided in this section, it shall be unlawful for any unit, department or agency of the State government, or any division or subdivision of the unit, department or agency, or any individual employee or employees of the unit, department or agency in his, or her, or their capacity as employee or employees thereof, to engage directly or indirectly in the sale of goods, wares or merchandise in competition with citizens of the State, or to engage in the operation of restaurants, cafeterias or other eating places in any building owned by or leased in the name of the State, or to maintain service establishments for the rendering of services to the public ordinarily and customarily rendered by private enterprises, or to provide transportation services, or to contract with any person, firm or corporation for the operation or rendering of the businesses or services on behalf of the unit, department or agency, or to purchase for or sell to any person, firm or corporation any article of merchandise in competition with private enterprise. The leasing or subleasing of space in any building owned, leased or operated by any unit, department or agency or division or subdivision thereof of the State for the purpose of operating or rendering of any of the businesses or services herein referred to is hereby prohibited.

(b) The provisions of subsection (a) of this section shall not apply to:

(1) Counties and municipalities.



- (2) The Department of Health and Human Services or the Department of Agriculture and Consumer Services for the sale of serums, vaccines, and other like products.
- (3) The Department of Administration, except that the agency shall not exceed the authority granted in the act creating the agency.
- (4) The State hospitals for the mentally ill.
- (5) The Department of Health and Human Services.
- (6) The North Carolina School for the Blind at Raleigh.
- (6a) The Department of Juvenile Justice and Delinquency Prevention.
- (7) The North Carolina Schools for the Deaf.
- (8) The University of North Carolina with regard to:
  - a. The University's utilities and other services operated by it prior to January 1, 2005.
  - b. The sale of articles produced incident to the operation of instructional departments, articles incident to educational research, articles of merchandise incident to classroom work, meals, books, or to articles of merchandise when sold to members of the educational staff or staff auxiliary to education or to duly enrolled students or occasionally to immediate members of the families of members of the educational staff or of duly enrolled students.
  - c. The sale of meals or merchandise to persons attending meetings or conventions as invited guests.
  - d. The operation by the University of North Carolina of an inn or hotel and dining and other facilities usually connected with a hotel or inn.
  - e. The hospital and Medical School of the University of North Carolina.
  - f. The Coliseum of North Carolina State University at Raleigh, and the other schools and colleges for higher education maintained or supported by the State.
  - g. The Centennial Campus of North Carolina State University at Raleigh.
  - h. The Horace Williams Campus of the University of North Carolina at Chapel Hill.
  - i. A Millennial Campus of a constituent institution of The University of North Carolina.
  - j. The comprehensive student health services or the comprehensive student infirmaries maintained by the constituent institutions of the University of North Carolina.
  - k. Agreements by the North Carolina School of the Arts to the use of that school's facilities, equipment, and services of students, faculty, and staff for the creation of commercial materials and productions that may be unrelated to educational purposes, so long as the proceeds from those agreements are used for the benefit of the educational mission of the North Carolina School of the Arts.
  - l. Activities that further the mission of the University as stated in G.S. 116-1.
  - m. Activities that serve students or employees of the University or members of the immediate families or guests of students or employees.
  - n. Activities that provide University-related services or market University-related merchandise to alumni of the University and members of their immediate families.
  - o. Activities that enable the community in which the constituent institution or other University entity is located, or the people of

the State to utilize the University's facilities, equipment, or expertise. If the University proposes to engage in a new type of activity under this subdivision, then the University shall provide electronic notice of the proposal to the persons who have requested to be included in the registry created pursuant to subdivision (j)(2) of this section prior to engaging in the new type of activity.

- (8a) The University of North Carolina with regard to the operation of gift shops, snack bars, and food service facilities physically connected to any of The University of North Carolina's public exhibition spaces, including the North Carolina Arboretum, provided that the resulting profits are used to support the operation of the public exhibition space.
- (9) The Department of Environment and Natural Resources, except that the Department shall not construct, maintain, operate or lease a hotel or tourist inn in any park over which it has jurisdiction. The North Carolina Wildlife Resources Commission may sell wildlife memorabilia as a service to members of the public interested in wildlife conservation.
- (10) Child-caring institutions or orphanages receiving State aid.
- (11) Highlands School in Macon County.
- (12) The North Carolina State Fair.
- (13) Rural electric memberships corporations.
- (13a) Repealed by Session Laws 2006-264, s. 8, effective August 27, 2006.
- (13b) The Department of Agriculture and Consumer Services with regard to its lessees at farmers' markets operated by the Department.
- (13c) The Western North Carolina Agricultural Center.
- (13d) Agricultural centers or livestock facilities operated by the Department of Agriculture and Consumer Services.
- (14) Nothing herein contained shall be construed to prohibit the engagement in any of the activities described in subsection (a) hereof by a firm, corporation or person who or which is a lessee of space only of the State of North Carolina or any of its departments or agencies; provided the leases shall be awarded by the Department of Administration to the highest bidder, as provided by law in the case of State contracts and which lease shall be for a term of not less than one year and not more than five years.
- (15) The State Department of Correction is authorized to purchase and install automobile license tag plant equipment for the purpose of manufacturing license tags for the State and local governments and for such other purposes as the Department may direct.

The Commissioner of Motor Vehicles, or such other authority as may exercise the authority to purchase automobile license tags is hereby directed to purchase from, and to contract with, the State Department of Correction for the State automobile license tag requirements from year to year.

The price to be paid to the State Department of Correction for the tags shall be fixed and agreed upon by the Governor, the State Department of Correction, and the Motor Vehicle Commissioner, or such authority as may be authorized to purchase the supplies.

- (16) Laundry services performed by the Department of Correction may be provided only for agencies and instrumentalities of the State which are supported by State funds and for county or municipally controlled and supported hospitals presently being served by the Department of Correction, or for which services have been contracted or applied for in writing, as of May 22, 1973. In addition to the prior sentence, laundry services performed by the Department of Correction may be provided



**G.S. 66-58(c)(3) is set out twice.**

for the Governor Morehead School and the North Carolina School for the Deaf.

The services shall be limited to wet-washing, drying and ironing of flatwear or flat goods such as towels, sheets and bedding, linens and those uniforms prescribed for wear by the institutions and further limited to only flat goods or apparel owned, distributed or controlled entirely by the institutions and shall not include processing by any dry-cleaning methods; provided, however, those garments and items presently being serviced by wet-washing, drying and ironing may in the future, at the election of the Department of Correction, be processed by a dry-cleaning method.

- (17) The North Carolina Global TransPark Authority or a lessee of the Authority.
- (18) The activities and products of private enterprise carried on or manufactured within a State prison facility pursuant to G.S. 148-70.
- (19) The North Carolina Justice Academy.
- (20) The Department of Transportation, or any nonprofit lessee of the Department, for the sale of books, crafts, gifts, and other tourism-related items at visitor centers owned by the Department.
- (21) The North Carolina Rural Redevelopment Authority or a lessee of the Authority.
- (22) The North Carolina State Highway Patrol.
- (23) The North Carolina State Lottery Commission.
- (c) The provisions of subsection (a) shall not prohibit:
  - (1) The sale of products of experiment stations or test farms.
  - (1a) The sale of products raised or produced incident to the operation of a community college viticulture/enology program as authorized by G.S. 18B-1114.4.
  - (1b) The sale by North Carolina State University at University-owned facilities of dairy products, including ice cream, cheeses, milk-based beverages, and the by-products of heavy cream, produced by the Dairy and Process Applications Laboratory, so long as any profits are used to support the Department of Food Science and College of Agriculture and Life Sciences at North Carolina State University.
  - (2) The sale of learned journals, works of art, books or publications of the Department of Cultural Resources or other agencies, or the Supreme Court Reports or Session Laws of the General Assembly.
  - (3) **(Effective until July 1, 2007)** The business operation of endowment funds established for the purpose of producing income for educational purposes; for purposes of this section, the phrase "operation of endowment funds" shall include the operation by public postsecondary educational institutions of campus stores, the profits from which are used exclusively for awarding scholarships to defray the expenses of students attending the institution; provided, that the operation of the stores must be approved by the board of trustees of the institution, and the merchandise sold shall be limited to educational materials and supplies, gift items and miscellaneous personal-use articles. Provided further that sales at campus stores are limited to employees of the institution and members of their immediate families, to duly enrolled students of the campus at which a campus store is located and their immediate families, to duly enrolled students of other campuses of the University of North Carolina other than the campus at which the campus store is located, to other campus stores and to other persons who are on campus other than for



**G.S. 66-58(c)(3) is set out twice.**

the purpose of purchasing merchandise from campus stores. It is the intent of this subdivision that campus stores be established and operated for the purpose of assuring the availability of merchandise described in this Article for sale to persons enumerated herein and not for the purpose of competing with stores operated in the communities surrounding the campuses of the University of North Carolina.

- (3) **(Effective July 1, 2007)** The business operation of endowment funds established for the purpose of producing income for educational purposes; for purposes of this section, the phrase “operation of endowment funds” shall include the operation by constituent institutions of The University of North Carolina of campus stores, the profits from which are used exclusively for awarding scholarships to defray the expenses of students attending the institution; provided, that the operation of the stores must be approved by the board of trustees of the institution, and the merchandise sold shall be limited to educational materials and supplies, gift items and miscellaneous personal-use articles. Provided further that, notwithstanding this subsection, profits from a campus store operated by the endowment of the North Carolina School of Science and Mathematics are used exclusively for student activities, athletics, and other programs to enhance student life. Provided further that sales at campus stores are limited to employees of the institution and members of their immediate families, to duly enrolled students of the campus at which a campus store is located and their immediate families, to duly enrolled students of other campuses of the University of North Carolina other than the campus at which the campus store is located, to other campus stores and to other persons who are on campus other than for the purpose of purchasing merchandise from campus stores. It is the intent of this subdivision that campus stores be established and operated for the purpose of assuring the availability of merchandise described in this Article for sale to persons enumerated herein and not for the purpose of competing with stores operated in the communities surrounding the campuses of the University of North Carolina.
- (3a) The use of community college personnel or facilities, with the consent of the trustees of that college, in support of or by a private business enterprise located on a community college campus or in the service area of a community college for one or more of the following specific services in support of economic development:
- a. Small business incubators. — As used in this sub-subdivision, the term “small business incubators” means sites for new business ventures in the service area of the community college that are in need of the support and assistance provided by the college; and, without which, the likelihood of success of the business would be greatly diminished. The services of the small business incubator shall not extend to any such new business venture for a period of more than 24 months.
  - b. Product testing services.
  - c. Videoconferencing services provided to the public for occasional use.
- (3b) The operation of a military business center by a community college. For the purposes of this subdivision, the term “military business center” means a facility that serves to coordinate and facilitate interactions between the United States Armed Forces; military personnel, veterans, and their families; and private businesses.

- (3c) The use of the personnel and facilities of Western Piedmont Community College, with the consent of the trustees of the college, in support of economic development through the operation of the East Campus and its companion facilities as an event venue.
- (3d) The use of community college facilities by a private business enterprise that has loaned or donated instructional equipment to the college to demonstrate that equipment to customers. This use of college facilities shall be in accordance with policies adopted by the board of trustees of the college.
- (4) The operation of lunch counters by the Department of Health and Human Services as blind enterprises of the type operated on January 1, 1951, in State buildings in the City of Raleigh.
- (5) The operation of a snack bar and cafeteria in the State Legislative Building, and a snack bar in the Legislative Office Building.
- (6) The maintenance by the prison system authorities of eating and sleeping facilities at units of the State prison system for prisoners and for members of the prison staff while on duty, or the maintenance by the highway system authorities of eating and sleeping facilities for working crews on highway construction or maintenance when actually engaged in such work on parts of the highway system.
- (7) The operation by penal, correctional or facilities operated by the Department of Health and Human Services, the Department of Juvenile Justice and Delinquency Prevention, or by the Department of Agriculture and Consumer Services, of dining rooms for the inmates or clients or members of the staff while on duty and for the accommodation of persons visiting the inmates or clients, and other bona fide visitors.
- (8) The sale by the Department of Agriculture and Consumer Services of livestock, poultry and publications in keeping with its present livestock and farm program.
- (9) The operation by the public schools of school cafeterias.
- (9a) The use of a public school bus or public school activity bus for a purpose allowed under G.S. 115C-242 or the use of a public school activity bus for a purpose authorized by G.S. 115C-247.
- (9b) The use of a public school activity bus by a nonprofit corporation or a unit of local government to provide transportation services for school-aged and preschool-aged children, their caretakers, and their instructors to or from activities being held on the property of a nonprofit corporation or a unit of local government. The local board of education that owns the bus shall ensure that the person driving the bus is licensed to operate the bus and that the lessee has adequate liability insurance to cover the use and operation of the leased bus.
- (10) Sale by any State correctional or other institution of farm, dairy, livestock or poultry products raised or produced by it in its normal operations as authorized by the act creating it.
- (11) The sale of textbooks, library books, forms, bulletins, and instructional supplies by the State Board of Education, State Department of Public Instruction, and local school authorities.
- (12) The sale of North Carolina flags by or through the auspices of the Department of Administration, to the citizens of North Carolina.
- (13) The operation by the Department of Correction of forestry management programs on State-owned lands, including the sale on the open market of timber cut as a part of the management program.
- (14) The operation by the Department of Correction of facilities to manufacture and produce traffic and street name signs for use on the public streets and highways of the State.



- (15) The operation by the Department of Correction of facilities to manufacture and produce paint for use on the public streets and highways of the State.
- (16) The performance by the Department of Transportation of dredging services for a unit of local government.
- (17) The sale by the State Board of Elections to political committees and candidate committees of computer software designed by or for the State Board of Elections to provide a uniform system of electronic filing of the campaign finance reports required by Article 22A of Chapter 163 of the General Statutes and to facilitate the State Board's monitoring of compliance with that Article. This computer software for electronic filing of campaign finance reports shall not exceed a cost of one hundred dollars (\$100.00) to any political committee or candidate committee without the State Board of Elections first notifying in writing the Joint Legislative Commission on Governmental Operations.
- (18) The leasing of no more than 50 acres within the North Carolina Zoological Park by the Department of Environment and Natural Resources to the North Carolina Zoological Society for the maintenance or operation, pursuant to a contract or otherwise, of an exhibition center, theater, conference center, and associated restaurants and lodging facilities.
- (19) The use of the North Carolina Museum of Art's conservation lab by the Regional Conservation Services Program of the North Carolina Museum of Art Foundation for the provision of conservation treatment services on privately owned works of art. However, when providing this service, the Regional Conservation Services Program shall give priority to publicly owned works of art.

(d) A department, agency or educational unit named in subsection (b) shall not perform any of the prohibited acts for or on behalf of any other department, agency or educational unit.

(e) Any person, whether employee of the State of North Carolina or not, who shall violate, or participate in the violation of this section, shall be guilty of a Class 1 misdemeanor.

(f) Notwithstanding the provisions of G.S. 66-58(a), the operation by the Department of Correction of facilities for the manufacture of any product or the providing of any service pursuant to G.S. 148-70 not regulated by the provisions of subsection (c) hereof, shall be subject to the prior approval of the Governor, with biennial review by the General Assembly, at the beginning of each fiscal year commencing after October 1, 1975. The Department of Correction shall file with the Director of the Budget quarterly reports detailing prison enterprise operations in such a format as shall be required by the Director of the Budget.

(g) **(Effective until July 1, 2007)** The North Carolina School of Science and Mathematics may engage in any of the activities permitted by G.S. 66-58(b)(8) and (c)(3).

(h) Notwithstanding the provisions of G.S. 66-58(b)(8), The University of North Carolina, its constituent institutions, the Centennial Campus of North Carolina State University, the Horace Williams Campus of the University of North Carolina at Chapel Hill, a Millennial Campus of a constituent institution of The University of North Carolina, or any corporation or other legal entity created or directly controlled by and using land owned by The University of North Carolina shall consult with and provide the following information to the Joint Legislative Commission on Governmental Operations before



issuing debt or executing a contract for a golf course or for any transient accommodations facility, including a hotel or motel:

- (1) Architectural concepts.
- (2) Financial and debt service projections.
- (3) Business plans.
- (4) Operating plans.
- (5) Feasibility studies and consultant reports.

(i) The Board of Governors of The University of North Carolina shall establish a panel to determine whether The University of North Carolina is authorized pursuant to sub-subdivisions m., n., and o. of subdivision (8) of subsection (b) of this section to undertake an activity in competition with an existing or proposed nongovernmental entity. Pursuant to G.S. 138-5, panel members shall receive the same per diem and reimbursement for travel expenses as members of State boards and commissions. The University of North Carolina shall be responsible for staffing and paying the expenses of the panel. The panel shall consist of nine members as follows:

- (1) Two members who are familiar with the interests of the business community of the State appointed by the Governor.
- (2) Two members who are familiar with the interests of the business community of the State appointed by the General Assembly upon the recommendation of the Speaker of the House of Representatives under G.S. 120-121.
- (3) Two members who are familiar with the interests of the business community of the State appointed by the General Assembly upon the recommendation of the President Pro Tempore of the Senate under G.S. 120-121.
- (4) Three members who are not employees of The University of North Carolina appointed by the Board of Governors.

The panel may make the determination whether a proposed or ongoing activity undertaken under sub-subdivisions m. or n. of subdivision (8) of subsection (b) of this section is unauthorized competition. The panel may also make a determination whether a proposed or ongoing activity undertaken under sub-subdivision o. of subdivision (8) of subsection (b) of this section is either unauthorized or unfair competition. The University will be bound by a decision of the panel that a proposed or ongoing activity is not justified by the exceptions set out in sub-subdivisions m., n., or o. of subdivision (8) of subsection (b) of this section.

The panel established by this subsection shall report to the Joint Legislative Economic Development Oversight Committee. The panel shall report to the Committee by May 1 of each year on the number and types of determinations made during the preceding year.

(j) The Board of Governors shall establish and publish procedures to be used by the panel created under subsection (i) of this section in making determinations. The procedures shall:

- (1) Include that a determination may be initiated based on a request from any nongovernmental entity in the State that is in or proposes to be in the same or a similar or competing business or based on a request from the constituent institution or other university system entity engaging in or proposing to engage in the activity.
- (2) Require the panel to maintain a registry of all parties that request to receive notification of the panel's proceedings. The notification may be electronic and shall be given to all parties that have requested to be notified at least seven days prior to the panel's meeting. The notice shall include the name of the constituent institution or other university system entity engaging in or proposing to engage in the activity and the nature of the activity. The panel shall provide the documents

relating to any agenda item to anyone requesting them in advance of the panel's proceedings.

- (3) Provide that the agendas for the panel's meetings, the minutes of the meetings, and the determinations of the panel shall be posted on The University of North Carolina Web site.

(k) The University of North Carolina and its employees may rely on a determination made by the panel created under subsection (i) of this section as to whether an activity violates this section, and a determination that an activity is authorized shall be an absolute defense in any prosecution for any activity undertaken before a contrary determination is made by a court or by an opinion of the Attorney General. The panel shall not have the power to overrule a prior determination of the Attorney General.

(l) The proceeds of any activity undertaken under sub-subdivisions m., n., or o. of subdivision (8) of subsection (b) of this section shall be placed in an institutional trust fund pursuant to G.S. 116-36.1 and shall be used to continue to conduct the activity that generated the proceeds or to further the mission of the constituent institution or other University entity engaging in the activity. (1929, c. 221, s. 1; 1933, c. 172, s. 18; 1939, c. 122; 1941, c. 36; 1951, c. 1090, s. 1; 1957, c. 349, ss. 6, 10; 1967, c. 996, s. 13; 1973, c. 476, ss. 48, 128, 143; c. 671, s. 1; c. 965; c. 1262, s. 86; c. 1294; c. 1457, s. 7; 1975, c. 730, ss. 2-5; c. 840; c. 879, s. 46; 1977, cc. 355, 715; c. 771, s. 4; 1979, c. 830, s. 4; 1981, c. 635, s. 3; 1983, c. 8; c. 476; c. 717, s. 13; c. 761, s. 168; 1985, c. 589, s. 28; c. 757, s. 206(d); 1989, c. 727, s. 218(9); 1989 (Reg. Sess., 1990), c. 1004, s. 1; 1991, c. 749, s. 7; 1991 (Reg. Sess., 1992), c. 902, s. 3; 1993, c. 539, s. 513; 1994, Ex. Sess., c. 24, s. 14(c); 1993 (Reg. Sess., 1994), c. 769, s. 17.15; c. 777, s. 4(e); 1995, c. 247, s. 2; c. 507, s. 13.1(a); 1997-258, s. 1; 1997-261, ss. 4-6; 1997-315, s. 1; 1997-443, s. 11A.21; 1997-456, s. 55.2A; 1997-527, s. 1; 1998-202, s. 4(d), (e); 1998-212, ss. 9.9, 13.3; 1999-234, s. 9; 1999-237, ss. 19.7, 27.23A; 2000-137, ss. 4(f), 4(g); 2000-148, s. 6; 2000-177, s. 10; 2001-41, s. 2; 2001-127, s. 1; 2001-368, s. 1; 2002-102, s. 3; 2002-109, s. 1; 2002-126, ss. 9.15(a), 18.5; 2004-124, ss. 8.17(b), 9.13; 2005-20, s. 1; 2005-63, s. 1; 2005-247, s. 1; 2005-344, s. 5; 2005-397, ss. 1, 2, 4; 2006-66, ss. 9.11(w), (x); 2006-264, s. 8.)

**Subdivision (c)(3) Set Out Twice.** — The first version of subdivision (c)(3) set out above is effective until July 1, 2007. The second version of subdivision (c)(3) set out above is effective July 1, 2007.

**Local Modification.** — Columbus: 1977, c. 850; Bertie County Board of Education: 2006-61, ss. 1, 2; Dare County Board of Education: 2004-16 (as to lease of property to construct and provide up to three affordable rental housing projects with priority for teachers); Haywood County Consolidated School System Board of Education: 2006-3 (use of buses for events); Hertford County Board of Education: 2006-86, ss. 1-3 (as to construction, provision or maintenance of affordable rental housing on property owned or leased by Hertford County Board of Education and rent of housing units owned by the Board with priority for teachers); Moore County Board of Education: 1999-176, s. 1 (use of buses for tournament June 12, 1999-June 20, 1999); 2004-68; Roanoke Rapids Graded School District: 2006-8 (as to use of buses to serve

transportation needs of BikeWalk Virginia event).

**Editor's Note.** —

Session Laws 2006-66, s. 1.2, provides: "This act shall be known as 'The Current Operations and Capital Improvements Appropriations Act of 2006'."

Session Laws 2006-66, s. 28.6 is a severability clause.

**Effect of Amendments.** —

Session Laws 2006-66, ss. 9.11(w), (x), effective July 1, 2007, in subdivision (c)(3), in the first sentence, substituted "constituent" for "public postsecondary educational" and inserted "of The University of North Carolina" and added the second sentence; and deleted subsection (g).

Session Laws 2006-264, s. 8, effective August 27, 2006, deleted former subdivision (b)(13a) which read: "State Farm Operations Commission."



## ARTICLE 24.

*Trade Secrets Protection Act.*

## § 66-152. Definitions.

## CASE NOTES

**Factors in Determining Whether Information Is Trade Secret. —**

In a specialized construction equipment rental market where customer pricing was highly competitive, a corporation's pricing, customer, and employee salary information met the factors of a trade secret under G.S. 66-152, and those trade secrets were misappropriated when a competing limited liability company (LLC) solicited the corporation's employees who had that information. *Sunbelt Rentals, Inc. v. Head & Engquist Equip., L.L.C.*, 174 N.C. App. 49, 620 S.E.2d 222, 2005 N.C. App. LEXIS 2290 (2005).

**Trade Secret Properly Found to Have Been Misappropriated. —**

Targeted solicitation, and the use of those targeted employees to solicit other employees with that information, was an unfair trade practice under G.S. 75-1.1; since the corporation also showed that the customers it lost and the geographical areas where it lost business were the same customers and areas of the employees who the LLC hired away from the corporation, the corporation showed a proximate cause connection to its lost profits and those lost profit damages, along with treble damages and attorney fees, were properly awarded. *Sunbelt Rentals, Inc. v. Head & Engquist Equip., L.L.C.*, 174 N.C. App. 49, 620 S.E.2d 222, 2005 N.C. App. LEXIS 2290 (2005).

## § 66-155. Burden of proof.

## CASE NOTES

**A prima facie case of misappropriation existed, etc. —**

In a specialized construction equipment rental market where customer pricing was highly competitive, a corporation's pricing, customer, and employee salary information met the factors of a trade secret under G.S. 66-152,

and those trade secrets were misappropriated when a competing limited liability company solicited the corporation's employees who had that information. *Sunbelt Rentals, Inc. v. Head & Engquist Equip., L.L.C.*, 174 N.C. App. 49, 620 S.E.2d 222, 2005 N.C. App. LEXIS 2290 (2005).

## § 66-157. Statute of limitations.

## CASE NOTES

**Laches Inapplicable Where There was No Delay in Bringing Action Within Limitation Period. —** Since corporation brought a misappropriation action within three years, as required by the statute of limitations in G.S. 66-157, and since there was no delay in bring-

ing the action, laches was properly held not to bar the corporation's action. *Sunbelt Rentals, Inc. v. Head & Engquist Equip., L.L.C.*, 174 N.C. App. 49, 620 S.E.2d 222, 2005 N.C. App. LEXIS 2290 (2005).

## ARTICLE 26.

*Farm Machinery Agreements.*

## § 66-181. Usage of trade.

The terms "utility" and "industrial," when used to refer to equipment, implements, machinery, attachments, or repair parts, shall have the meaning commonly used and understood among dealers and suppliers of farm equip-



ment as a usage of trade in accordance with G.S. 25-1-303(c). (1985, c. 441, s. 1; 2006-112, s. 22.)

**Editor's Note.** — Session Laws 2006-112, s. 60, provides that: "A document of title issued or a bailment that arises before October 1, 2006, and the rights, obligations, and interests flowing from that document or bailment are governed by any statute amended or repealed by this act as if amendment or repeal had not

occurred and may be terminated, completed, consummated, or enforced under that statute."

**Effect of Amendments.** — Session Laws 2006-112, s. 22, effective October 1, 2006, substituted "G.S. 25-1-303(c)" for "G.S. 25-1-205(2)."

## ARTICLE 40.

### *Uniform Electronic Transactions Act.*

#### § 66-313. Scope.

(a) Except as otherwise provided in subsections (b), (c), and (e) of this section, this Article applies to electronic records and electronic signatures relating to a transaction.

(b) This Article does not apply to a transaction to the extent it is governed by:

- (1) A law governing the creation and execution of wills, codicils, or testamentary trusts.
- (2) Chapter 25 of the General Statutes other than G.S. 25-1-306, Article 2, and Article 2A.
- (3) Article 11A of Chapter 66 of the General Statutes.

(c) This Article applies to an electronic record or electronic signature otherwise excluded from the application of this Article under subsection (b) of this section to the extent it is governed by a law other than those specified in subsection (b) of this section.

(d) A transaction subject to this Article is also subject to other applicable substantive law.

(e) This Article shall not apply to:

- (1) Any notice of the cancellation or termination of utility services, including water, heat, and power.
- (2) Any notice of default, acceleration, repossession, foreclosure or eviction, or the right to cure, under a credit agreement secured by, or a rental agreement for, a primary residence of an individual.
- (3) Any notice of the cancellation or termination of health insurance or benefits, or life insurance or benefits, excluding annuities.
- (4) Any notice of the recall of a product, or material failure of a product that risks endangering health or safety.
- (5) Any document required to accompany the transportation or handling of hazardous materials, pesticides, or other toxic or dangerous materials. (2000-152, s. 1; 2001-295, s. 2; 2006-112, s. 23.)

**Editor's Note.** — Session Laws 2006-112, s. 60, provides that: "A document of title issued or a bailment that arises before October 1, 2006, and the rights, obligations, and interests flowing from that document or bailment are governed by any statute amended or repealed by this act as if amendment or repeal had not

occurred and may be terminated, completed, consummated, or enforced under that statute."

**Effect of Amendments.** — Session Laws 2006-112, s. 23, effective October 1, 2006, substituted "G.S. 25-1-306" for "G.S. 25-1-107 and G.S. 25-1-206" in subdivision (b)(2).

## § 66-326. Transferable records.

(a) In this section, “transferable record” means an electronic record that:

- (1) Would be a note under Article 3 of Chapter 25 of the General Statutes or a document under Article 7 of Chapter 25 of the General Statutes if the electronic record were in writing; and
- (2) The issuer of the electronic record expressly has agreed is a transferable record.

(b) A person has control of a transferable record if a system employed for evidencing the transfer of interests in the transferable record reliably establishes that person as the person to which the transferable record was issued or transferred.

(c) A system satisfies subsection (b) of this section, and a person is deemed to have control of a transferable record, if the transferable record is created, stored, and assigned in such a manner that:

- (1) A single authoritative copy of the transferable record exists which is unique, identifiable, and, except as otherwise provided in subdivisions (4), (5), and (6) of this subsection, unalterable;
- (2) The authoritative copy identifies the person asserting control as:
  - a. The person to which the transferable record was issued; or
  - b. If the authoritative copy indicates that the transferable record has been transferred, the person to which the transferable record was most recently transferred;
- (3) The authoritative copy is communicated to and maintained by the person asserting control or its designated custodian;
- (4) Copies or revisions that add or change an identified assignee of the authoritative copy can be made only with the consent of the person asserting control;
- (5) Each copy of the authoritative copy and any copy of a copy is readily identifiable as a copy that is not the authoritative copy; and
- (6) Any revision of the authoritative copy is readily identifiable as authorized or unauthorized.

(d) Except as otherwise agreed, a person having control of a transferable record is the holder, as defined in G.S. 25-1-201(21), of the transferable record and has the same rights and defenses as a holder of an equivalent record or writing under Chapter 25 of the General Statutes, including, if the applicable statutory requirements under G.S. 25-3-302(a), 25-7-501, or 25-9-330 are satisfied, the rights and defenses of a holder in due course, a holder to which a negotiable document of title has been duly negotiated, or a purchaser, respectively. Delivery, possession, and endorsement are not required to obtain or exercise any of the rights under this subsection.

(e) Except as otherwise agreed, an obligor under a transferable record has the same rights and defenses as an equivalent obligor under equivalent records or writings under Chapter 25 of the General Statutes.

(f) If requested by a person against which enforcement is sought, the person seeking to enforce the transferable record shall provide reasonable proof that the person is in control of the transferable record. Proof may include access to the authoritative copy of the transferable record and related business records sufficient to review the terms of the transferable record and to establish the identity of the person having control of the transferable record. (2000-152, s. 1; 2000-140, s. 97; 2006-112, s. 24.)

**Editor’s Note.** — Session Laws 2006-112, s. 60, provides that: “A document of title issued or a bailment that arises before October 1, 2006, and the rights, obligations, and interests flowing from that document or bailment are gov-

erned by any statute amended or repealed by this act as if amendment or repeal had not occurred and may be terminated, completed, consummated, or enforced under that statute.”

**Effect of Amendments.** — Session Laws



2006-112, s. 24, effective October 1, 2006, substituted "G.S. 25-1-201(21)" for "G.S. 25-1-201(20)" in the first sentence of subsection (d).

## ARTICLE 41.

### *Manufacturing Redevelopment Districts.*

#### § 66-341. Purpose.

A manufacturing redevelopment district shall be established to provide manufacturing, research and development, and related service and support jobs to citizens of the State while ensuring the remediation of known and unknown environmental conditions at manufacturing facilities. (2005-462, s. 2; 2006-264, s. 99.5(g).)

#### Editor's Note. —

Session Laws 2005-462, s. 8, as amended by Session Laws 2006-264, s. 99.5(g), provides, in part, that: "If the Secretary of State has not approved at least one certification by a new

operator of a manufacturing facility that is required to establish a manufacturing redevelopment district as provided in G.S. 66-342(a) prior to 1 September 2008, then this act will expire on 1 September 2008."

#### § 66-342. Establishment; criteria.

(a) A manufacturing redevelopment district may be established on any parcel or tract of land or on any combination of contiguous parcels or tracts of land as provided in this section. To establish a manufacturing redevelopment district, the new operator of the manufacturing facilities located within the boundaries of the district shall certify to the Secretary of State that the district meets all of the criteria set out in this section. The certification shall describe the boundaries of the district by metes and bounds and shall set out the specific financial mechanism that guarantees completion of the assessment and remediation program as required under subdivision (b)(8) of this section. The district shall be considered to be established as a manufacturing redevelopment district on the date the Secretary of State approves the certification. The Secretary of State shall approve the certification if the new operator provides sufficient documentation that the new operator has met each of the criteria set out in subsection (b) of this section. Once established, a manufacturing redevelopment district shall continue to exist until title to the real property comprising the district is transferred to the State as provided in G.S. 66-346.

(b) A manufacturing redevelopment district may be established only if all of the following criteria are met at the time the district is to be established:

- (1) The real property is located in a county that is economically distressed. For purposes of this subdivision, a county shall be considered economically distressed if, as of the date of the most recent annual assessment by county officials, all of the following apply:
  - a. The average weekly wage in the county is less than five hundred twenty-five dollars (\$525.00) per person.
  - b. The percentage of unemployed workers is greater than six percent (6%).
  - c. The percentage of citizens who are at or below the federal poverty level, as determined by the most recent federal decennial census, is greater than nine percent (9%).
- (2) All of the real property comprising the district is a privately owned in-holding of 50 acres or more within a State forest of 10,000 acres or more.



- (3) The district contains a manufacturing facility that has been out of production for two years or more.
- (4) Failure to restart the manufacturing facility would result in a permanently lost opportunity to create 50 or more jobs.
- (5) The manufacturing facility has a total square footage of 500 square feet or more.
- (6) The new operator of the manufacturing facility guarantees investment of at least five million dollars (\$5,000,000) in the manufacturing facility within 12 months following the creation of the manufacturing redevelopment district and guarantees employment of at least 50 persons.
- (7) The new operator of the facility has done all of the following:
  - a. Accepted responsibility for all requirements of this act.
  - b. Accepted responsibility for assessment and remediation of known and unknown environmental conditions on the property that comprises the manufacturing redevelopment district to standards approved by the Department of Environment and Natural Resources in accordance with this act and other applicable environmental laws, regulations, and rules.
  - c. Agreed to assume all other liabilities as provided in G.S. 66-344.
  - d. Agreed to remove all buildings in the manufacturing redevelopment district when the new operator permanently ceases manufacturing operations.
  - e. Agreed to comply with other requirements of G.S. 66-346.
- (8) The new operator provides financial assurance, acceptable to the Department of Environment and Natural Resources, for the fulfillment of the requirements set out in G.S. 66-342(b)(7)b. and c. The financial assurance shall include a prefunded escrow account or other financing mechanism, in an amount not less than five million dollars (\$5,000,000), that runs in favor of the State in the event of a default. The establishment of the prefunded account shall not relieve the new operator of its obligation to comply with applicable federal and State laws, regulations, and rules, and shall not be construed to alter the authority of the Department of Environment and Natural Resources to enforce the requirements of applicable federal and State laws, regulations, and rules. The Department of Environment and Natural Resources shall: (i) review the financial assurance contemplated by this act in light of reasonably available financial assurance and guaranteed remediation products and in light of known and reasonably anticipated unknown environmental conditions at the manufacturing redevelopment district, and (ii) approve or disapprove the financial assurance within 45 days after the new operator submits a complete financial assurance proposal, including copies of the proposed financial assurance instrument or mechanism, to the Department of Environment and Natural Resources. The requirement that the financial assurance is acceptable to the Department of Environment and Natural Resources shall be waived if the Department of Environment and Natural Resources does not complete its review within the 45-day period. The 45-day review period may be extended if the new operator and the Department of Environment and Natural Resources mutually agree to the extension.
- (9) The owner of the real property has entered into an agreement to transfer the real property to be used as the manufacturing redevelopment district to a local government entity. This local government entity has, in turn, entered into an agreement to transfer the real property comprising the district to the new operator under a condition that when manufacturing operations permanently cease, the new

operator will comply with the requirements of G.S. 66-346. (2005-462, s. 3; 2006-264, s. 99.5(a)-(c), (g).)

**Editor's Note. —**

Session Laws 2005-462, s. 8, as amended by Session Laws 2006-264, s. 99.5(g), provides, in part, that: "If the Secretary of State has not approved at least one certification by a new operator of a manufacturing facility that is required to establish a manufacturing redevel-

opment district as provided in G.S. 66-342(a) prior to 1 September 2008, then this act will expire on 1 September 2008."

**Effect of Amendments. —** Session Laws 2006-264, s. 99.5(a)-(c), effective August 27, 2006, rewrote subsection (a), and subdivisions (b)(7)b., and (b)(8).

## § 66-343. Qualified immunity for third-party claims; enforcement of environmental requirements.

(a) No person who owned or had an interest in any real property within a manufacturing redevelopment district at any time prior to the establishment of the district shall be liable to any private or third party for civil claims arising out of the presence of oil, a hazardous substance, or a hazardous waste on the real property if the cause of action arose after transfer of the property to the new operator under this act, regardless of when the oil, hazardous substance, or hazardous waste was brought to or discovered at the site. The qualified immunity provided by this section shall attach at the time that the Secretary of State approves certification of the manufacturing redevelopment district or at the time that the real property comprising the manufacturing redevelopment district is transferred to the new operator, whichever occurs later. The qualified immunity provided by this section is with respect to any theory of legal liability, including, but not limited to, any claim of negligence, nuisance, or trespass, or arising under other common law principles, or arising under any State statute or rule, including, but not limited to, Article 9 of Chapter 130A of the General Statutes, Articles 21 and 21A of Chapter 143 of the General Statutes, and rules adopted pursuant to those Articles. The qualified immunity provided by this section shall continue in effect after the termination of the manufacturing redevelopment district.

(b) Nothing in this act shall be construed to prevent the State from enforcing remediation standards, monitoring, or compliance requirements specifically required by the United States Environmental Protection Agency to be enforced by the State as a condition to receiving and retaining federal funds or program approval, authorization, or delegation. (2005-462, s. 4; 2006-264, s. 99.5(d), (g).)

**Editor's Note. —** Session Laws 2005-462, s. 4, was codified as this section by the Revisor of Statutes.

Session Laws 2005-462, s. 8, as amended by Session Laws 2006-264, s. 99.5(g), provides, in part, that: "If the Secretary of State has not approved at least one certification by a new operator of a manufacturing facility that is

required to establish a manufacturing redevelopment district as provided in G.S. 66-342(a) prior to 1 September 2008, then this act will expire on 1 September 2008."

**Effect of Amendments. —** Session Laws 2006-264, s. 99.5(d), effective August 27, 2006, rewrote subsection (a).

## § 66-344. Assignment of liability.

In addition to any liability under any provision of law, the new operator of the manufacturing redevelopment district or its successor in interest shall be liable for all claims for which any prior owner has been granted qualified immunity by G.S. 66-343. This assignment of liability shall continue in effect after the termination of the manufacturing redevelopment district. The new operator or its successor in interest shall have all rights, claims, and defenses that are or would have been available to any prior owner with respect to claims



for which the prior owner has been granted qualified immunity. (2005-462, s. 5; 2006-264, s. 99.5(g).)

**Editor's Note. —**

Session Laws 2005-462, s. 8, as amended by Session Laws 2006-264, s. 99.5(g), provides, in part, that: "If the Secretary of State has not approved at least one certification by a new

operator of a manufacturing facility that is required to establish a manufacturing redevelopment district as provided in G.S. 66-342(a) prior to 1 September 2008, then this act will expire on 1 September 2008."

## **§ 66-345. Manufacturing redevelopment districts: transfer of property to a subsequent manufacturer.**

The new operator or its successor in interest shall not transfer the property comprising the manufacturing redevelopment district to any person, including without limitation any corporate affiliate of the new operator, until the Secretary of State certifies that the person has met all of the requirements applicable to a new operator under G.S. 66-342(b)(7) through (9). (2005-462, s. 6; 2006-264, s. 99.5(e), (g).)

**Editor's Note. —**

Session Laws 2005-462, s. 8, as amended by Session Laws 2006-264, s. 99.5(g), provides, in part, that: "If the Secretary of State has not approved at least one certification by a new operator of a manufacturing facility that is required to establish a manufacturing redevelopment district as provided in G.S. 66-342(a) prior to 1 September 2008, then this act will

expire on 1 September 2008."

**Effect of Amendments. —** Session Laws 2006-264, s. 99.5(e), effective August 27, 2006, inserted "Manufacturing redevelopment districts:" in the section catchline; and substituted "until the Secretary of State certifies that the person has" for "until such person has" near the end of the paragraph.

## **§ 66-346. Donation and transfer of the district; transfer to the State.**

(a) The local government entity to which the real property comprising the manufacturing redevelopment district is transferred pursuant to G.S. 66-342(b)(9) shall accept title to the real property and shall immediately transfer title to the new operator. The consideration for the transfer by the local government entity of title to the new operator shall be the creation of jobs and economic opportunities that will result from restarting manufacturing operations on the real property.

(b) When the new operator or its successor in interest permanently ceases manufacturing operations at the facility within the manufacturing redevelopment district, it shall expeditiously do all of the following:

- (1) Demolish and remove all buildings in the manufacturing redevelopment district.
- (2) Perform any additional assessment and remediation required by the Department of Environment and Natural Resources in accordance with applicable environmental laws.
- (3) Tender transfer of title to all of the land constituting the manufacturing redevelopment district to the State of North Carolina upon completion of any such assessment and remediation.

(c) The State Property Office shall accept donation of the property for allocation to the contiguous State forest upon demonstration that all buildings have been removed and remediation completed to the satisfaction of the Secretary of the Department of Environment and Natural Resources in light of the requirements of this section.

(d) When the State Property Office accepts donation of the property as provided in subsection (c) of this section, the manufacturing redevelopment district shall terminate. (2005-462, s. 7; 2006-264, s. 99.5(f), (g).)



**Editor's Note.** —

Session Laws 2005-462, s. 8, as amended by Session Laws 2006-264, s. 99.5(g), provides, in part, that: "If the Secretary of State has not approved at least one certification by a new operator of a manufacturing facility that is required to establish a manufacturing redevel-

opment district as provided in G.S. 66-342(a) prior to 1 September 2008, then this act will expire on 1 September 2008."

**Effect of Amendments.** — Session Laws 2006-264, s. 99.5(f), effective August 27, 2006, deleted "such" following "immediately transfer" in the first sentence of subsection (a).

**ARTICLE 42.***State Franchise for Cable Television Service.***§ 66-350. Definitions.**

The following definitions apply in this Article:

- (1) Cable service. — Defined in G.S. 105-164.3.
- (2) Cable system. — Defined in 47 U.S.C. § 522.
- (3) Channel. — A portion of the electromagnetic frequency spectrum that is used in a cable system and is capable of delivering a television channel.
- (4) Existing agreement. — A local franchise agreement that was awarded under G.S. 153A-137 or G.S. 160A-319 and meets either of the following:
  - a. Is in effect on January 1, 2007.
  - b. Expired before January 1, 2007, and the cable service provider under the agreement provides cable service to subscribers in the franchise area on January 1, 2007.
- (5) Pass a household. — Make service available to a household, regardless of whether the household subscribes to the service.
- (6) PEG channel. — A public, educational, or governmental access channel provided to a county or city.
- (7) Secretary. — The Secretary of State.
- (8) Video programming. — Defined in G.S. 105-164.3. (2006-151, s. 1.)

**Editor's Note.** — Session Laws 2006-151, s. 22, makes this Article effective January 1, 2007.

Session Laws 2006-151, s. 20, contains a severability clause.

**§ 66-351. State franchising authority.**

(a) Authority. — The Secretary of State is designated the exclusive franchising authority in this State for cable service provided over a cable system. This designation replaces the authorization to counties and cities in former G.S. 153A-137 and G.S. 160A-319 to award a franchise for cable service. This designation is effective January 1, 2007. After this date, a county or city may not award or renew a franchise for cable service.

(b) Award and Scope. — The Secretary is considered to have awarded a franchise to a person who files a notice of franchise under G.S. 66-352. A franchise for cable service authorizes the holder of the franchise to construct and operate a cable system over public rights-of-way within the area to be served. Chapter 160A of the General Statutes governs the regulation of public rights-of-way by a city. (2006-151, s. 1.)

**Editor's Note.** — Session Laws 2006-151, s. 19, provides that: "The Secretary of State has no authority to determine whether a person who is providing video programming is providing cable service over a cable system. An award

of a State-issued franchise under Article 42 of Chapter 66 of the General Statutes, as enacted by this act, does not affect a determination of whether video programming provided by the holder of the franchise is considered cable ser-

vice provided over a cable system under federal law or under a state law that applies substantially the same definitions of “cable service” and “cable system” as federal law. A person who provides video programming may obtain a State-issued franchise under Article 42 of

Chapter 66 of the General Statutes, as enacted by this act, and thereby become subject to that Article, regardless of whether the video programming the person provides is considered cable service provided under a cable system under that Article or under federal law.”

## **§ 66-352. Award of franchise and commencement of service.**

(a) Notice of Franchise. — A person who intends to provide cable service over a cable system in an area must file a notice of franchise with the Secretary before providing the service. A person who files a notice of franchise must pay a fee in the amount set in G.S. 57C-1-22 for filing articles of organization.

A notice of franchise is effective when it is filed with the Secretary. The notice of franchise must include all of the following:

- (1) The applicant’s name, principal place of business, mailing address, physical address, telephone number, and e-mail address.
- (2) A description and map of the area to be served.
- (3) A list of each county and city in which the described service area is located, in whole or in part.
- (4) A schedule indicating when service is expected to be offered in the service area.

(b) Commencement of Service. — A person who files a notice of franchise under subsection (a) of this section must begin providing cable service in the service area described in the notice within 120 days after the notice is filed. If cable service does not begin within this period, the notice of franchise terminates 130 days after it was filed. If cable service begins within this period, the holder of the State-issued franchise must file a notice of service with the Secretary within 10 days after the cable service begins. Cable service begins when it passes one or more households in the described service area. This subsection does not apply to a cable service provider who terminates an existing agreement whose franchise area includes all of the service area described in a notice of franchise filed by the provider under subsection (a) of this section.

A notice of service for a service area must include all of the following:

- (1) The effective date of a notice of franchise for that area.
- (2) A description and map of the service area.
- (3) A statement that cable service has begun in the service area.

(c) Extension. — A person who intends to provide cable service over a cable system in an area that is contiguous with but outside the service area described in a notice of franchise on file with the Secretary must file a notice of franchise under subsection (a) of this section that includes the proposed area. The initial service requirements in subsection (b) of this section apply to the proposed area. If the map of the area to be served includes any area that is part of the service area of another State-issued franchise, the termination of a notice of franchise for the proposed area for failure to begin service within the required time does not affect the status of the other State-issued franchise.

(d) Withdrawal. — A person may withdraw a notice of franchise by filing a notice of withdrawal with the Secretary. The notice of withdrawal must be filed at least 90 days before the service is withdrawn. (2006-151, s. 1.)

## **§ 66-353. Annual service report.**

A holder of a State-issued franchise must file an annual service report with the Secretary. The report must be filed on or before July 31 of each year. The report must be accompanied by a fee in the amount set in G.S. 57C-1-22 for filing an annual report. The report must include all of the following:



- (1) The effective date of a notice of franchise for that area.
- (2) A description and map of the service area.
- (3) The approximate number of households in the service area.
- (4) A description and a map of the households passed in the service area as of July 1.
- (5) The percentage of households passed in the service area as of July 1.
- (6) The percentage of households passed in the service area as of July 1 of any preceding year for which a report was required under this section.
- (7) A report indicating the extent to which the holder has met the customer service requirements under G.S. 66-356(b).
- (8) A schedule indicating when service is expected to be offered in the service area, to the extent the schedule differs from one included in the notice of franchise or in a report previously submitted under this section, and an explanation of the reason for the new schedule. (2006-151, s. 1.)

### **§ 66-354. General filing and report requirements.**

(a) General. — A document filed with the Secretary under this Article must be signed by an officer or general partner of the person submitting the document. Within five days after a person files a document with the Secretary under this Article, the person must send a copy of the document to any county or city included in the service area described in the document and to the registered agent of any cable service provider that is providing cable service under an existing agreement in the service area described in the document.

The provisions of Article 2 of Chapter 55D of the General Statutes apply to the submission of a document under this Article. A document filed under this Article is a public record as defined in G.S. 132-1. The Secretary must post a document filed under this Article on its Internet Web site or indicate on its Internet Web site that the document has been filed and is available for inspection.

A successor in interest to a person who has filed a notice of franchise is not required to file another notice of franchise. When a change in ownership occurs, the owner must file a notice of change in ownership with the Secretary within 14 days after the change becomes effective.

(b) Forfeiture. — A person who offers cable service over a cable system without filing a notice of franchise or a notice of service as required by this Article is subject to forfeiture of the revenue received during the period of noncompliance from subscribers to the cable service in the area of noncompliance. Forfeiture does not apply to revenue received from cable service provided over a cable system in an area that is adjacent to a service area described in a notice of franchise and notice of service filed by that cable service provider under G.S. 66-352 if the provider obtains a State-issued franchise and files a notice of service that includes this area within 20 days after a civil action for forfeiture is filed. A forfeiture does not affect the liability of the cable service provider for sales tax due under G.S. 105-164.4 on cable service.

A cable service provider whose area includes the area in which a person is providing cable service without complying with the notice of franchise and notice of service requirements may bring a civil action for forfeiture. The amount required to be forfeited in the action must be remitted to the Civil Penalty and Forfeiture Fund established in G.S. 115C-457.2. (2006-151, s. 1.)

### **§ 66-355. Effect on existing local franchise agreement.**

(a) Existing Agreement. — This Article does not affect an existing agreement except as follows:



- (1) Effective January 1, 2007, gross revenue used to calculate the payment of the franchise tax imposed by G.S. 153A-154 or G.S. 160A-214 does not include gross receipts from cable service subject to sales tax under G.S. 105-164.4. This exclusion does not otherwise affect the calculation of gross revenue and the payment to counties and cities of franchise tax revenue under existing agreements that have not been terminated under subsection (b) of this section.
  - (2) A cable service provider under an existing agreement that is in effect on January 1, 2007, may terminate the agreement in accordance with subsection (b) of this section in any of the following circumstances:
    - a. A notice of service filed under G.S. 66-352 indicates that one or more households in the franchise area of the existing agreement are passed by both the cable service provider under the existing agreement and the holder of a State-issued franchise.
    - b. As of January 1, 2007, a county or city has an existing agreement with more than one cable service provider for substantially the same franchise area and at least twenty-five percent (25%) of the households in the franchise areas of the existing agreements are passed by more than one cable service provider.
    - c. A person provides wireline competition in the franchise area of the existing agreement by offering video programming over wireline facilities to single family households by a method that does not require a franchise under this Article. A notice of termination filed on the basis of wireline competition must include evidence of the competition in providing video programming service, such as an advertisement announcing the availability of the service, the acceptance of an order for the service, and information on the provider's Web site about the availability of the service. A county or city is allowed 60 days to review the evidence. The effective date of the termination is tolled during this review period. At the end of this period, the termination proceeds unless the county or city has obtained an order enjoining the termination based on the cable service provider's failure to establish the existence of wireline competition in its franchise area.
  - (3) A cable service provider under an existing agreement that expired before January 1, 2007, may obtain a State-issued franchise. The provider does not have to terminate the agreement in accordance with subsection (b) of this section because the agreement has expired.
- (b) Termination. — To terminate an existing agreement, a cable service provider must file a notice of termination with the affected county or city and file a notice of franchise with the Secretary. A termination of an existing agreement becomes effective at the end of the month in which the notice of termination is filed with the affected county or city. A termination of an existing agreement ends the obligations under the agreement and under any local cable regulatory ordinance that specifically authorizes the agreement as of the effective date of the termination but does not affect the rights or liabilities of the county or city, a taxpayer, or another person arising under the existing agreement or local ordinance before the effective date of the termination. (2006-151, s. 1.)

## § 66-356. Service standards and requirements.

(a) Discrimination Prohibited. — A person who provides cable service over a cable system may not deny access to the service to any group of potential residential subscribers within the filed service area because of the race or income of the residents. A violation of this subsection is an unfair or deceptive act or practice under G.S. 75-1.1.

In determining whether a cable service provider has violated this subsection with respect to a group of potential residential subscribers in a service area, the following factors must be considered:

- (1) The length of time since the provider filed the notice of service for the area. If less than a year has elapsed since the notice of service was filed, it is conclusively presumed that a violation has not occurred.
- (2) The cost of providing service to the affected group due to distance from facilities, density, or other factors.
- (3) Technological impediments to providing service to the affected group.
- (4) Inability to obtain access to property required to provide service to the affected group.
- (5) Competitive pressure to respond to service offered by another cable service provider or other provider of video programming.

(b) FCC Standards. — A person who provides cable service over a cable system must comply with the customer service requirements in 47 C.F.R. Part 76 and emergency alert requirements established by the Federal Communications Commission.

(c) Complaints. — The Consumer Protection Division of the Attorney General's Office is designated as the State agency to receive and respond to customer complaints concerning cable services. Persistent or repeated violations of the federal customer service requirements or the terms and conditions of the cable service provider's agreement with customers are unfair or deceptive acts or practices under G.S. 75-1.1.

To facilitate the resolution of customer complaints, the cable service provider must include the following statement on the customer's bill: "If you have a complaint about your cable service, you should first contact customer service at the following telephone number: (insert the cable service provider's customer service telephone number). If the cable service provider does not satisfactorily resolve your complaint, contact the Consumer Protection Division of the Attorney General's Office of the State of North Carolina (insert information on how to contact the Consumer Protection Division of the Attorney General's Office).

(d) No Build-Out. — No build-out requirements apply to a person who provides cable service under a State-issued franchise.

(e) [Report to Revenue Laws Study Committee. — ] The Consumer Protection Division of the Attorney General's Office must report to the Revenue Laws Study Committee on or before April 1 of each year, beginning April 1, 2008, on the following information concerning cable service complaints the Division has received from cable customers under this section:

- (1) The number of customer complaints.
- (2) The types of customer complaints.
- (3) The different means of resolving customer complaints. (2006-151, ss. 1, 18.)

**Editor's Note.** — Session Laws 2006-151, s. 17, provides that: "A primary purpose of this act is to promote consumer choice in video service providers. A premise of this goal is that increased competition will lead to improved service. Under competition, a customer who is dissatisfied with service by one cable service provider will have the option of choosing a different service provider.

"G.S. 66-356, as enacted by this act, designates the Consumer Protection Division of the Attorney General's Office as the agency to receive and respond to unresolved customer complaints about cable service provided by the

holder of a State-issued franchise. The transition from local franchise agreements to State-issued franchises will occur gradually.

"Due to the expected improvement in customer service and the gradual change to State-issued franchises, the impact of the requirement in new G.S. 66-356 on the staffing needs of the Consumer Protection Division is not clear. The Office of the Attorney General is therefore requested to monitor the number and type of cable service complaints it receives from customers in areas served under a local franchise agreement and from areas served under a State-issued franchise to determine whether



the Consumer Protection Division needs additional staff to fulfill the duty imposed by new G.S. 66-356 and to make a report concerning staffing to the Fiscal Research Division of the North Carolina General Assembly by April 1, 2007.”

Session Laws 2006-151, s. 18, was codified as G.S. 66-356(e), at the direction of the Revisor of Statutes.

## § 66-357. Availability and use of PEG channels.

(a) Application. — This section applies to a person who provides cable service under a State-issued franchise. It does not apply to a person who provides cable service under an existing agreement.

(b) Local Request. — A county or city must make a written request to a cable service provider for PEG channel capacity. The request must include a statement describing the county’s or city’s plan to operate and program each channel requested. The cable service provider must provide the requested PEG channel capacity within the later of the following:

- (1) 120 days after the cable service provider receives the written request.
- (2) 30 days after any interconnection requested under G.S. 66-358(a)(1) is accomplished.

(c) Initial PEG Channels. — A city with a population of at least 50,000 is allowed a minimum of three initial PEG channels plus any channels in excess of this minimum that are activated, as of July 1, 2006, under the terms of an existing franchise agreement whose franchise area includes the city. A city with a population of less than 50,000 is allowed a minimum of two initial PEG channels plus any channels in excess of this minimum that are activated, as of July 1, 2006, under the terms of an existing franchise agreement whose franchise area includes the city. For a city included in the franchise area of an existing agreement, the agreement determines the service tier placement and transmission quality of the initial PEG channels. For a city that is not included in the franchise area of an existing agreement, the initial PEG channels must be on a basic service tier, and the transmission quality of the channels must be equivalent to those of the closest city covered by an existing agreement.

A county is allowed a minimum of two initial PEG channels plus any channels in excess of this minimum that are activated, as of July 1, 2006, under the terms of an existing franchise agreement whose franchise area includes the county. For a county included in the franchise area of an existing agreement, the agreement determines the service tier placement and transmission quality of the initial PEG channels. For a county that is not included in the franchise area of an existing agreement, the initial PEG channels must be on a basic service tier and the transmission quality of the channels must be equivalent to those of any city with PEG channels in the county.

The cable service provider must maintain the same channel designation for a PEG channel unless the service area of the State-issued franchise includes PEG channels that are operated by different counties or cities and those PEG channels have the same channel designation. Each county and city whose PEG channels are served by the same cable system headend must cooperate with each other and with the cable system provider in sharing the capacity needed to provide the PEG channels.

(d) Additional PEG Channels. — A county or city that does not have seven PEG channels, including the initial PEG channels, is eligible for an additional PEG channel if it meets the programming requirements in this subsection. A county or city that has seven PEG channels is not eligible for an additional channel.

A county or city that meets the programming requirements in this subsection may make a written request under subsection (b) of this section for an additional channel. The additional channel may be provided on any service



tier. The transmission quality of the additional channel must be at least equivalent to the transmission quality of the other channels provided.

The PEG channels operated by a county or city must meet the following programming requirements for at least 120 continuous days in order for the county or city to obtain an additional channel:

- (1) All of the PEG channels must have scheduled programming for at least eight hours a day.
- (2) The programming content of each of the PEG channels must not repeat more than fifteen percent (15%) of the programming content on any of the other PEG channels.
- (3) No more than fifteen percent (15%) of the programming content on any of the PEG channels may be character-generated programming.

(e) Use of Channels. — If a county or city no longer provides any programming for transmission over a PEG channel it has activated, the channel may be reprogrammed at the cable service provider's discretion. A cable service provider must give at least a 60-day notice to a county or city before it reprograms a PEG channel that is not used. The cable service provider must restore a previously lost PEG channel within 120 days of the date a county or city certifies to the provider a schedule that demonstrates the channel will be used.

(f) Operation of Channels. — A cable service provider is responsible only for the transmission of a PEG channel. The county or city to which the PEG channel is provided is responsible for the operation and content of the channel. A county or city that provides content to a cable service provider for transmission on a PEG channel is considered to have authorized the provider to transmit the content throughout the provider's service area, regardless of whether part of the service area is outside the boundaries of the county or city.

All programming on a PEG channel must be noncommercial. A cable service provider may not brand content on a PEG channel with its logo, name, or other identifying marks. A cable service provider is not required to transmit content on a PEG channel that is branded with the logo, name, or other identifying marks of another cable service provider.

(g) Compliance. — A county or city that has not received PEG channel capacity as required by this section may bring an action to compel a cable service provider to comply with this section. (2006-151, s. 1.)

## § 66-358. Transmission of PEG channels.

(a) Service. — A cable service provider operating under a State-issued franchise must transmit a PEG channel by one of the following methods:

- (1) Interconnection with another cable system operated in its service area. A cable service provider operating in the same service area as a provider under a State-issued franchise must interconnect its cable system on reasonable and competitively neutral terms with the other provider's cable system within 120 days after it receives a written request for interconnection and may not refuse to interconnect on these terms. The terms include compensation for costs incurred in interconnecting. Interconnection may be accomplished by direct cable, microwave link, satellite, or another method of connection.
- (2) Transmission of the signal from each PEG channel programmer's origination site, if the origination site is in the provider's service area.

(b) Signal. — All PEG channel programming provided to a cable service provider for transmission must meet the federal National Television System Committee standards or the Advanced Television Systems Committee Standards. If a PEG channel programmer complies with these standards and the cable service provider cannot transmit the programming without altering the

transmission signal, then the cable service provider must do one of the following:

- (1) Alter the transmission signal to make it compatible with the technology or protocol the cable service provider uses to deliver its cable service.
- (2) Provide to the county or city the equipment needed to alter the transmission signal to make it compatible with the technology or protocol the cable service provider uses to deliver its cable service. (2006-151, s. 1.)

### **§ 66-359. PEG channel grants.**

(a) PEG Channel Fund. — The PEG Channel Fund is created as an interest-bearing special revenue fund. It consists of revenue allocated to it under G.S. 105-164.44I(b) and any other revenues appropriated to it. The e-NC Authority, created under G.S. 143B-437.46, administers the Fund.

(b) Grants. — A county or city may apply to the e-NC Authority for a grant from the PEG Channel Fund. In awarding grants from the Fund, the e-NC Authority must, to the extent possible, select applicants from all parts of the State based upon need. Grants from the Fund are subject to the following limitations:

- (1) The grant may not exceed twenty-five thousand dollars (\$25,000).
- (2) The applicant must match the grant on a dollar-for-dollar basis.
- (3) The grant may be used only for capital expenditures necessary to provide PEG channel programming.
- (4) An applicant may receive no more than one grant per fiscal year.

(c) Reports. — The e-NC Authority must publish an annual report on grants awarded under this section. The report must list each grant recipient, the amount of the grant, and the purpose of the grant. (2006-151, s. 1.)

### **§ 66-360. Service to public building.**

At the written request of a county or city, a cable service provider operating under a State-issued franchise must provide cable service without charge to a public building located within 125 feet of the provider's cable system. The required service is the basic, or lowest-priced, service the provider offers to customers. The terms and conditions that apply to service provided to a residential retail customer apply to the service provided to the public building. Only one service outlet is required for a building. The cable service provider is not required to provide inside wiring and is not required to provide service that conflicts with restrictions that apply in a program licensing agreement or another contract. A public building is a building used as a public school, a charter school, a county or city library, or a function of the county or city. (2006-151, s. 1.)

# Chapter 71A.

## Indians.

Sec.

71A-5. Haliwa-Saponi Indian Tribe of North Carolina; rights, privileges, immunities, obligations and duties.

### § 71A-3. Lumbee Tribe of North Carolina; rights, privileges, immunities, obligations and duties.

#### CASE NOTES

**Cited in** In re A.D.L., 169 N.C. App. 701, 612 S.E.2d 639, 2005 N.C. App. LEXIS 797 (2005).

### § 71A-5. Haliwa-Saponi Indian Tribe of North Carolina; rights, privileges, immunities, obligations and duties.

The Indians now residing in Halifax, Warren and adjoining counties of North Carolina, originally found by the first permanent white settlers on the Roanoke River in Halifax and Warren Counties, and who descend from the Saponi, Nansemond, and other tribes of Indians originally inhabiting the coastal regions of North Carolina, shall, from and after April 15, 1965, be designated and officially recognized as the Haliwa-Saponi Indian Tribe, and they shall continue to enjoy all their rights, privileges and immunities as an American Indian Tribe with a recognized tribal governing body carrying out and exercising substantial governmental duties and powers similar to the State, being recognized as eligible for the special programs and services provided by the United States to Indians because of their status as Indians. (1965, c. 254; 1977, 2nd Sess., c. 1193, s. 1; 1997-293, s. 1; 2006-111, s. 1.)

**Effect of Amendments.** — Session Laws 2006-111, s. 1, effective July 13, 2006, substituted “Haliwa-Saponi Indian” for “Haliwa Saponi” in the section catchline; substituted “who descend from the Saponi, Nansemond, and other” for “claiming, descent from certain” near the beginning, substituted “Haliwa-Saponi Indian Tribe” for “Haliwa Saponi Tribe of North Carolina” near the middle, and substituted “an American Indian Tribe with a recog-

nized tribal governing body carrying out and exercising substantial governmental duties and powers similar to the State, being recognized as eligible for the special programs and services provided by the United States to Indians because of their status as Indians” for “citizens of the State as now or hereafter provided by law, and shall continue to be subject to all the obligations and duties fo citizens under the law” at the end.



## Chapter 74.

### Mines and Quarries.

#### Article 2A.

#### Mine Safety and Health Act.

#### Sec.

74-24.16. Education, training, technical assistance, and research.

#### Sec.

74-24.6. (Effective July 1, 2007) Advisory Council.

#### ARTICLE 2A.

#### *Mine Safety and Health Act.*

### § 74-24.6. (Effective July 1, 2007) Advisory Council.

(a) The Commissioner shall appoint an Advisory Council consisting of 11 members to assist him in the development of safety and health standards for mines which are subject to this Article and to advise him on matters relating to safety and health in such mines. Said Advisory Council shall include three members expressly qualified by experience and affiliation to present the viewpoint of operators of such mines, three persons similarly qualified to present the viewpoint of workers in such mines, and five members of the public sector with knowledge of mining operations or associated health and safety aspects thereof. The Commissioner of Labor shall annually designate one member to act as chairman. The members of the Advisory Council shall serve at the pleasure of the Commissioner and shall have no specific term of office.

(b) The Advisory Council shall hold not fewer than two meetings during each calendar year, and said meetings shall be open to the public. The Commissioner shall furnish to the Advisory Council such secretarial, clerical, and other services as he deems necessary to conduct its business.

(c) The members of the Advisory Council shall be compensated for travel expenses and per diem as authorized by the Commissioner in accordance with those amounts paid to State boards under Chapter 138 of the General Statutes.

(d) The Commissioner may from time to time select representatives of professional organizations of technicians, professional persons specializing in occupational safety and health, and representatives of State agencies who by experience and affiliation are qualified to present the viewpoint of operators of mines and workers in mines to assist the Advisory Council in performing its duties. Such persons, except State employees, selected for temporary purposes may be paid such per diem and travel expenses for attending meetings as may be fixed by the Commissioner. (1975, c. 206, s. 6; 1977, c. 683; 2006-203, s. 20.)

**Section Set Out Twice.** — This section above is effective July 1, 2007. For the section as in effect until July 1, 2007, see the main volume.

**Editor's Note.** — Session Laws 2006-203, s. 126, provides, in part: "Prosecutions for offenses committed before the effective date of this act are not abated or affected by this act, and the statutes that would be applicable but for this act remain applicable to those prosecutions."

**Effect of Amendments.** — Session Laws 2006-203, s. 20, effective July 1, 2007, and applicable to the budget for the 2007-2009 biennium and each subsequent biennium thereafter, substituted "Commissioner" for "Advisory Budget Commission" in subsection (c); and, deleted "by the Advisory Budget Commission and recommended" following "fixed by" near the end of subsection (d).

§ 74-24.16. Education, training, technical assistance, and research.

(a) The Commissioner through the Director is authorized to develop and conduct expanded programs for the education, training, and technical assistance of operators and miners in the recognition, avoidance, and prevention of accidents or unsafe or unhealthful working conditions and to conduct such research as may be necessary in mines which are subject to this Article.

(b) The Commissioner is authorized to conduct, directly or by grants, short-term training of personnel engaged in work related to the Commissioner's responsibilities under this Article.

(c) In carrying out the provisions of this Article, the Commissioner is authorized to enter into agreements and contracts with, and accept grants from and make grants to, public and private agencies and organizations and individuals.

(d) Repealed by Session Laws 2006-66, s. 13.1, effective July 1, 2006. (1975, c. 206, s. 16; 2005-276, s. 42.2(a); 2005-345, s. 48(a); 2006-66, s. 13.1.)

Editor's Note. —

Session Laws 2006-66, s. 1.2, provides: "This act shall be known as 'The Current Operations and Capital Improvements Appropriations Act of 2006'."

Session Laws 2006-66, s. 28.6 is a severability clause.

Effect of Amendments. —

Session Laws 2006-66, s. 13.1, effective July 1, 2006, deleted subsection (d), which read: "The Commissioner may establish fees not to exceed fifty dollars (\$50.00) for each person participating in education and training programs provided by the Department of Labor pursuant to this section."

ARTICLE 7.

*The Mining Act of 1971.*

§ 74-46. Title.

CASE NOTES

Cited in *Good Hope Hosp., Inc. v. N.C. HHS*, 174 N.C. App. 266, 620 S.E.2d 873, 2005 N.C. App. LEXIS 2399 (2005).

§ 74-68. Cooperation with other agencies; contracts and grants.

CASE NOTES

Cited in *Good Hope Hosp., Inc. v. N.C. HHS*, 174 N.C. App. 266, 620 S.E.2d 873, 2005 N.C. App. LEXIS 2399 (2005).

## Chapter 74C.

### Private Protective Services.

#### Article 1.

#### Private Protective Services Board.

Sec.

74C-3. Private protective services profession defined.

#### ARTICLE 1.

#### *Private Protective Services Board.*

### § 74C-3. Private protective services profession defined.

(a) As used in this Chapter, the term “private protective services profession” means and includes the following:

- (1) “Armored car profession” means any person, firm, association, or corporation which provides secured transportation and protection from one place or point to another place or point of money, currency, coins, bullion, securities, checks, documents, stocks, bonds, jewelry, paintings, and other valuables for a fee or other valuable consideration. This definition does not include a person operating an armored car business pursuant to a motor carrier certificate or permit issued by the North Carolina Utilities Commission which grants operating rights for such business; however, armed armored car service guards shall be subject to the provisions of G.S. 74C-13.
- (2) Repealed by Session Laws 1983, c. 786, s. 2.
- (3) “Counterintelligence service profession” means any person, firm, association, or corporation which discovers, locates, or disengages by electronic, electrical, or mechanical means any listening or other monitoring equipment surreptitiously placed to gather information concerning any individual, firm, association, or corporation for a fee or other valuable consideration.
- (4) “Courier service profession” means any person, firm, association, or corporation which transports or offers to transport from one place or point to another place or point documents, papers, maps, stocks, bonds, checks, or other small items of value which require expeditious service for a fee or other valuable consideration. Armed courier service guards shall be subject to the provisions of G.S. 74C-13.
- (5) “Detection of deception examiner” means any person, firm, association, or corporation which uses any device or instrument, regardless of its name or design, for the purpose of the detection of deception or any person who reviews the work product of an examiner including charts, tapes or other methods of record keeping for the purpose of detecting deception or determining accuracy.
- (6) “Security guard and patrol profession” means any person, firm, association, or corporation that provides a security guard on a contractual basis for another person, firm, association, or corporation for a fee or other valuable consideration and performing one or more of the following functions:
  - a. Prevention or detection of intrusion, entry, larceny, vandalism, abuse, fire, or trespass on private property;
  - b. Prevention, observation, or detection of any unauthorized activity on private property;



- c. Protection of patrons and persons lawfully authorized to be on the premises of the person, firm, association, or corporation that entered into the contract for security services; or
  - d. Control, regulation, or direction of the flow or movement of the public, whether by vehicle or otherwise, only to the extent and for the time directly and specifically required to assure the protection of properties.
- (7) "Guard-dog service profession" means any person, firm, association, or corporation which contracts with another person, firm, association, or corporation to place, lease, rent, or sell a trained dog for the purpose of protecting lives or property for a fee or other valuable consideration.
- (8) "Private detective" or "private investigator" are synonymous and mean any person who engages in the profession of or accepts employment to furnish, agrees to make, or makes inquiries or investigations concerning the below-listed topics on a contractual basis:
- a. Crimes or wrongs done or threatened against the United States or any state or territory of the United States;
  - b. The identity, habits, conduct, business, occupation, honesty, integrity, credibility, knowledge, trustworthiness, efficiency, loyalty, activity, movement, whereabouts, affiliations, associations, transactions, acts, reputation, or character of any person;
  - c. The location, disposition, or recovery of lost or stolen property;
  - d. The cause or responsibility for fires, libels, losses, accidents, damages, or injuries to persons or to properties;
  - e. Securing evidence to be used before any court, board, officer, or investigative committee; or
  - f. Protection of individuals from serious bodily harm or death.
- (9) "Special limited guard and patrol profession" means any person who is licensed under Chapter 74D of the General Statutes of North Carolina and provides armed alarm responders pursuant to G.S. 74C-13. Applicants for this limited license shall not be required to meet the experience requirements for a security guard and patrol license. Any experience gained under this limited license shall not be counted as experience for a security guard and patrol license.
- (b) "Private protective services" shall not mean:
- (1) Licensed insurance adjusters legally employed as such and who engage in no other investigative activities unconnected with adjustment or claims against an insurance company;
  - (2) An officer or employee of the United States, this State, or any political subdivision of either while such officer or employee is engaged in the performance of his official duties within the course and scope of his employment with the United States, this State, or any political subdivision of either;
  - (3) A person engaged exclusively in the business of obtaining and furnishing information as to the financial rating or credit worthiness of persons; and a person who provides consumer reports in connection with:
    - a. Credit transactions involving the consumer on whom the information is to be furnished and involving the extensions of credit to the consumer,
    - b. Information for employment purposes,
    - c. Information for the underwriting of insurance involving the consumer,
    - d. Information in connection with a determination of the consumer's eligibility for a license or other benefit granted by a governmental instrumentality required by law to consider an applicant's financial responsibility, or

- e. A legitimate business need for the information in connection with a business transaction involving the consumer;
- (4) An attorney at law licensed to practice in North Carolina while engaged in such practice and his agent, provided said agent is performing duties only in connection with his principal's practice of law;
- (5) The legal owner or lien holder, and his agents and employees, of personal property which has been sold in a transaction wherein a security interest in personal property has been created to secure the sales transaction, who engage in repossession of said personal property;
- (6) Repealed by Session Laws 1989, c. 759, s. 3.
- (7) Repealed by Session Laws 1981, c. 807, s. 1.
- (8) Employees of a licensee who are employed exclusively as undercover agents; provided that for purposes of this section, undercover agent means an individual hired by another person, firm, association, or corporation to perform a job for that person, firm, association, or corporation and, while performing such job, to act as an undercover operative, employee, or independent contractor of a licensee, but under the supervision of a licensee;
- (9) A person who is engaged in an alarm systems business subject to the provisions of Chapter 74D of the General Statutes;
- (10) A person who obtains or verifies information regarding applicants for employment, with the knowledge and consent of the applicant, and is
  - (i) engaged in business as a private personnel service as defined in G.S. 95-47.1 or engaged in business as a private employer fee pay personnel service, (ii) engaged in the business of obtaining or verifying information regarding applicants for employment, or (iii) an employer with whom the applicant has applied for employment;
- (11) A person who conducts efficiency studies. An efficiency study is an analysis of an employer's business, made at the request of the employer, to determine one or more of the following:
  - a. The most efficient procedures by which an employee of the business can perform the employee's assigned duties.
  - b. The adequacy of an employee's performance of the employee's assigned duties that require interaction with a client or customer of the business.

If a person making an efficiency study observes an instance of theft or another illegal act committed by an employee of the business, the person may report the instance to the employer without violating G.S. 74C-3(a)(8).
- (12) Research laboratories and consultants who analyze, test, or in any way apply their expertise to interpreting, evaluating, or analyzing facts or evidence submitted by another in order to determine the cause or effect of physical or psychological occurrences, and give their opinions and findings to the requesting source or to a designee of the requestor;
- (13) A person who works regularly and exclusively as an employee of an employer in connection with the business affairs of that employer. If the employee is an armed security guard and wears, carries, or possesses a firearm in the performance of his duties, the provisions of G.S. 74C-13 apply;
- (14) An employee of a security department of a private business that conducts investigations exclusively on matters internal to the business affairs of the business; or
- (15) Representatives of nonprofit organizations funded all or in part by business improvement districts who provide information and direc-

tions to local tourists and residents, engage in street cleaning and beautification services within the business improvement districts, and notify local law enforcement of any illegal activity observed by the representatives within the business improvement districts. (1973, c. 528, s. 1; 1977, c. 481; 1979, c. 818, s. 2; 1981, c. 807, ss. 1-3; 1983, c. 259; c. 786, ss. 2, 3; c. 794, s. 1; 1987, c. 284; c. 657, s. 1; 1989, c. 759, s. 3; 2001-487, s. 64(a); 2006-264, s. 46.)

**Effect of Amendments.** — Session Laws 2006-264, s. 46, effective August 27, 2006, in subsection (b), substituted “; or” for a period at the end of subdivision (b)(14), and added subdivision (b)(15).



## **Chapter 74E.**

### **Company Police Act.**

Sec.

74E-6. Oaths, powers, and authority of company police officers.

#### **§ 74E-6. Oaths, powers, and authority of company police officers.**

(a) Requirements. — An individual who is commissioned as a company police officer must take the oath of office required of a law enforcement officer before the individual assumes the duties of a company police officer. The person in each company police agency who is responsible for the agency's company police officers must be commissioned as a company police officer.

(b) Categories. — The following three distinct classifications of company police officers are established:

- (1) Campus Police Officers — Only those company police officers who are employed by any college or university that is a constituent institution of The University of North Carolina or any private college or university that is licensed or exempted from licensure as prescribed by G.S. 116-15, and who are employed by a campus police agency that was licensed pursuant to this Chapter prior to the enactment of Chapter 74G of the General Statutes.
- (2) Railroad Police Officers — Those company police officers who are employed by a certified rail carrier and commissioned as company police officers under this Chapter.
- (3) Special Police Officers — All company police officers not designated as a campus police officer or railroad police officer.

(c) All Company Police. — Company police officers, while in the performance of their duties of employment, have the same powers as municipal and county police officers to make arrests for both felonies and misdemeanors and to charge for infractions on any of the following:

- (1) Real property owned by or in the possession and control of their employer.
- (2) Real property owned by or in the possession and control of a person who has contracted with the employer to provide on-site company police security personnel services for the property.
- (3) Any other real property while in continuous and immediate pursuit of a person for an offense committed upon property described in subdivisions (1) or (2) of this subsection.

Company police officers shall have, if duly authorized by the superior officer in charge, the authority to carry concealed weapons pursuant to and in conformity with G.S. 14-269(b)(4) and (5).

(d) Campus Police. — Campus police officers have the powers contained in subsection (c) of this section and also have the powers in that subsection upon that portion of any public road or highway passing through or immediately adjoining the property described in that subsection, wherever located. The board of trustees of any college or university that qualifies as a campus police agency pursuant to this Chapter may enter into a mutual aid agreement with the governing board of a municipality or, with the consent of the county sheriff, a county to the same extent as a municipal police department pursuant to Chapter 160A.

(e) Railroad Police. — Railroad police officers have the powers contained in subsection (c) and also have the powers and authority granted by federal law

or by a regulation promulgated by the United States Secretary of Transportation. Notwithstanding any of the provisions of this Chapter, the limitations on the power to make arrests contained in subsection (c) above, shall not be applicable to railroad police officers commissioned by the Attorney General pursuant to the authority of this Chapter.

(f) Repealed by Session Laws 2005-231, s. 3, effective July 28, 2005.

(g) Exclusive Authority. — Notwithstanding any other provision of law, the authority granted to company police officers shall be limited to the provisions of this Chapter. (1871-2, c. 138, s. 53; Code, s. 1990; Rev., s. 2607; 1907, c. 128, s. 2; c. 462; c. 470, ss.3, 4; C.S., ss. 3483, 3485; 1933, c. 134, s. 8; 1941, c. 97, s. 5; 1943, c. 676, s. 2; 1959, c. 124, s. 1; 1963, c. 1165, s. 2; 1965, c. 872; 1969, c. 844, s. 8; 1977, c. 148, s. 4; 1981, c. 884, s. 4; 1987, c. 469; 1989, c. 518, s. 1; 1991 (Reg. Sess., 1992), c. 1043, s. 1; 1997-441, s. 1; 1999-68, s. 3; 2005-231, s. 3; 2006-259, s. 5(b).)

**Effect of Amendments. —**

Session Laws 2006-259, s. 5(b), effective October 1, 2006, substituted “G.S. 14-269(b)(4)

and (5)” for “G.S. 14-269(b)(5)” at the end of the last paragraph in subsection (c).

**Chapter 75.**  
**Monopolies, Trusts and Consumer Protection.**

**Article 1.**

**General Provisions.**

Sec.  
75-38. Prohibit excessive pricing during states of disaster, states of emergency, or abnormal market disruptions.

**Article 2A.**

**Identity Theft Protection Act.**

75-63. Security freeze.

**Article 4.**

**Telephone Solicitations.**

75-106 through 75-114. [Reserved.]

**Article 5.**

**Unsolicited Facsimiles.**

Sec.  
75-115. Definitions.  
75-116. Prohibition of unsolicited facsimiles; exception.  
75-117. Facsimiles to contain identifying material.  
75-118. Enforcement.

**ARTICLE 1.**

*General Provisions.*

**§ 75-1. Combinations in restraint of trade illegal.**

**CASE NOTES**

**I. General Consideration.**

**I. GENERAL CONSIDERATION.**

**Cited** in Good Hope Hosp., Inc. v. N.C. HHS,

174 N.C. App. 266, 620 S.E.2d 873, 2005 N.C. App. LEXIS 2399 (2005).

**§ 75-1.1. Methods of competition, acts and practices regulated; legislative policy.**

**CASE NOTES**

- I. General Consideration.
- II. Trade or Commerce.
- III. Unfair and Deceptive Acts.
  - A. In General.
  - B. Illustrative Cases.
- IV. Pleading and Practice.

**I. GENERAL CONSIDERATION.**

**Scope of Chapter. —**

Where the seller was not engaged in the sale of her own home, she did not carry her burden of demonstrating that the transaction was beyond the scope of N.C.G.S. ch. 75. Willen v. Hewson, — N.C. App. —, 622 S.E.2d 187, 2005 N.C. App. LEXIS 2612 (2005).

**Application of Section to Third-Party Claimants. —**

North Carolina did not recognize a cause of action for third-party claimants against the insurance company of an adverse party based on unfair and deceptive trade practices under G.S. 75-1.1; since a passenger brought a claim for personal injuries against a driver's insurer before the driver's liability was established



judicially, he was not a third-party beneficiary of the policy, and his claim against the insurer was properly dismissed. *Craven v. Demidovich*, 172 N.C. App. 340, 615 S.E.2d 722, 2005 N.C. App. LEXIS 1429 (2005), cert. denied, 360 N.C. 62, 623 S.E.2d 581 (2005).

**Federal Preemption.** —

Defendants' motion to strike references in plaintiff's complaint to G.S. 58-63-15(11) and G.S. 75-1.1 was granted because plaintiff's state claims were preempted by the Employee Retirement Income Security Act, 29 U.S.C.S. §§ 1001-1461; by incorporating those acts specified in G.S. 58-63-15(11), by including any acts considered "unethical" in the insurance industry and by providing trebled damages for violations, G.S. 75-1.1 provided for relief in addition to and outside of that available under 29 U.S.C.S. § 1132(a)(1)(B) and becomes that "separate vehicle" which was completely preempted and not saved under 29 U.S.C.S. § 1144(b)(2)(A). *Smith v. Jefferson Pilot Fin. Ins. Co.*, 367 F. Supp. 2d 839, 2005 U.S. Dist. LEXIS 6865 (M.D.N.C. 2005).

**Election of Remedies Required.** — Pursuant to the doctrine of election of remedies, a party may not recover twice based on the same conduct; a trial court erred in awarding the buyers in a used car purchase transaction treble damages under both G.S. 20-348(a) and again under N.C.G.S., ch. 75. *Blankenship v. Town & Country Ford, Inc.*, — N.C. App. —, 622 S.E.2d 638, 2005 N.C. App. LEXIS 2616 (2005).

**Preemption by Fair Credit Reporting Act.** — In a debtor's suit against a creditor based on her inability to obtain credit from a report of a balance due on a credit card account that was obtained by her deceased husband without the debtor's knowledge or permission, the debtor's claim against the creditor for violation of the North Carolina Unfair and Deceptive Trade Practice Act, G.S. 75-1.1 et seq., was preempted by the Fair Credit Reporting Act, 15 U.S.C.S. § 1681t. *Johnson v. MBNA Am. Bank, N.A.*, — F. Supp. 2d —, 2006 U.S. Dist. LEXIS 10533 (M.D.N.C. Mar. 9, 2006).

**Fair Debt Collection Act as Exclusive Remedy.** — In a debtor's suit against a creditor based on a credit card debt from a credit card obtained by her deceased husband without the debtor's knowledge and consent, the debtor's claim for violation of the North Carolina Unfair and Deceptive Trade Practice Act, G.S. 75-1.1 et seq., based on allegedly abusive debt collection conduct failed because the North Carolina Debt Collection Act, G.S. 75-50 et seq., provided the exclusive remedy for such a claim. *Johnson v. MBNA Am. Bank, N.A.*, — F. Supp. 2d —, 2006 U.S. Dist. LEXIS 10533 (M.D.N.C. Mar. 9, 2006).

**Conclusion of Law Reviewable De Novo on Appeal.** — In an unfair trade practices case that certain borrowers filed against a lender for

violations of G.S. 75-1.1, an appellate court applied a de novo standard of review to a trial court's decision holding that an arbitration clause in the loan agreement of certain buyers was invalid. The trial court's determination of whether the dispute was subject to arbitration was a conclusion of law that was reviewable de novo on appeal. *Tillman v. Commer. Credit Loans, Inc.*, — N.C. App. —, 629 S.E.2d 865, 2006 N.C. App. LEXIS 1186 (2006).

In an unfair trade practices case that certain borrowers filed against a lender for violations of G.S. 75-1.1, the borrowers failed to show that an arbitration clause in their loan agreement was invalid. The borrowers failed to prove that the costs of arbitration were prohibitively high and would have exceeded the costs of litigation, as the borrowers made unequal comparisons between the two categories of costs and left out of their calculations certain statutory provisions, including the provision in G.S. 75.16.1, which allowed an award of attorney's fees for the prevailing party. *Tillman v. Commer. Credit Loans, Inc.*, — N.C. App. —, 629 S.E.2d 865, 2006 N.C. App. LEXIS 1186 (2006).

In an unfair trade practices case that certain borrowers filed against a lender for violations of G.S. 75-1.1, the arbitration clause in the borrowers' loan agreement was not unconscionable for lack of mutuality. Mutuality merely required consideration on each side of a contract, mutuality did not require that each of a contract's terms had to apply equally to both parties to be enforceable, and the consideration was sufficient if it was shown that there was some consideration on both sides of a contract. *Tillman v. Commer. Credit Loans, Inc.*, — N.C. App. —, 629 S.E.2d 865, 2006 N.C. App. LEXIS 1186 (2006).

**Applied** in *McDonald Bros., Inc. v. Tinder Wholesale, LLC*, 395 F. Supp. 2d 255, 2005 U.S. Dist. LEXIS 25446 (M.D.N.C. 2005).

**Cited** in *Moose v. Versailles Condo. Ass'n*, 171 N.C. App. 377, 614 S.E.2d 418, 2005 N.C. App. LEXIS 1199 (2005); *Good Hope Hosp., Inc. v. N.C. HHS*, 174 N.C. App. 266, 620 S.E.2d 873, 2005 N.C. App. LEXIS 2399 (2005); *Creekside Constr. Co. v. Dowler*, 172 N.C. App. 558, 616 S.E.2d 609, 2005 N.C. App. LEXIS 1783 (2005); *In re Medley*, — Bankr. —, 2005 Bankr. LEXIS 2290 (Bankr. M.D.N.C. Nov. 10, 2005); *Hurtado USA, Inc. v. Am. Safety & Indem. Co.*, — F. Supp. 2d —, 2005 U.S. Dist. LEXIS 30444 (M.D.N.C. Nov. 16, 2005); *Carroll v. Ferro*, — N.C. App. —, 633 S.E.2d 708, 2006 N.C. App. LEXIS 1904 (2006); *Time Warner Entertainment-Advance/Newhouse P'ship v. Carteret-Craven Elec. Mbrshp. Corp.*, — F. Supp. 2d —, 2006 U.S. Dist. LEXIS 64195 (E.D.N.C. Aug. 11, 2006).

## II. TRADE OR COMMERCE.

**Claims Against Attorney Barred.** — In their debt collection practice, defendants, a law

firm and its president, were learned professionals, exempt under the North Carolina Debt Collection Act and the North Carolina Unfair and Deceptive Trade Practices Act; the court was unable to limit the exemption to attorneys licensed in North Carolina and no exception would be made for alleged insufficient supervision in connection with claims brought by plaintiff consumers. *Godfredson v. JBC Legal Group, P.C.*, 387 F. Supp. 2d 543, 2005 U.S. Dist. LEXIS 17878 (E.D.N.C. 2005).

### III. UNFAIR AND DECEPTIVE ACTS.

#### A. In General.

##### **Breach of Contract. —**

In a case arising from the termination of an employee where the trial judge entered an order finding as a matter of law that, where the jury found that there was a breach of contract by the employer and also found the employer engaged in two of three aggravating circumstances associated with the breach, the employer had engaged in unfair and deceptive trade practices entitling employee to treble damages, the court did not err by refusing to divide the breach of contract claim and the violation of G.S. 75-1.1 for purposes of awarding treble damages. *Johnson v. Colonial Life & Accident Ins. Co.*, 173 N.C. App. 365, 618 S.E.2d 867, 2005 N.C. App. LEXIS 2015 (2005).

In a case arising from the termination of an employee, where the evidence showed aggravating factors in addition to a breach of contract, there was sufficient evidence to show a violation of G.S. 75-1.1. *Johnson v. Colonial Life & Accident Ins. Co.*, 173 N.C. App. 365, 618 S.E.2d 867, 2005 N.C. App. LEXIS 2015 (2005).

##### **Effect of Absence of Valid Contract. —**

Because the buyers to a contract with the seller did not possess any contract rights due to the insufficiency of their consideration, they could not allege damages by virtue of any alleged unfair and deceptive acts of the seller relating to that alleged contract; further, because the buyers did not allege that the seller intended to deceive them from the outset, there was no allegation that an unfair or deceptive act by the seller induced the buyers either to pay the deposits mentioned in the alleged option contract or to leave the deposits with the seller's agent rather than withdrawing them. *McLamb v. T.P. Inc.*, 173 N.C. App. 586, 619 S.E.2d 577, 2005 N.C. App. LEXIS 2122 (2005).

**Unfair and Deceptive Trade Practices Claim Separate and District. —** Insurance company which engaged in the act or practice of not attempting in good faith to effectuate prompt, fair, and equitable settlements of claims in which liability had become reasonably clear, G.S. 58-63-15(11)(f), also violated G.S. 75-1.1, as a matter of law, without the necessity of an additional showing of frequency

indicating a "general business practice," and allegations to that effect sufficiently stated an unfair and deceptive trade practices (UDTP) claim; while insureds' claims for breach of contract, breach of fiduciary duty, and bad faith were barred by the three-year statute of limitations, their UDTP claim was separate and distinct from the claims on the underlying insurance policy, was thus governed by the G.S. 75-16.2 four-year statute of limitations applicable to such claims, and was therefore timely. *Page v. Lexington Ins. Co.*, — N.C. App. —, 628 S.E.2d 427, 2006 N.C. App. LEXIS 862 (2006).

#### B. Illustrative Cases.

**Applicability To Check Cashing Business That Charged Usurious Interest Rates. —** Where evidence against a check cashing business established that it executed contracts for usurious loans, it used its alternative business purpose of providing Internet access to consumers as a guise to cover this illegal activity, and no evidentiary basis existed upon which a reasonable fact-finder could reach a contrary conclusion, the State's claims of usury and violations of the Consumer Finance Act were established as a matter of law; moreover, the contracts which customers had with the business were cancelled pursuant to G.S. 75-15.1, requiring all funds collected by the business pursuant to such contracts to be refunded to the customers. *State ex rel. Cooper v. NCCS Loans, Inc.*, — N.C. App. —, 624 S.E.2d 371, 2005 N.C. App. LEXIS 2588 (2005).

**Usury. —** Reorganized check cashing companies' policy of extending an immediate cash rebate and Internet usage to its customers in exchange for a one-year commitment to make bi-weekly payments in an amount equal to five times the amount of the rebate, violated G.S. 24-2.1, was usurious, and constituted an unfair and deceptive trade practice in violation of G.S. 75-1.1. The fact that the reorganized companies characterized the transactions as rebates or Internet service agreements was subterfuge to conceal the usurious rate of interest. *State ex rel. Cooper v. NCCS Loans, Inc.*, — N.C. App. —, 620 S.E.2d 697, 2005 N.C. App. LEXIS 2392 (2005).

**Deceiving Lessor as to Intent to Vacate Property. —** Where the jury found that an advertising company's president deliberately deceived a lessor and potential lessee as to his intent to vacate property and remove his sign, and instead remained on the property, delaying and ultimately preventing the potential lessee from securing a permit for the site and occupying the property, the evidence was sufficient to support the jury's findings that the president committed unfair and deceptive practices. *Beroth Oil Co. v. Whiteheart*, 173 N.C. App. 89,



618 S.E.2d 739, 2005 N.C. App. LEXIS 1903 (2005).

**Failure to Maintain Dwellings.** —

Tenant was entitled to a verdict in the tenant's favor in the unfair trade practices claim pursuant to G.S. 75-1.1, where the landlord breached the implied warranty of habitability by refusing to repair the leased premises; a residential lease agreement fell under the unfair trade practices statute, and the tenant established that the rental premises was uninhabitable, that the landlord knew that the premises needed to be repaired, and that the landlord refused to make repairs and continued to demand rent payments. *Dean v. Hill*, 171 N.C. App. 479, 615 S.E.2d 699, 2005 N.C. App. LEXIS 1275 (2005).

**Tortious Interference With Noncompete Agreement.** — Debtor's competitor was not entitled to summary judgment on a bankruptcy trustee's claim for violation of the North Carolina Unfair and Deceptive Trade Practices Act because the trustee presented evidence that the competitor intentionally induced the debtor's employees to breach their noncompete agreements with the debtor and that this was done with a wrong purpose. *Magers v. Holland Group of Tenn., Inc. (In re Griffin Services, Inc.)*, — Bankr. —, 2005 Bankr. LEXIS 1116 (Bankr. M.D.N.C. Mar. 2, 2005).

**Sale of Illegal Agreements.** — Summary judgment was not granted to the director of a corporation in a claim under the North Carolina Unfair and Deceptive Trade Practices Act, G.S. 75-1.1 et seq., because there was evidence to show that the director engaged in conduct with the tendency or capacity to mislead when advocating the sale of certain illegal agreements; moreover, the claims were not barred by the four-year statute of limitations. *Rich Food Servs., Inc. v. Rich Plan Corp.*, — F. Supp. 2d —, 2002 U.S. Dist. LEXIS 27799 (E.D.N.C. Nov. 11, 2002).

**Inflating Value to Increase Price for Right of First Refusal.** — Defendant oil company's motions to dismiss, for judgment on the pleadings, and to strike certain allegations as irrelevant were denied where plaintiff's complaint stated claims for fraudulent inducement and violation of the Unfair and Deceptive Trade Practices Act, G.S. 75-1. The oil company was alleged to have inflated the value of plaintiff's service station, increasing the price for the operator's right of first refusal. *Simaan, Inc. v. BP Prods. N. Am., Inc.*, 395 F. Supp. 2d 271, 2005 U.S. Dist. LEXIS 11204 (M.D.N.C. 2005).

**Denial of Insurance Claim.** —

Insureds did not show that a homeowner's insurance carrier failed to adopt and implement reasonable standards for the prompt investigation of claims arising under insurance policies, pursuant to G.S. 58-63-15(11)(c) of the Unfair Claims Settlement Practices statute,

N.C. Gen. Stat. ch. 58, art. 63, by producing no evidence regarding those practices except for the carrier's two-sentence explanation of its general investigation practices; summary judgment was therefore properly granted to the carrier in the insureds' action under G.S. 75-1.1. *Nelson v. Hartford Underwriters Ins. Co.*, — N.C. App. —, 630 S.E.2d 221, 2006 N.C. App. LEXIS 1185 (2006).

Homeowner's insurance carrier did not violate G.S. 58-63-15(11)(e) of the Unfair Claims Settlement Practices statute, N.C. Gen. Stat. ch. 58, art. 63, by failing to affirm or deny coverage of insureds' second claim based on mold damage in their house because the re-investigation was carried out in a reasonable amount of time and the insureds filed an action against the carrier shortly after the re-investigation report was concluded, providing little time for the carrier to respond; summary judgment was therefore properly granted to the carrier in the insureds' action under G.S. 75-1.1. *Nelson v. Hartford Underwriters Ins. Co.*, — N.C. App. —, 630 S.E.2d 221, 2006 N.C. App. LEXIS 1185 (2006).

Homeowner's insurance carrier did not violate G.S. 58-63-15(11)(d) of the Unfair Claims Settlement Practices statute, N.C. Gen. Stat. ch. 58, art. 63, by failing to conduct a reasonable investigation when it commissioned a local engineering firm to report on a mold problem in the home of insureds because the purpose of the report was to determine whether mold was present and not to determine all its possible causes or the types of mold present; summary judgment was therefore properly granted to the carrier in the insureds' action under G.S. 75-1.1. *Nelson v. Hartford Underwriters Ins. Co.*, — N.C. App. —, 630 S.E.2d 221, 2006 N.C. App. LEXIS 1185 (2006).

Summary judgment was properly granted to a homeowners' insurance carrier on insureds' cause of action under G.S. 75-1.1 claiming that the carrier violated G.S. 58-63-15(11)(n) of the Unfair Claims Settlement Practices statute, N.C. Gen. Stat. ch. 58, art. 63, by failing to provide a reasonable explanation of the basis in the policy for denying their claim; the carrier grounded its denial on exclusions in the policy for mold and faulty workmanship, and the omission of the policy's issuance after the harm occurred as a third ground for denial did not make the explanation unreasonable, unfair, or deceptive. *Nelson v. Hartford Underwriters Ins. Co.*, — N.C. App. —, 630 S.E.2d 221, 2006 N.C. App. LEXIS 1185 (2006).

Summary judgment was properly granted to a homeowners' insurance carrier on insureds' cause of action under G.S. 75-1.1 claiming that the carrier violated G.S. 58-63-15(11)(a) of the Unfair Claims Settlement Practices Statute, N.C. Gen. Stat. ch. 58, art. 63, by misrepresenting facts or insurance policy provisions relating



to their claim for mold damage in their home; coverages not mentioned in its letter denying the claim were not applicable to the claim, the letter expressly reserved the carrier's right to assert other rights or defenses, and the letter was not unethical or unscrupulous and did not have a tendency to deceive the insureds. *Nelson v. Hartford Underwriters Ins. Co.*, — N.C. App. —, 630 S.E.2d 221, 2006 N.C. App. LEXIS 1185 (2006).

**Intentional Destruction of Documents Subject to Audit.** — Summary judgment was denied where defendant's alleged intentional destruction of relevant documents in preparation for an audit by the plaintiff could be viewed as an intentional action to mislead or deceive the plaintiff sufficient to state an unfair trade practices claim under G.S. 75-1.1. *N.C. Mut. Life Ins. Co. v. McKinley Fin. Servs.*, — F. Supp. 2d —, 2005 U.S. Dist. LEXIS 36308 (M.D.N.C. Dec. 22, 2005).

**Repossessor Was Liable to Debtor for Perishable Goods.** — Evidence supported the finding of an unfair and deceptive trade practice on the part of defendant reposessor with regard to the loss of a debtor's load of watermelons that was being held in a truck that was repossessed, because the reposessor denied the debtor a realistic opportunity to remove the goods at the time of the repossession and failed to respond to the debtor's prompt inquiries to access and remove the watermelons from the reposessor's secured yard. *Eley v. Mid/East Acceptance Corp. of N.C., Inc.*, 171 N.C. App. 368, 614 S.E.2d 555, 2005 N.C. App. LEXIS 1253 (2005).

**Conduct Not Amounting to Unfair Trade Practice.** —

Trial court erred in granting judgment as to a services provider's unfair and deceptive trade practices claim as the mere establishment of a subsidiary corporation for the purpose of limiting the parent corporation's liability was not per se an unfair and deceptive trade practice; accordingly, the case was remanded to the lower court for a trial before a jury to determine whether the parent corporation's conduct, as to the provider, constituted an unfair and deceptive trade practice. *Excel Staffing Serv. v. HP Reidsville*, 172 N.C. App. 281, 616 S.E.2d 349, 2005 N.C. App. LEXIS 1582 (2005).

**Conduct of Ex-Employee.** —

Targeted solicitation, and the use of those targeted employees to solicit other employees with that information, was an unfair trade practice under G.S. 75-1.1; since the corporation also showed that the customers it lost and the geographical areas where it lost business were the same customers and areas of the employees who the LLC hired away from the corporation, the corporation showed a proximate cause connection to its lost profits and those lost profit damages, along with treble

damages and attorney fees, were properly awarded. *Sunbelt Rentals, Inc. v. Head & Engquist Equip., L.L.C.*, 174 N.C. App. 49, 620 S.E.2d 222, 2005 N.C. App. LEXIS 2290 (2005).

**Violation Not Found.** —

Trial court did not err by granting a directed verdict motion to a wedding show operator that was sued by a bridal facility owner because the bridal facility owner failed to prove that the declining attendance of vendors at his bridal shows was proximately caused by the wedding show operator, and the bridal facility owner merely speculated as to his lost profits so that the jury could not reasonably calculate the amount of any lost profits by the bridal facility owner. *Castle McCulloch, Inc. v. Freedman*, 169 N.C. App. 497, 610 S.E.2d 416, 2005 N.C. App. LEXIS 604 (2005), *aff'd*, 360 N.C. 57, 620 S.E.2d 674 (2005).

**Weight-loss Center.** — In an action brought against a weight loss center and other defendants, the trial court erred in granting partial summary judgment against those plaintiffs who did not request their prescription as to a claim brought under the Unfair and Deceptive Trade Practices Act; at a minimum, a jury question existed as to damages. *Jacobs v. Physicians Weight Loss Ctr. of Am., Inc.*, 173 N.C. App. 663, 620 S.E.2d 232, 2005 N.C. App. LEXIS 2280 (2005).

**Franchisees properly supported their claim against franchisors for unfair and deceptive practices** where the evidence showed that franchisors of retail gasoline stations and a putative purchaser of the stations reallocated the value of the stations to inflate the value of the station of franchisees who had a right of first refusal to purchase the station; the franchisors misrepresented the purchaser's offer as the reallocated value and refused to provide the agreement with the purchaser, the franchisees had no choice but to rely on the misrepresentation in order to exercise their right of first refusal, and exercising such right did not constitute a ratification of the transaction since the franchisees were unaware of the true facts. *Simaan, Inc. v. BP Prods. N. Am., Inc.*, — F. Supp. 2d —, 2005 U.S. Dist. LEXIS 11203 (M.D.N.C. May 26, 2005).

**Claim of Improper Sexual Advances.** — Plaintiff's claim that defendants wrongfully induced him to take employment, only to subject him to sexual advances, survived a motion to dismiss because the offending conduct, misleading a prospective employee to induce him to accept employment and face harassment, occurred before the employer-employee relationship existed. *Mayes v. Moore*, 419 F. Supp. 2d 775, 2006 U.S. Dist. LEXIS 9757 (M.D.N.C. 2006).

**Sweepstakes Contestant Not Entitled to Damages.** — Under G.S. 75-16, a sweepstakes contestant was not entitled to damages for

unfair and deceptive trade practices, pursuant to G.S. 75-1.1 and G.S. 75-32; even if the contest sponsor's actions constituted actionable conduct pursuant to G.S. 75-1.1 and G.S. 75-32, no reasonable person could have relied on the representations contained therein to conclude that he or she would be entitled to the entire contest prize because any actual injury suffered could not have been, as a matter of law, proximately caused by the sponsor's representations. *Fozard v. Publr. Clearing House, Inc.*, — F. Supp. 2d —, 1999 U.S. Dist. LEXIS 22994 (M.D.N.C. Apr. 29, 1999).

#### IV. PLEADING AND PRACTICE.

##### **Plaintiff Held Not Entitled to Proceed Under This Section. —**

Injury in fact is required for both standing and to support claims under the North Carolina Unfair and Deceptive Trade Practices Act (NC UDTPA); vehicle owners' claims against the manufacturer of the vehicles, alleging that the failure to install a brake shift interlock device (BSI) violated the NC UDTPA were properly dismissed for lack of standing where the owners suffered no injury or property damage arising from the lack of a BSI, did not allege that

the vehicles were defective or had diminished in value, had not installed a BSI on their vehicles, and had no realized damages. *Coker v. DaimlerChrysler Corp.*, 172 N.C. App. 386, 617 S.E.2d 306, 2005 N.C. App. LEXIS 1792 (2005), cert. denied, 360 N.C. 61, 623 S.E.2d 581 (2005).

##### **Complaint Held Sufficient to State Claim. —**

Creditor was not entitled to judgment on the pleadings on a Chapter 11 debtor's unfair trade practices claim where the debtor sufficiently stated a claim for defamation, and defamation could serve as a basis for the unfair trade practices claim. *Natural Care Labs, Inc. v. Medline Indus. (In re NCL Liquidation Corp.)*, — Bankr. —, 2005 Bankr. LEXIS 2067 (Bankr. M.D.N.C. Oct. 21, 2005).

**Statute of Limitations. —** Plaintiffs' claims against a trust company and its trustee under G.S. 75-1.1 failed where the statute of limitations for the action began to accrue when plaintiffs closed on their property and as that was more than four years prior to the filing of the action, the statute of limitations in G.S. 75-16.2 had expired. *Skinner v. Preferred Credit*, 172 N.C. App. 407, 616 S.E.2d 676, 2005 N.C. App. LEXIS 1806 (2005).

## § 75-15.1. Restoration of property and cancellation of contract.

#### CASE NOTES

**Applicability To Check Cashing Business That Charged Usurious Interest Rates. —** Where evidence against a check cashing business established that it executed contracts for usurious loans, it used its alternative business purpose of providing Internet access to consumers as a guise to cover this illegal activity, and no evidentiary basis existed upon which a reasonable fact-finder could reach a contrary conclusion, the State's claims of

usury and violations of the Consumer Finance Act were established as a matter of law; moreover, the contracts which customers had with the business were cancelled pursuant to G.S. 75-15.1, requiring all funds collected by the business pursuant to such contracts to be refunded to the customers. *State ex rel. Cooper v. NCCS Loans, Inc.*, — N.C. App. —, 624 S.E.2d 371, 2005 N.C. App. LEXIS 2588 (2005).

## § 75-16. Civil action by person injured; treble damages.

#### CASE NOTES

- I. In General.
- II. Practice and Procedure.
- III. Damages.

#### I. IN GENERAL.

**Insurance Company Violation Shown as a Matter of Law. —** Insurance company which engaged in the act or practice of not attempting in good faith to effectuate prompt, fair, and equitable settlements of claims in which liability had become reasonably clear, G.S. 58-63-15(11)(f), also violated G.S. 75-1.1, as a matter of law, without the necessity of an additional

showing of frequency indicating a "general business practice," and allegations to that effect sufficiently stated an unfair and deceptive trade practices (UDTP) claim; while insureds' claims for breach of contract, breach of fiduciary duty, and bad faith were barred by the three-year statute of limitations, their UDTP claim was separate and distinct from the claims on the underlying insurance policy, was thus governed by the G.S. 75-16.2 four-year statute



of limitations applicable to such claims, and was therefore timely. *Page v. Lexington Ins. Co.*, — N.C. App. —, 628 S.E.2d 427, 2006 N.C. App. LEXIS 862 (2006).

**Cited in** *Jacobs v. Physicians Weight Loss Ctr. of Am., Inc.*, 173 N.C. App. 663, 620 S.E.2d 232, 2005 N.C. App. LEXIS 2280 (2005).

## II. PRACTICE AND PROCEDURE.

### **Causal Relation Between Violation and Injury Must Be Shown. —**

Because the buyers to a contract with the seller did not possess any contract rights due to the insufficiency of their consideration, they could not allege damages by virtue of any alleged unfair and deceptive acts of the seller relating to that alleged contract; further, because the buyers did not allege that the seller intended to deceive them from the outset, there was no allegation that an unfair or deceptive act by the seller induced the buyers either to pay the deposits mentioned in the alleged option contract or to leave the deposits with the seller's agent rather than withdrawing them. *McLamb v. T.P. Inc.*, 173 N.C. App. 586, 619 S.E.2d 577, 2005 N.C. App. LEXIS 2122 (2005).

### **Proof of fraud would necessarily constitute, etc.**

In a Chapter 11 case, a motion to dismiss a fraud claim brought by a creditor in its individual capacity was not dismissed because the complaint contained sufficient allegations to satisfy the heightened pleading requirements in Fed. R. Civ. P. 9 where the creditor contended that misrepresentations and omissions were made with intent to induce reliance, reliance occurred, and damages were the result; these allegations also supported causes of action for negligent misrepresentation and unfair and deceptive trade practices. *TUG Liquidation, LLC v. Atwood (In re BuildNet, Inc.)*, — Bankr. —, 2004 Bankr. LEXIS 2383 (Bankr. M.D.N.C. June 16, 2004).

## III. DAMAGES.

### **Prejudgment Interest Not Trebled. —**

In a case arising from the termination of an employee, pre-judgment interest should not have been awarded based on treble damages arising from a violation of G.S. 75-1.1 due to a breach of contract; rather, the pre-judgment interest should have been awarded on the actual damages for breach of contract. *Johnson v. Colonial Life & Accident Ins. Co.*, 173 N.C. App.

365, 618 S.E.2d 867, 2005 N.C. App. LEXIS 2015 (2005).

### **Treble Damages Awarded. —**

Award to a plaintiff in the amount of \$1,365, which represented the trebling of \$455, the amount that the plaintiff had paid for watermelons lost due to the defendant's repossession of her truck and the refusal to permit the plaintiff an opportunity to retrieve the perishable melons, was upheld on appeal, because the plaintiff's testimony that she paid \$3.50 per watermelon was sufficient to support the amount of damages asserted by the plaintiff. *Eley v. Mid/East Acceptance Corp. of N.C., Inc.*, 171 N.C. App. 368, 614 S.E.2d 555, 2005 N.C. App. LEXIS 1253 (2005).

### **Treble Damages Required and Attorney's Fees Permissible. —**

In a specialized construction equipment rental market where customer pricing was highly competitive, a corporation's pricing, customer, and employee salary information met the factors of a trade secret under G.S. 66-152, and those trade secrets were misappropriated when a competing limited liability company (LLC) solicited the corporation's employees who had that information; since the corporation also showed that the customers it lost and the geographical areas where it lost business were the same customers and areas of the employees who the LLC hired away from the corporation, the corporation showed a proximate cause connection to its lost profits and those lost profit damages, along with treble damages and attorney fees, were properly awarded. *Sunbelt Rentals, Inc. v. Head & Engquist Equip., L.L.C.*, 174 N.C. App. 49, 620 S.E.2d 222, 2005 N.C. App. LEXIS 2290 (2005).

### **Sweepstakes Contestant Not Entitled to Damages. —**

Under G.S. 75-16, a sweepstakes contestant was not entitled to damages for unfair and deceptive trade practices, pursuant to G.S. 75-1.1 and G.S. 75-32; even if the contest sponsor's actions constituted actionable conduct pursuant to G.S. 75-1.1 and G.S. 75-32, no reasonable person could have relied on the representations contained therein to conclude that he or she would be entitled to the entire contest prize because any actual injury suffered could not have been, as a matter of law, proximately caused by the sponsor's representations. *Fozard v. Publr. Clearing House, Inc.*, — F. Supp. 2d —, 1999 U.S. Dist. LEXIS 22994 (M.D.N.C. Apr. 29, 1999).

## § 75-16.1. Attorney fee.

### CASE NOTES

#### **When Attorneys' Fees May Be Awarded.**

In an unfair trade practices case that certain

borrowers filed against a lender for violations of G.S. 75-1.1, the borrowers failed to show that an arbitration clause in their loan agreement



was invalid. The borrowers failed to prove that the costs of arbitration were prohibitively high and would have exceeded the costs of litigation, as the borrowers made unequal comparisons between the two categories of costs and left out of their calculations certain statutory provisions, including the provision in G.S. 75-16.1, which allowed an award of attorney's fees for the prevailing party. *Tillman v. Commer. Credit Loans, Inc.*, — N.C. App. —, 629 S.E.2d 865, 2006 N.C. App. LEXIS 1186 (2006).

**Discretion of Court.** —

Where the trial court had discretion to refuse to award any attorneys' fees, its decision to award approximately half of the amount requested by the buyers was not an abuse of discretion; the buyers were also entitled to attorneys' fees on appeal. *Willen v. Hewson*, — N.C. App. —, 622 S.E.2d 187, 2005 N.C. App. LEXIS 2612 (2005).

**In an action to confirm an arbitration award by a contractor**, the trial court properly declined to award attorney fees to property owners under G.S. 75-16.1; the owners resisted

arbitration up to and including at the hearing from which the trial court finally compelled arbitration. *Creekside Constr. Co. v. Dowler*, 172 N.C. App. 558, 616 S.E.2d 609, 2005 N.C. App. LEXIS 1783 (2005).

Trial court did not abuse its discretion in awarding attorney's fees because the trial court found that the plaintiff knew, or should have known, that it would be unable to establish any damages arising from the alleged conduct of the defendant and that the action was frivolous and malicious; furthermore, the appellate court found that the trial court's decision was not manifestly unsupported by reason. *Castle McCulloch, Inc. v. Freedman*, 169 N.C. App. 497, 610 S.E.2d 416, 2005 N.C. App. LEXIS 604 (2005), *aff'd*, 360 N.C. 57, 620 S.E.2d 674 (2005).

**Applied** in *Eley v. Mid/East Acceptance Corp. of N.C., Inc.*, 171 N.C. App. 368, 614 S.E.2d 555, 2005 N.C. App. LEXIS 1253 (2005).

**Cited** in *Beroth Oil Co. v. Whiteheart*, 173 N.C. App. 89, 618 S.E.2d 739, 2005 N.C. App. LEXIS 1903 (2005).

## § 75-16.2. Limitation of actions.

### CASE NOTES

**Accrual of Cause of Action.** —

Plaintiffs' claims against a trust company and its trustee under G.S. 75-1.1 failed where the statute of limitations for the action began to accrue when plaintiffs closed on their property and as that was more than four years prior to the filing of the action, the statute of limitations in G.S. 75-16.2 had expired. *Skinner v. Preferred Credit*, 172 N.C. App. 407, 616 S.E.2d 676, 2005 N.C. App. LEXIS 1806 (2005).

In cases based on allegedly fraudulent conduct or negligent misrepresentation, the cause of action accrues at the time the fraud is discovered or should have been discovered with the exercise of reasonable diligence. Ordinarily, whether a person has exercised due diligence is a question for the jury; however, where the evidence is clear and shows without conflict that the claimant had both the capacity and opportunity to discover the mistake or discrepancy but failed to do so, the absence of reasonable diligence is established as a matter of law. *Rich Food Servs., Inc. v. Rich Plan Corp.*, — F.

Supp. 2d —, 2002 U.S. Dist. LEXIS 27799 (E.D.N.C. Nov. 11, 2002).

**Unfair and Deceptive Trade Practices Claim.** — Insurance company which engaged in the act or practice of not attempting in good faith to effectuate prompt, fair, and equitable settlements of claims in which liability had become reasonably clear, G.S. 58-63-15(11)(f), also violated G.S. 75-1.1, as a matter of law, without the necessity of an additional showing of frequency indicating a "general business practice," and allegations to that effect sufficiently stated an unfair and deceptive trade practices (UDTP) claim; while insureds' claims for breach of contract, breach of fiduciary duty, and bad faith were barred by the three-year statute of limitations, their UDTP claim was separate and distinct from the claims on the underlying insurance policy, was thus governed by the G.S. 75-16.2 four-year statute of limitations applicable to such claims, and was therefore timely. *Page v. Lexington Ins. Co.*, — N.C. App. —, 628 S.E.2d 427, 2006 N.C. App. LEXIS 862 (2006).

## § 75-32. Representation of winning a prize.

### CASE NOTES

**Remedies.** — Under G.S. 75-16, a sweepstakes contestant was not entitled to damages

for unfair and deceptive trade practices, pursuant to G.S. 75-1.1 and G.S. 75-32; even if the

contest sponsor's actions constituted actionable conduct pursuant to G.S. 75-1.1 and G.S. 75-32, no reasonable person could have relied on the representations contained therein to conclude that he or she would be entitled to the entire contest prize because any actual injury suffered

could not have been, as a matter of law, proximately caused by the sponsor's representations. *Fozard v. Publr's. Clearing House, Inc.*, — F. Supp. 2d —, 1999 U.S. Dist. LEXIS 22994 (M.D.N.C. Apr. 29, 1999).

## **§ 75-38. Prohibit excessive pricing during states of disaster, states of emergency, or abnormal market disruptions.**

(a) Upon a triggering event, it is prohibited and shall be a violation of G.S. 75-1.1 for any person to sell or rent or offer to sell or rent any goods or services which are consumed or used as a direct result of an emergency or which are consumed or used to preserve, protect, or sustain life, health, safety, or economic well-being of persons or their property with the knowledge and intent to charge a price that is unreasonably excessive under the circumstances. This prohibition shall apply to all parties in the chain of distribution, including, but not limited to, a manufacturer, supplier, wholesaler, distributor, or retail seller of goods or services. This prohibition shall apply in the area where the state of disaster or emergency has been declared or the abnormal market disruption has been found.

In determining whether a price is unreasonably excessive, it shall be considered whether:

- (1) The price charged by the seller is attributable to additional costs imposed by the seller's supplier or other costs of providing the good or service during the triggering event.
- (2) The price charged by the seller exceeds the seller's average price in the preceding 60 days before the triggering event. If the seller did not sell or rent or offer to sell or rent the goods or service in question prior to the time of the triggering event, the price at which the goods or service was generally available in the trade area shall be used as a factor in determining if the seller is charging an unreasonably excessive price.
- (3) The price charged by the seller is attributable to fluctuations in applicable commodity markets; fluctuations in applicable regional, national, or international market trends; or to reasonable expenses and charges for attendant business risk incurred in procuring or selling the goods or services.

(b) In the event the Attorney General investigates a complaint for a violation of this section and determines that the seller has not violated the provisions of this section and if the seller so requests, the Attorney General shall promptly issue a signed statement indicating that the Attorney General has not found a violation of this section.

(c) For the purposes of this section, the end of a triggering event is the earlier of 45 days after the triggering event occurs or the expiration or termination of the triggering event unless the prohibition is specifically extended by the Governor.

(d) A "triggering event" means the declaration of a state of emergency pursuant to G.S. 166A-8 or Article 36A of Chapter 14 of the General Statutes, the proclamation of a state of disaster pursuant to G.S. 166A-6, or a finding of abnormal market disruption pursuant to G.S. 75-38(e).

(e) An "abnormal market disruption" means a significant disruption, whether actual or imminent, to the production, distribution, or sale of goods and services in North Carolina, which are consumed or used as a direct result of an emergency or used to preserve, protect, or sustain life, health, safety, or economic well-being of a person or his or her property. A significant disruption



may result from a natural disaster, weather, acts of nature, strike, power or energy failures or shortages, civil disorder, war, terrorist attack, national or local emergency, or other extraordinary adverse circumstances. A significant market disruption can be found only if a declaration of a state of emergency, state of disaster, or similar declaration is made by the President of the United States or an issuance of Code Red/Severe Risk of Attack in the Homeland Security Advisory System is made by the Department of Homeland Security, whether or not such declaration or issuance applies to North Carolina.

(f) The existence of an abnormal market disruption shall be found and declared by the Governor pursuant to the definition in subsection (e) of this section. The duration of an abnormal market disruption shall be 45 days from the triggering event, but may be renewed by the Governor if the Governor finds and declares the disruption continues to affect the economic well-being of North Carolinians beyond the initial 45-day period. (2003-412, s. 1; 2006-245, s. 1; 2006-259, s. 41.)

**Effect of Amendments.** — Session Laws 2006-245, s. 1, effective August 15, 2006, rewrote the section heading and text.

Session Laws 2006-259, s. 41, effective August 23, 2006, in subsection (d), inserted “or

Article 36A of Chapter 14 of the General Statutes,” and deleted “Article 36A of Chapter 14 of the General Statutes” following “pursuant to” near the end.

## ARTICLE 2.

### *Prohibited Acts by Debt Collectors.*

## § 75-50. Definitions.

### CASE NOTES

#### **Exclusive Remedy For Unfair Debt Collection Practices.** —

In a debtor’s suit against a creditor based on a credit card debt from a credit card obtained by her deceased husband without the debtor’s knowledge and consent, the debtor’s claim for violation of the North Carolina Unfair and Deceptive Trade Practice Act, G.S. 75-1.1 et seq., based on allegedly abusive debt collection conduct failed because the North Carolina Debt Collection Act, G.S. 75-50 et seq., provided the exclusive remedy for such a claim. *Johnson v. MBNA Am. Bank, N.A.*, — F. Supp. 2d —, 2006 U.S. Dist. LEXIS 10533 (M.D.N.C. Mar. 9, 2006).

**Learned Profession Exemption.** — In their debt collection practice, defendants, a law firm and its president, were learned professionals, exempt under G.S. 75-1.1(b) from the North

Carolina Debt Collection Act and the North Carolina Unfair and Deceptive Trade Practices Act; the court was unable to limit the exemption to attorneys licensed in North Carolina and no exception would be made for alleged insufficient supervision in connection with claims brought by plaintiff consumers. *Godfredson v. JBC Legal Group, P.C.*, 387 F. Supp. 2d 543, 2005 U.S. Dist. LEXIS 17878 (E.D.N.C. 2005).

**Allegations Held Insufficient Under Section (b).** — A claim under the North Carolina Debt Collection Act, alleging improper practices in the specific context of debt collection, must also satisfy the requirements of a more general claim under the North Carolina Unfair and Deceptive Trade Practices Act. *Godfredson v. JBC Legal Group, P.C.*, 387 F. Supp. 2d 543, 2005 U.S. Dist. LEXIS 17878 (E.D.N.C. 2005).

## ARTICLE 2A.

### *Identity Theft Protection Act.*

## § 75-63. Security freeze.

(a) A consumer may place a security freeze on the consumer’s credit report by making a request in writing by certified mail to a consumer reporting agency. A security freeze shall prohibit, subject to exceptions in subsection (l)



of this section, the consumer reporting agency from releasing the consumer's credit report or any information from it without the express authorization of the consumer. When a security freeze is in place, a consumer reporting agency may not release the consumer's credit report or information to a third party without prior express authorization from the consumer. This subsection does not prevent a consumer reporting agency from advising a third party that a security freeze is in effect with respect to the consumer's credit report.

(b) A consumer reporting agency shall place a security freeze on a consumer's credit report no later than five business days after receiving a written request from the consumer.

(c) The consumer reporting agency shall send a written confirmation of the security freeze to the consumer within 10 business days of placing the freeze and at the same time shall provide the consumer with a unique personal identification number or password, other than the consumer's social security number, to be used by the consumer when providing authorization for the release of the consumer's credit report for a specific period of time.

(d) If the consumer wishes to allow the consumer's credit report to be accessed for a specific period of time while a freeze is in place, the consumer shall contact the consumer reporting agency, request that the freeze be temporarily lifted, and provide all of the following:

(1) Proper identification.

(2) The unique personal identification number or password provided by the consumer reporting agency pursuant to subsection (c) of this section.

(3) The proper information regarding the time period for which the report shall be available to users of the credit report.

(e) A consumer reporting agency may develop procedures involving the use of telephone, fax, the Internet, or other electronic media to receive and process a request from a consumer to temporarily lift a freeze on a credit report pursuant to subsection (d) of this section in an expedited manner.

(f) A consumer reporting agency that receives a request from a consumer to temporarily lift a freeze on a credit report pursuant to subsection (d) of this section shall comply with the request no later than three business days after receiving the request.

(g) A consumer reporting agency shall remove or temporarily lift a freeze placed on a consumer's credit report only in the following cases:

(1) Upon the consumer's request, pursuant to subsections (d) or (j) of this section.

(2) If the consumer's credit report was frozen due to a material misrepresentation of fact by the consumer. If a consumer reporting agency intends to remove a freeze upon a consumer's credit report pursuant to this subdivision, the consumer reporting agency shall notify the consumer in writing prior to removing the freeze on the consumer's credit report.

(h) If a third party requests access to a consumer credit report on which a security freeze is in effect and this request is in connection with an application for credit or any other use and the consumer does not allow the consumer's credit report to be accessed for that specific period of time, the third party may treat the application as incomplete.

(i) If a consumer requests a security freeze pursuant to this section, the consumer reporting agency shall disclose to the consumer the process of placing and temporarily lifting a security freeze and the process for allowing access to information from the consumer's credit report for a specific period of time while the security freeze is in place.

(j) A security freeze shall remain in place until the consumer requests that the security freeze be removed. A consumer reporting agency shall remove a

security freeze within three business days of receiving a request for removal from the consumer, who provides all of the following:

- (1) Proper identification.
  - (2) The unique personal identification number or password provided by the consumer reporting agency pursuant to subsection (c) of this section.
- (k) A consumer reporting agency shall require proper identification of the person making a request to place or remove a security freeze.
- (l) The provisions of this section do not apply to the use of a consumer credit report by any of the following:
- (1) A person, or the person's subsidiary, affiliate, agent, subcontractor, or assignee with whom the consumer has, or prior to assignment had, an account, contract, or debtor-creditor relationship for the purposes of reviewing the active account or collecting the financial obligation owing for the account, contract, or debt.
  - (2) A subsidiary, affiliate, agent, assignee, or prospective assignee of a person to whom access has been granted under subsection (d) of this section for purposes of facilitating the extension of credit or other permissible use.
  - (3) Any person acting pursuant to a court order, warrant, or subpoena.
  - (4) A state or local agency, or its agents or assigns, which administers a program for establishing and enforcing child support obligations.
  - (5) A state or local agency, or its agents or assigns, acting to investigate fraud, including Medicaid fraud, or acting to investigate or collect delinquent taxes or assessments, including interest and penalties, unpaid court orders, or to fulfill any of its other statutory responsibilities.
  - (6) A federal, state, or local governmental entity, including law enforcement agency, court, or their agent or assigns.
  - (7) A person for the purposes of prescreening as defined by the Fair Credit Reporting Act, 15 U.S.C. § 1681, et seq.
  - (8) Any person for the sole purpose of providing for a credit file monitoring subscription service to which the consumer has subscribed.
  - (9) A consumer reporting agency for the purpose of providing a consumer with a copy of the consumer's credit report upon the consumer's request.
  - (10) Any depository financial institution for checking, savings, and investment accounts.
  - (11) Any property and casualty insurance company for use in setting or adjusting a rate, adjusting a claim, or underwriting for property and casualty insurance purposes.
- (m) If a security freeze is in place, a consumer reporting agency shall not change any of the following official information in a credit report without sending a written confirmation of the change to the consumer within 30 days of the change being posted to the consumer's file: name, date of birth, social security number, and address. Written confirmation is not required for technical modifications of a consumer's official information, including name and street abbreviations, complete spellings, or transposition of numbers or letters. In the case of an address change, the written confirmation shall be sent to both the new address and the former address.
- (n) The following persons are not required to place in a credit report a security freeze pursuant to this section provided, however, that any person that is not required to place a security freeze on a credit report under the provisions of subdivision (3) of this subsection shall be subject to any security freeze placed on a credit report by another consumer reporting agency from which it obtains information:



- (1) A check services or fraud prevention services company, which reports on incidents of fraud or issues authorizations for the purpose of approving or processing negotiable instruments, electronic fund transfers, or similar methods of payment.
  - (2) A deposit account information service company, which issues reports regarding account closures due to fraud, substantial overdrafts, ATM abuse, or other similar negative information regarding a consumer to inquiring banks or other financial institutions for use only in reviewing a consumer request for a deposit account at the inquiring bank or financial institution.
  - (3) A consumer reporting agency that does all of the following:
    - a. Acts only to resell credit information by assembling and merging information contained in a database of one or more credit reporting agencies.
    - b. Does not maintain a permanent database of credit information from which new credit reports are produced.
- (o) **(See Editor's note for effective date)** This section does not prevent a consumer reporting agency from charging a fee of no more than ten dollars (\$10.00) to a consumer for each freeze, removal of the freeze, or temporary lifting of the freeze for a period of time, regarding access to a consumer credit report, except that a consumer reporting agency may not charge any fee to any of the following:
- (1) A victim of identity theft who has submitted a copy of a valid investigative or incident report or complaint with a law enforcement agency about the unlawful use of the victim's identifying information by another person.
  - (2) A veteran who has received notification from the United States Department of Veterans Affairs indicating that the veteran's information is, or may be, included in the information involved in the Department of Veterans Affairs' data breach, first announced on May 22, 2006; provided that the application for a freeze includes the notification and proof of status as a veteran as defined in this subdivision. As used in this subsection, the term "veteran" means a veteran, as defined in G.S. 126-81, a member of the armed forces of the United States, as defined in G.S. 165-20, or a member of the North Carolina National Guard.
  - (3) Persons who are the authorized agents of, or receive benefits from the State or federal government based on a relationship to, a veteran who would or could qualify under subdivision (2) of this subsection.
- (o) **(See Editor's note for effective date)** This section does not prevent a consumer reporting agency from charging a fee of no more than ten dollars (\$10.00) to a consumer for each freeze, removal of the freeze, or temporary lifting of the freeze for a period of time, regarding access to a consumer credit report, except that a consumer reporting agency may not charge any fee to a victim of identity theft who has submitted a copy of a valid investigative or incident report or complaint with a law enforcement agency about the unlawful use of the victim's identifying information by another person.
- (p) At any time that a consumer is required to receive a summary of rights required under section 609 of the federal Fair Credit Reporting Act, the following notice shall be included:

### **"North Carolina Consumers Have the Right to Obtain a Security Freeze.**

You have a right to place a "security freeze" on your credit report pursuant to North Carolina law. The security freeze will prohibit a consumer reporting



agency from releasing any information in your credit report without your express authorization. A security freeze must be requested in writing by certified mail.

The security freeze is designed to prevent credit, loans, and services from being approved in your name without your consent. However, you should be aware that using a security freeze to take control over who gains access to the personal and financial information in your credit report may delay, interfere with, or prohibit the timely approval of any subsequent request or application you make regarding new loans, credit, mortgage, insurance, rental housing, employment, investment, license, cellular phone, utilities, digital signature, Internet credit card transactions, or other services, including an extension of credit at point of sale.

The freeze will be placed within five business days. When you place a security freeze on your credit report, within 10 business days, you will be provided a personal identification number or a password to use when you want to remove or lift temporarily the security freeze.

A freeze does not apply when you have an existing account relationship and a copy of your report is requested by your existing creditor or its agents or affiliates for certain types of account review, collection, fraud control, or similar activities.

You should plan ahead and lift a freeze if you are actively seeking credit or services as a security freeze may slow your applications, as mentioned above.

You can remove a freeze or authorize temporary access for a specific period of time by contacting the consumer reporting agency and providing all of the following:

- (1) Your personal identification number or password,
- (2) Proper identification to verify your identity, and
- (3) Proper information regarding the period of time you want your report available to users of the credit report.

A consumer reporting agency that receives a request from you to temporarily lift a freeze on a credit report shall comply with the request no later than three business days after receiving the request. A consumer reporting agency may charge you up to ten dollars (\$10.00) for each time you freeze, remove the freeze, or temporarily lift the freeze for a period of time, except a consumer reporting agency may not charge any amount to a victim of identify theft who has submitted a copy of a valid investigative or incident report or complaint with a law enforcement agency about the unlawful use of the victim's identifying information by another person.

You have a right to bring a civil action against someone who violates your rights under the credit reporting laws. The action can be brought against a consumer reporting agency or a user of your credit report."

(q) A violation of this section is a violation of G.S. 75-1.1. (2005-414, s. 1; 2006-158, s. 1.)

**Subsection (o) Set Out Twice.** — The first version of subsection (o) set out above is effective until January 1, 2007, or upon the United States Department of Veterans Affairs implementing a program that will pay for a subscription to a credit monitoring program for person eligible for a fee waiver under subdivisions (o)(2) and (3), whichever occurs first. The second version of subsection (o) set out above is effective January 1, 2007, or upon the United States Department of Veterans Affairs implementing a program that will pay for a subscription to a credit monitoring program for person eligible for a fee waiver under subdivisions

(o)(2) and (3), whichever occurs first.

**Editor's Note.** — Session Laws 2006-158, s. 2, provides that from July 23, 2006, through July 1, 2007, there shall be no fee charged by a consumer reporting agency for the removal of a security freeze by persons who, prior to the expiration date of the 2006 amendment, placed a freeze under G.S. 75-63(o)(2) and G.S. 75-63(o)(3), as set forth by the 2006 amendment to subsection (o).

Session Laws 2006-158, s. 3, provides, in part, that s. 1, which amended subsection (o), shall be effective for a minimum of 90 days from July 23, 2006, but otherwise shall expire on

January 1, 2007, or upon the United States Department of Veterans Affairs implementing a program that will pay for a subscription to a credit monitoring program for persons eligible for a fee waiver under G.S. 75-63(o)(2) and G.S. 75-63(o)(3), whichever event occurs first.

**Effect of Amendments.** — Session Laws

2006-158, s. 1, effective July 23, 2006, in subsection (o), substituted “any of the following:” for “a”, added the subdivision (o)(1) designation, added “A” at the beginning of subdivision (o)(1), and added subdivisions (o)(2) and (o)(3). See Editor’s note for effective date and applicability.

## ARTICLE 4.

### *Telephone Solicitations.*

**§§ 75-106 through 75-114:** Reserved for future codification purposes.

## ARTICLE 5.

### *Unsolicited Facsimiles.*

## § 75-115. Definitions.

The following definitions apply in this Article:

(1) Established business relationship. —

a. A relationship between a seller and a consumer based on:

1. The consumer’s purchase, rental, or lease of the seller’s goods or services or a financial transaction between the consumer and the seller or one or more of its affiliates within the 18 months immediately preceding the date of an unsolicited advertisement; or
2. The consumer’s inquiry or application regarding a product or service offered by the seller within the three months immediately preceding the date of an unsolicited advertisement.

b. A relationship between a tax-exempt nonprofit organization and a person based on:

1. The person’s association with the tax-exempt nonprofit organization as a member, contributor, or volunteer of the tax-exempt nonprofit organization within the 18 months immediately preceding the date of an unsolicited advertisement;
2. The person’s subscription to or use of the services of the tax-exempt nonprofit organization within the 18 months immediately preceding the date of an unsolicited advertisement; or
3. The person’s inquiry regarding the tax-exempt nonprofit organization within the three months immediately preceding the date of an unsolicited advertisement.

(2) Telephone facsimile machine. — Equipment that has the capacity to do either or both of the following:

- a. Transcribe text or images or both from paper into an electronic signal and to transmit that signal over a regular telephone line.
- b. Transcribe text or images or both from an electronic signal received over a regular telephone line onto paper.

(3) Unsolicited advertisement. — Any material advertising the commercial availability or quality of any property, goods, or services that is transmitted to any person or entity without that person’s or entity’s prior express invitation or permission. Prior express invitation or permission may be obtained for a specific or unlimited number of

advertisements and may be obtained for a specific or unlimited period of time. (2006-207, s. 1.)

**Editor's Note.** — Session Laws 2006-207, s. 2006, and applicable to offenses committed on 2, made this Article effective September 1, or after that date.

### **§ 75-116. Prohibition of unsolicited facsimiles; exception.**

(a) No person or entity, if either the person or entity or the recipient is located within the State of North Carolina, shall (i) use any telephone facsimile machine, computer, or other device to send or (ii) cause another person or entity to use a telephone facsimile machine to send an unsolicited advertisement to a telephone facsimile machine.

(b) This section shall not apply to a person or entity that has an established business relationship with the recipient of the facsimile. However, the person or entity who sends an unsolicited advertisement under this subsection shall provide a notice in the unsolicited advertisement that: (i) is clear and conspicuous and on the first page of the unsolicited advertisement; (ii) states that the recipient may make a request to the sender to “do not send” any future unsolicited advertisements to a telephone facsimile machine and that the sender’s failure to comply with the request is unlawful; and (iii) includes a toll-free domestic telephone number or facsimile machine number that the recipient may call at any time on any day of the week to transmit a request to “do not send” future facsimiles. (2006-207, s. 1.)

### **§ 75-117. Facsimiles to contain identifying material.**

(a) It shall be a violation of this Article for any person or entity, if either the person or entity or the recipient is located in the State of North Carolina, to do either of the following:

- (1) Initiate any communication using a telephone facsimile machine that does not clearly mark in a margin at the top or bottom of each transmitted page or on the first page of each transmission the date and time sent; an identification of the business, other entity, or person sending the message, and the telephone number of the sending machine or of the business, other entity, or person.
- (2) Use a computer or other electronic device to send any message via a telephone facsimile machine unless it is clearly marked in a margin at the top or bottom of each transmitted page of the message or on the first page of the transmission the date and time it is sent, the identification of the business, other entity, or person sending the message, and the telephone number of the sending machine or of the business, other entity, or person.

(b) This section shall not apply to a facsimile sent by or on behalf of a professional or trade association that is a tax-exempt nonprofit organization and in furtherance of the association’s tax-exempt purpose to a member of the association if all of the following conditions are met:

- (1) The member voluntarily provided the association the facsimile number to which the facsimile was sent.
- (2) The facsimile is not primarily for the purpose of advertising the commercial availability or quality of any property, goods, or services of one or more third parties.
- (3) The member who is sent the facsimile has not requested that the association stop sending facsimiles. (2006-207, s. 1.)

### **§ 75-118. Enforcement.**

(a) A person or entity who receives an unsolicited advertisement in violation of this Article may bring any of the following actions in civil court:



- (1) An action to enjoin further violations of this Article by the person or entity who sent the unsolicited advertisement.
- (2) An action to recover five hundred dollars (\$500.00) for the first violation, one thousand dollars (\$1,000) for the second violation, and five thousand dollars (\$5,000) for the third and any other violation that occurs within two years of the first violation.

(b) In an action brought pursuant to this Article, the court may award a prevailing plaintiff reasonable attorneys' fees if the court finds the defendant willfully engaged in the act or practice, and the court may award reasonable attorneys' fees to a prevailing defendant if the court finds that the plaintiff knew, or should have known, that the action was frivolous and malicious.

(c) Actions brought by a person or entity pursuant to this section shall be tried in the county where the plaintiff resides at the time of the commencement of the action.

(d) This section shall not be construed to alter or restrict any remedy a person may have under federal law, including the Junk Fax Prevention Act of 2005, against a person or entity who sends an unsolicited advertisement.

(e) A violation of G.S. 75-116 is a violation of G.S. 75-1.1. (2006-207, s. 1.)

## Chapter 75A.

### Boating and Water Safety.

#### Article 1.

##### Boating Safety Act.

Sec.

- 75A-2. Definitions.
- 75A-3. Wildlife Resources Commission to administer Chapter; Vessel Committee; funds for administration.
- 75A-4. Identification numbers required.
- 75A-5. Application for certificate of number and fees; reciprocity; change of ownership; conformity with federal regulations; records; award of certificates; renewal of certificates; transfer of partial interest; destroyed or junked vessels; abandonment; change of address; duplicate certificates; display.
- 75A-5.1. Commercial fishing vessels; renewal of identification number.
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- 75A-10.2. Proof of ownership of a vessel.
- 75A-11. Duty of operator involved in collision, accident, casualty, or other occurrence.
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#### Article 4.

##### Vessel Titling Act.

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- 75A-45. Legal holder of certificate of title subject to security interest.
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- 75A-47. Surrender of certificate required when security interest paid.
- 75A-48. Levy of execution, etc.
- 75A-49. Registration prima facie evidence of ownership; rebuttal.

#### ARTICLE 1.

##### *Boating Safety Act.*

### § 75A-2. Definitions.

As used in this Chapter, unless the context clearly requires a different meaning:

- (1) "Abandoned vessel" means a vessel that has been relinquished, left, or given up by the lawful owner without the intention to later resume

any right or interest in the vessel. The term does not include a vessel that is left by an owner or agent of the owner with any person or business for the purpose of storage, maintenance, or repair and that is not subsequently reclaimed.

- (1a) "Certificate of number" means the document and permanent identification number issued by the Wildlife Resources Commission for the purpose of registering a vessel in this State.
- (1b) "Commission" means the Wildlife Resources Commission.
- (1c) "Director" means the Executive Director of the Wildlife Resources Commission.
- (1d) "Electric generating facility" means any plant facilities and equipment used for the purposes of producing, generating, transmitting, delivering, or furnishing electricity for the production of power.
- (1e) "Motorboat" means any vessel equipped with propulsion machinery of any type, whether or not the machinery is the principal source of propulsion: Provided, that "propulsion machinery" as used in this section shall not include an electric motor when used as the only means of mechanical propulsion of any vessel.
- (1f) "No-wake speed" means idle speed or slow speed creating no appreciable wake.
- (2) "Operate" means to navigate or otherwise use or occupy any motorboat or vessel that is afloat.
- (3) "Owner" means a person, other than a lienholder, having the property in or title to a vessel. The term includes a person entitled to the use or possession of a vessel subject to an interest in another person, reserved or created by agreement and securing payment or performance of an obligation, but the term excludes a lessee under a lease not intended as security.
- (4) "Person" means an individual, partnership, firm, corporation, association, or other entity.
- (4a) "Underway" means a vessel that is not at anchor, or made fast to the shore, or aground.
- (5) "Vessel" means every description of watercraft or structure, other than a seaplane on the water, used or capable of being used as a means of transportation or habitation on the water.
- (6) "Waters of this State" means any waters within the territorial limits of this State, and the marginal sea adjacent to this State and the high seas when navigated as a part of a journey or ride to or from the shore of this State, but does not include private ponds as defined in G.S. 113-129.
- (7) Redesignated as subdivision (1d). (1959, c. 1064, s. 2; 1965, c. 634, s. 1; 1969, c. 87; 1975, c. 340, s. 1; 1983, c. 446, s. 1; 1993 (Reg. Sess., 1994), c. 753, s. 2; 2006-185, s. 1.)

**Effect of Amendments.** — Session Laws 2006-185, s. 1, effective January 1, 2007, and applicable to offenses committed on or after January 1, 2007, added subdivisions (1), (1a), (1b), and (1c); redesignated former subdivision (1) as present subdivision (1e); in subdivision (1e), substituted "the machinery" for "such machinery" near the beginning and deleted "Provided further, that the term 'motorboat' shall not include a vessel which has a valid

marine document issued by the Bureau of Customs of the United States government or any federal agency successor thereto" following "any vessel" at the end; added subdivision (1f); in subdivision (2), substituted "any" for "a" and deleted "vessel, and shall be applicable to any motorboat or" preceding "vessel"; added subdivision (4a); and transferred the provisions of former subdivision (7) to subdivision (1d).



### § 75A-3. Wildlife Resources Commission to administer Chapter; Vessel Committee; funds for administration.

(a) The Commission shall enforce and administer the provisions of this Chapter.

(b) The chair of the Commission shall designate from among the members of the Commission three members who shall serve as the Vessel Committee of the Commission, and who shall, in their activities with the Commission, place special emphasis on the administration and enforcement of this Chapter.

(c) The Boating Account is established within the Wildlife Resources Fund created under G.S. 143-250. All moneys collected pursuant to the numbering and titling provisions of this Chapter shall be credited to this Account. Motor fuel excise tax revenue is credited to the Account under G.S. 105-449.126. The Commission shall use revenue in the Account, subject to the Executive Budget Act and the Personnel Act, for the administration and enforcement of this Chapter; for activities relating to boating and water safety including education and waterway marking and improvement; and for boating access area acquisition, development, and maintenance. The Commission shall use at least three dollars (\$3.00) of each one-year certificate of number fee and at least nine dollars (\$9.00) of each three-year certificate of number fee collected under the numbering provisions of G.S. 75A-5 for boating access area acquisition, development, and maintenance. (1959, c. 1064, s. 3; 1961, c. 644; 1963, c. 1003; 1981 (Reg. Sess., 1982), c. 1182, s. 2; 1993, c. 422, s. 1; 1995, c. 390, s. 13; 1999-392, s. 5; 2006-185, s. 1.)

**Effect of Amendments.** — Session Laws 2006-185, s. 1, effective January 1, 2007, and applicable to offenses committed on or after January 1, 2007, substituted “Vessel” for “Motorboat” in the middle of the section catchline; in subsection (a), substituted “The” for “It shall be the duty and responsibility of the North Carolina Wildlife Resources” at the beginning and substituted “shall” for “to” near the middle; in subsection (b), deleted “Wildlife Resources” preceding “Commission” throughout this subsection, substituted “chair” for “chairman” at the beginning and substituted “Vessel” for “Mo-

torboat” in the middle; in subsection (c), substituted “Motor fuel” for “Gasoline” at the beginning of the third sentence, substituted “The Commission shall use revenue in the Account” for “Revenue in the Account shall be used by the Wildlife Resources Commission” at the beginning of the fourth sentence, and, in the fifth sentence, substituted “The Commission shall use at” for “At”, substituted “certificate of number” for “vessel registration”, substituted “certificate of number” for “vessel registration”, and deleted “shall be used” preceding “for boating” near the end.

### § 75A-4. Identification numbers required.

Every vessel on the waters of this State shall be numbered, except those vessels exempted from numbering under G.S. 75A-7. No person shall operate or give permission for the operation of any vessel on the waters of this State unless all of the following conditions are met:

- (1) The vessel is numbered in accordance with this Chapter, or in accordance with applicable federal law, or in accordance with a federally approved numbering system of another state.
- (2) The certificate of number awarded to the vessel is in full force and effect.
- (3) The identification number set forth in the certificate of number is displayed on each side of the bow of the vessel. (1959, c. 1064, s. 4; 1983, c. 446, s. 1; 1999-392, s. 1; 2006-185, s. 1.)

**Effect of Amendments.** — Session Laws 2006-185, s. 1, effective January 1, 2007, and

applicable to offenses committed on or after January 1, 2007, substituted “the waters of this

State unless all of the following conditions are met." for "such waters unless the" at the end of the introductory paragraph; in subdivision (1), added the subdivision designation, added "The" at the beginning, and substituted "state." for "state, and unless" at the end; redesignated former subdivisions (1) and (2) as present sub-

divisions (2) and (3), respectively; in subdivision (2), substituted "the vessel" for "such vessel" and substituted "effect." for "effect, and"; and, in subdivision (3), substituted "identification" for "identifying" at the beginning and substituted "the vessel" for "such vessel" at the end of subdivision (3).

**§ 75A-5. Application for certificate of number and fees; reciprocity; change of ownership; conformity with federal regulations; records; award of certificates; renewal of certificates; transfer of partial interest; destroyed or junked vessels; abandonment; change of address; duplicate certificates; display.**

(a) Application for Certificate of Number and Fees. — The owner of each vessel requiring numbering by this State shall file an application for a certificate of number with the Commission. The Commission shall furnish application forms and shall prescribe the information contained in the application form. The application shall be signed by the owner of the vessel or the owner's agent and shall be accompanied by a fee of ten dollars (\$10.00) for a one-year period or by a fee of twenty-five dollars (\$25.00) for a three-year period; provided, however, there shall be no fee charged for vessels owned and operated by nonprofit rescue squads if they are operated exclusively for rescue purposes, including rescue training. The owner shall have the option of selecting a one-year numbering period or a three-year numbering period. Upon receipt of the application in approved form, the Commission shall enter the application in its records and issue the owner a certificate of number stating the identification number awarded to the vessel and the name and address of the owner, and a validation decal indicating the expiration date of the certificate of number. The owner shall paint on or attach to each side of the bow of the vessel the identification number in such manner as may be prescribed by rules of the Commission in order that it may be clearly visible. The identification number shall be maintained in legible condition. The validation decal shall be displayed on the starboard bow of the vessel immediately following the number. The certificate of number shall be pocket size and shall be available for inspection on the vessel for which the certificate is issued at all times the vessel is in operation. Any person charged with failing to so carry a certificate of number shall not be convicted if the person produces in court a certificate of number previously issued to the owner that was valid at the time of the alleged violation.

(b) Reciprocity. — The owner of any vessel already covered by a number in full force and effect pursuant to federal law or a federally approved numbering system of another state shall record the identification number prior to operating the vessel on the waters of this State in excess of the 90-day reciprocity period provided for in G.S. 75A-7(a)(1). The recordation shall be made pursuant to subsection (a) of this section, except that no additional or substitute identification number shall be issued.

(c) Change of Ownership. — Should the ownership of a vessel change, a new application form with a fee of ten dollars (\$10.00) for a one-year period or by a fee of twenty-five dollars (\$25.00) for a three-year period shall be filed with the Commission and a new certificate bearing the same identification number shall be awarded to the new owner in the same manner as an original certificate of number. Possession of the certificate shall in cases involving prosecution for violation of any provision of this Chapter be prima facie



evidence that the person whose name appears on the certificate is the owner of the vessel referred to on the certificate.

(d) Conformity With Federal Regulations. — In the event that an agency of the federal government shall have in force an over-all system of identification numbering for vessels within the United States, the numbering system employed pursuant to this Chapter by the Commission shall be in conformity therewith.

(e) Repealed by Session Laws 2006-185, s. 1.

(f) Records. — All records of the Commission made or kept pursuant to this section shall be public records.

(g) Award of Certificates. — Each certificate of number awarded pursuant to this Chapter, unless sooner terminated or discontinued in accordance with the provisions of this Chapter, shall continue in full force and effect to and including the last day of the month during which the certificate was awarded after the lapse of one year in the case of a one-year certificate or three years in the case of a three-year certificate. No person shall willfully remove a validation decal from any vessel during the continuance of its validity or alter, counterfeit, or otherwise tamper with a validation decal attached to any vessel for the purpose of changing or obscuring the indicated date of expiration of the certificate of number of the vessel.

(h) Renewal of Certificates. — An owner of a vessel awarded a certificate of number pursuant to this Chapter shall renew the certificate on or before the first day of the month after which the certificate expires; otherwise, the certificate shall lapse and be void until such time as it may thereafter be renewed. Application for renewal shall be submitted on a form approved by the Commission and shall be accompanied by a fee of ten dollars (\$10.00) for a one-year period or by a fee of twenty-five dollars (\$25.00) for a three-year period; provided, there shall be no fee required for a period of one year for renewal of certificates of number that have been previously issued to commercial fishing vessels as defined in G.S. 75A-5.1, upon compliance with all of the requirements of that section.

(i) Transfer of Partial Interest. — The owner shall furnish the Commission notice of the transfer of any part of the owner's interest other than the creation of a security interest in a vessel numbered in this State pursuant to subsections (a) and (b) of this section within 15 days of the transfer. A transfer of partial interest in a vessel shall not affect the owner's right to operate the vessel, nor shall a transfer of partial interest in a vessel terminate the certificate of number.

(i1) Destroyed or Junked Vessels. — The owner of any destroyed or junked vessel shall furnish the Commission notice of the destruction or junking of that vessel within 15 days of its occurrence. Destruction or junking terminates the certificate of number and renders the hull identification number invalid for that vessel.

(i2) Abandonment. — A person may acquire ownership of an abandoned vessel by providing proof to the Commission that the lawful owner has actually abandoned the vessel. The Commission shall adopt rules by which a person seeking to acquire ownership may demonstrate that the vessel is actually abandoned. At a minimum, the rules shall provide for a reasonable attempt to locate the lawful owner and, if the owner is located, notice by the claimant of an intention to claim ownership of the vessel.

(j) Change of Address. — Whenever any person, after applying for or obtaining the certificate of number of a vessel, moves from the address shown in the application or upon the certificate of number, that person shall notify the Commission of the change of address within 30 days of moving in a form acceptable to the Commission.

(j1) Duplicate Certificates. — The Commission shall issue a duplicate certificate of number for a vessel upon application by the person entitled to



hold the certificate, if the Commission is satisfied that the original certificate of number has been lost, stolen, mutilated, or destroyed, or has become illegible. The Commission shall charge a fee of five dollars (\$5.00) for issuance of each duplicate certificate.

(k) Display. — No number other than the identification number set forth in the certificate of number or granted reciprocity pursuant to this Chapter shall be painted, attached, or otherwise displayed on either side of the bow of a vessel, except the validation decal required by subsection (a) of this section.

(l) Repealed by Session Laws 2006-185, s. 1. (1959, c. 1064, s. 5; 1961, c. 469, s. 1; 1963, c. 470; 1975, c. 483, ss. 1, 2; 1977, c. 566; 1979, c. 761, ss. 1-7; 1981, c. 161; 1983, c. 194; c. 446, ss. 1, 2; 1987, c. 827, s. 4; 1993, c. 422, ss. 2-4; c. 539, ss. 563, 564; 1994, Ex. Sess., c. 24, s. 14(c); 1998-225, s. 4.1; 1999-248, ss. 1, 2; 1999-392, ss. 2-4; 2006-185, s. 1.)

**Effect of Amendments.** — Session Laws 2006-185, s. 1, effective January 1, 2007, and applicable to offenses committed on or after

January 1, 2007, rewrote the section and the section catchline.

### § 75A-5.1. Commercial fishing vessels; renewal of identification number.

(a) The owner of any commercial fishing vessel that is registered under the provisions of G.S. 113-168.6 may renew the certificate of number of the vessel free of charge for a one-year period when the owner has complied with all of the conditions of this section.

(b) As used in this section, “commercial fishing vessel” is a vessel used in a commercial fishing operation, as defined in G.S. 113-168.

(c) In order to be entitled to renewal of certificate of number under the provisions of this section, the owner of the vessel shall submit both of the following to the Commission:

(1) The regular application for renewal of the certificate of number of the vessel, as provided by G.S. 75A-5.

(2) Satisfactory proof that the vessel owner possesses a valid commercial fishing vessel registration.

(3) Repealed by Session Laws 2006-185, s. 1.

(d) Any person who willfully gives false information upon an application or statement required by this section or who falsifies any certificate of number fee receipt required by this section is guilty of a Class 1 misdemeanor. (1961, c. 469, s. 2; 1965, c. 957, s. 8; 1973, c. 1262, s. 86; 1977, c. 771, s. 4; 1983, c. 446, s. 2; 1989, c. 727, s. 218(16); 1993, c. 539, s. 565; 1994, Ex. Sess., c. 24, s. 14(c); 1997-443, s. 11A.119(a); 1998-225, s. 4.2; 2006-185, s. 1.)

**Effect of Amendments.** — Session Laws 2006-185, s. 1, effective January 1, 2007, and applicable to offenses committed on or after January 1, 2007, inserted “identification” in the section catchline; inserted “free of charge for a one-year period” in the middle of subsection (a); rewrote subsection (c); and, in subsection (d),

substituted “willfully gives” for “shall willfully give” near the beginning, substituted “an application or statement” for “the application or the statement” near the middle, substituted “falsifies any certificate or number” for “shall falsify any registration” in the middle and substituted “is guilty” for “shall be guilty” near the end.

### § 75A-5.2. Vessel agents.

(a) In order to facilitate the convenience of the public, the efficiency of administration, the need to keep statistics and records affecting the conservation of wildlife resources, boating, water safety, and other matters within the

jurisdiction of the Commission, and to facilitate vessel transactions, the Commission may conduct vessel transactions through any of the following:

- (1) Vessel agents.
- (2) The Commission's headquarters.
- (3) Employees of the Commission.
- (4) Two or more of those sources simultaneously.

(b) When there are substantial reasons for differing treatment, the Commission may conduct vessel transactions by one method in one locality and by another method in another locality.

(c) As compensation for services rendered to the Commission and to the general public, vessel agents shall receive the following specified commission from the statutory fee for each listed transaction:

- (1) Renewal of certificate of number — \$1.25.
- (2) Transfer of ownership and certificate of number — \$3.00.
- (3) Issuance of new certificate of number — \$3.00.
- (4) Issuance of duplicate certificate of number — \$0.50.
- (5) Issuance or transfer of certificate of title — \$3.00.

(d) When certificates of number are to be issued by vessel agents as provided by subsection (a) of this section, the Commission may adopt rules to provide for any of the following:

- (1) Qualifications of the vessel agents.
- (2) Duties of the vessel agents.
- (3) Methods and procedures to ensure accountability and security for proceeds and unissued certificates of number.
- (4) Types and amounts of evidence that a vessel agent must submit to relieve the agent of responsibility for losses due to occurrences beyond the control of the agent.
- (5) Any other reasonable requirement or condition that the Commission deems necessary to expedite and control the issuance of certificates of number by vessel agents.

(e) The Commission may adopt rules to authorize the Director to take any of the following actions related to vessel agents:

- (1) Select and appoint vessel agents in the areas most convenient to the boating public.
- (2) Limit the number of vessel agents in any one area if necessary for efficiency of operation.
- (3) Require prompt and accurate reporting and remittance of public funds or documents by vessel agents.
- (4) Conduct periodic and special audits of accounts.
- (5) Suspend or terminate the authorization of any vessel agent found to be noncompliant with rules adopted by the Commission or when State funds or property are reasonably believed to be in jeopardy.
- (6) Require the immediate surrender of all equipment, forms, supplies, records, and State funds and property issued by or belonging to the Commission, in the event of the termination of a license agent.

(f) The Commission is exempt from the contested case provisions of Chapter 150B of the General Statutes with respect to determinations of whether to authorize or terminate the authority of a person to conduct vessel transactions as a vessel agent of the Commission.

(g) If any check or bank account draft of any vessel agent for the issuance of certificates of number shall be returned by the banking facility upon which the same is drawn for lack of funds, the vessel agent shall be liable to the Commission for a penalty of five percent (5%) of the amount of the check or bank account draft, but in no event shall the penalty be less than five dollars (\$5.00) or more than two hundred dollars (\$200.00). Vessel agents shall be assessed a penalty of twenty-five percent (25%) of their issuing fee on all



remittances to the Commission after the fifteenth day of the month immediately following the month of sale.

- (h) It is a Class 1 misdemeanor for a vessel agent to do any of the following:
- (1) Withhold or misappropriate funds generated from vessel transactions.
  - (2) Falsify records of vessel transactions.
  - (3) Willfully and knowingly assist or allow a person to obtain a certificate of number or certificate of title for which the person is ineligible.
  - (4) Willfully issue a backdated certificate of number or certificate of title.
  - (5) Willfully include false information or omit material information on vessel transaction forms and records regarding either:
    - a. A person's entitlement to a particular certificate of number or certificate of title.
    - b. The applicability or term of a particular certificate of number.
  - (6) Charge or accept any fee, remuneration, or other item of value that exceeds the fee amounts provided by statute.
  - (7) Charge or accept any additional fee, remuneration, or other item of value in association with any activity set out in subdivisions (1) through (5) of this subsection. (2006-185, s. 1.)

**Editor's Note.** — Session Laws 2006-185, s. 3, makes this section effective January 1, 2007, and applicable to offenses committed on or after January 1, 2007.

## § 75A-6. Classification; rules.

(a) Vessels subject to the provisions of this Chapter shall be divided into five categories as follows:

- (1) Class A. Less than 16 feet in length.
  - (2) Class 1. Sixteen feet or over and less than 26 feet in length.
  - (3) Class 2. Twenty-six feet or over and less than 40 feet in length.
  - (4) Class 3. Forty feet or over and not more than 65 feet in length.
  - (5) Class 4. More than 65 feet in length.
- (b) through (e) Repealed by Session Laws 1993, c. 361, s. 2.
- (f) through (j) Repealed by Session Laws 2006-185, s. 1.
- (k) Repealed by Session Laws 1993, c. 361, s. 2.
- (l) No person shall operate or give permission for the operation of a vessel that is not equipped as required by this section.
- (m) The Commission may adopt rules to conform to the Federal Boat Safety Act of 1971 and the federal regulations adopted pursuant thereto.
- (n) All vessels propelled by machinery of 10 hp or less that are operated on the public waters of this State shall carry at least one personal flotation device, life belt, ring buoy, or other device of the sort prescribed by rules of the Commission for each person on board, and from one-half hour after sunset to one-half hour before sunrise shall carry a white light in the stern or shall have on board a hand flashlight in good working condition, which light shall be ready at hand and shall be temporarily displayed in sufficient time to prevent collision.
- (o) The Commission for Health Services shall adopt rules establishing standards for sewage treatment devices and holding tanks for marine toilets installed in vessels operating on the inland fishing waters of the State as designated by the Commission and the inland lake waters of the State. The Commission shall not issue a certificate of number for any vessel operating on the inland fishing waters of the State as designated by the Commission and the inland lake waters of this State that is equipped with a marine toilet unless the vessel is provided with a sewage treatment device or holding tank approved by the Commission for Health Services. All vessels operating on the inland fishing waters of the State as designated by the Commission and the inland lake



waters of the State that are equipped with a marine toilet shall provide a sewage treatment device or holding tank approved by the Commission for Health Services. Wildlife protectors may inspect vessels on the inland fishing waters of the State as designated by the Commission and the inland lake waters to determine if approved treatment devices or holding tanks are properly installed and if they are operating in a satisfactory manner. A vessel registered, documented, or otherwise licensed in another state and equipped with a marine toilet not prohibited in such state may be operated on the inland fishing waters of the State as designated by the Commission, without regard to the provisions of this subsection while making an interstate trip. (1959, c. 1064, s. 6; 1963, c. 396; 1965, c. 634, s. 2; 1967, cc. 230, 1075; 1971, c. 296, ss. 1, 2; 1973, c. 476, s. 128; 1975, c. 340, s. 2; c. 483, s. 3; 1989 (Reg. Sess., 1990), c. 1004, s. 55; 1993, c. 361, s. 2; 2006-185, s. 1.)

**Effect of Amendments.** — Session Laws 2006-185, s. 1, effective January 1, 2007, and applicable to offenses committed on or after January 1, 2007, rewrote the section.

### § 75A-6.1. Navigation rules.

(a) Every vessel operated on the waters of this State that is required to obtain an identification number pursuant to this Chapter, has a valid marine document issued by the federal Bureau of Customs or any federal agency successor to it, or issued pursuant to a federally approved numbering system of another state shall comply with the navigation rules, including requirements for navigational lights, sound-signaling devices, and other equipment, contained in the Inland Navigational Rules Act of 1980, codified as amended at 33 U.S.C. §§ 2001-2038, 2071-2073 (1993) and rules adopted pursuant thereto, see 33 C.F.R. Part 84 (1992).

(b) The Commission is responsible for the enforcement of the rules specified in subsection (a) of this section. The rules specified in subsection (a) of this section are also enforceable by all peace officers with general subject matter jurisdiction.

(c) Violation of the navigation rules specified in subsection (a) of this section shall constitute a Class 3 misdemeanor and is punishable only by a fine not to exceed one hundred dollars (\$100.00). (1993, c. 361, s. 1; 1994, Ex. Sess., c. 14, s. 44; 2006-185, s. 1.)

**Effect of Amendments.** — Session Laws 2006-185, s. 1, effective January 1, 2007, and applicable to offenses committed on or after January 1, 2007, substituted “Chapter, has a valid marine document issued by the federal Bureau of Customs or any federal agency successor to it, or issued” for “Chapter or” near the beginning of subsection (a) and deleted “Wildlife Resources” preceding “Commission” at the beginning of the first sentence of subsection (b).

### § 75A-7. Exemption from numbering requirements.

(a) A vessel shall not be required to be numbered under this Chapter if it is:

- (1) A vessel that is required to be awarded an identification number pursuant to federal law or a federally approved numbering system of another state, and for which an identification number has been so awarded: Provided, that any such vessel shall not have been within this State for a period in excess of 90 consecutive days.
- (2) A vessel from a country other than the United States temporarily using the waters of this State.
- (3) A vessel whose owner is the United States, a state or a subdivision thereof.
- (4) A ship’s lifeboat.

- (5) A vessel that has a valid marine document issued by the federal Bureau of Customs or any federal agency successor thereto.
- (6) A sailboat of not more than 14 feet on the load water line (LWL).
- (7) A vessel with no means of propulsion other than drifting or manual paddling, poling, or rowing.

(b) The Commission is hereby empowered to permit the voluntary numbering of vessels owned by the United States, a state or a subdivision thereof.

(c) Those vessels owned by the United States, a state or a subdivision thereof and those owned by nonprofit rescue squads may be assigned a certificate of number bearing no expiration date but which shall be stamped with the word “permanent” and shall not be renewable so long as the vessel remains the property of the governmental entity or nonprofit rescue squad. If the ownership of any such vessel is transferred from one governmental entity to another or to a nonprofit rescue squad or if a vessel owned by a nonprofit rescue squad is transferred to another nonprofit rescue squad or governmental entity, the Commission shall issue a new permanent certificate of number, displaying the same identification number, without charge to the successor entity. When any such vessel is sold to a private owner or is otherwise transferred to private ownership, the applicable certificate of number shall be deemed to have expired immediately prior to the transfer. Prior to further use on the waters of this State, the new owner shall obtain a certificate of number pursuant to the provisions of this Chapter. The provisions of this subsection applicable to a vessel owned by a nonprofit rescue squad apply only to a vessel operated exclusively for rescue purposes, including rescue training. (1959, c. 1064, s. 7; 1981, c. 162; 1983, c. 446, ss. 1-3; 2006-185, s. 1.)

**Effect of Amendments.** — Session Laws 2006-185, s. 1, effective January 1, 2007, and applicable to offenses committed on or after January 1, 2007, in subsection (a), in subdivision (a)(1), substituted “vessel that” for “vessel which” near the beginning, substituted “an identification number” for “a number” twice near the middle, and substituted “vessel” for “boat” near the end and, in subdivision (a)(5), substituted “vessel that” for “vessel which” near the beginning and substituted “Federal Bureau of Customs” for “Bureau of Customs of the United States government” near the middle; deleted “Wildlife Resources” preceding “Commission” near the beginning of subsection (b);

and, in subsection (c), in the second sentence, substituted “vessel” for “boat” twice and substituted “the Commission shall issue a new permanent certificate of number, displaying the same identification number,” for “a new permanent certificate may be issued,” in the third sentence, substituted “vessel” for “boat” and substituted “the transfer” for “such transfer” at the end, substituted “a certificate of number” for “either a temporary certificate of number or a regular certificate” near the end of the fourth sentence, and, in the fifth sentence, substituted “a vessel owned by a” for “motorboats owned by” and substituted “squad apply only to a vessel” for “squads apply only to those” in the middle.

## § 75A-8. Vessel liveries.

An owner of a vessel livery shall not rent a vessel to any person unless the provisions of this Chapter have been complied with. An owner of a vessel livery shall equip all vessels rented as required by this Chapter. (1959, c. 1064, s. 8; 1975, c. 340, s. 3; 1983, c. 446, s. 1; 2006-185, s. 1.)

**Effect of Amendments.** — Session Laws 2006-185, s. 1, effective January 1, 2007, and applicable to offenses committed on or after

January 1, 2007, substituted “Vessel” for “Boat” in the section catchline; and rewrote the section.

## § 75A-9. Muffling devices.

(a) Every internal combustion engine used on a vessel shall have effective muffling equipment installed and used on the exhaust to muffle the noise in a reasonable manner. The use of cutouts is prohibited.



(b) Every internal combustion engine with an open-air exhaust that is used on a vessel that has a capacity of operating at more than 4,000 revolutions per minute shall have effective muffling equipment installed and used on each exhaust manifold stack. This subsection shall not apply to a licensed commercial fishing vessel.

(c) This section shall not apply to vessels competing in a regatta or race approved by the United States Coast Guard, for such vessels while on trial runs during a period not to exceed 48 hours immediately preceding the regatta or race, and for such vessels while competing in official trials for speed records during a period not to exceed 48 hours immediately following the regatta or race. (1959, c. 1064, s. 9; 2006-185, s. 1.)

**Effect of Amendments.** — Session Laws 2006-185, s. 1, effective January 1, 2007, and applicable to offenses committed on or after

January 1, 2007, designated the existing provisions as subsection (a); rewrote subsection (a); and added subsections (b) and (c).

**§ 75A-9.1:** Repealed by Session Laws 2006-185, s. 1, effective January 1, 2007, and applicable to offenses committed on or after January 1, 2007.

**§ 75A-10. Operating vessel or manipulating water skis, etc., in reckless manner; operating, etc., while intoxicated, etc.; depositing or discharging litter, etc.**

(a) No person shall operate any motorboat or vessel, or manipulate any water skis, surfboard, or similar device on the waters of this State in a reckless or negligent manner so as to endanger the life, limb, or property of any person.

(b) No person shall manipulate any water skis, surfboard, nonmotorized vessel, or similar device on the waters of this State while under the influence of an impairing substance.

(b1) No person shall operate any vessel while underway on the waters of this State:

(1) While under the influence of an impairing substance, or

(2) After having consumed sufficient alcohol that the person has, at any relevant time after the boating, an alcohol concentration of 0.08 or more.

(b2) The fact that a person charged with violating this subsection is or has been legally entitled to use alcohol or a drug is not a defense to a charge under subsections (b) and (b1) of this section. The relevant definitions contained in G.S. 20-4.01 shall apply to subsections (b), (b1), and (b2) of this section.

(b3) A person who violates a provision of subsection (a), (b), or (b1) of this section is guilty of a Class 2 misdemeanor.

(c) No person shall place, throw, deposit, or discharge or cause to be placed, thrown, deposited, or discharged on the waters of this State or into the inland lake waters of this State, any litter, raw sewage, bottles, cans, papers, or other liquid or solid materials which render the waters unsightly, noxious, or otherwise unwholesome so as to be detrimental to the public health or welfare or to the enjoyment and safety of the water for recreational purposes.

(d) No person shall place, throw, deposit, or discharge or cause to be placed, thrown, deposited, or discharged on the waters of this State or into the inland lake waters of this State any medical waste as defined by G.S. 130A-290 which renders the waters unsightly, noxious, or otherwise unwholesome so as to be detrimental to the public health or welfare or to the enjoyment and safety of the water for recreational purposes.



(e) A person who willfully violates subsection (d) of this section is guilty of a Class 1 misdemeanor. A person who willfully violates subsection (d) of this section and in so doing releases medical waste that creates a substantial risk of physical injury to any person who is not a participant in the offense is guilty of a Class F felony which may include a fine not to exceed fifty thousand dollars (\$50,000) per day of violation. (1959, c. 1064, s. 10; 1965, c. 634, s. 3; 1985, c. 615, ss. 1-5; 1989, c. 742, s. 1; 1995, c. 506, s. 14; 2006-185, s. 1.)

**Effect of Amendments.** — Session Laws 2006-185, s. 1, effective January 1, 2007, and applicable to offenses committed on or after January 1, 2007, substituted “vessel” for “boat” at the beginning of the section catchline; in subsection (b1), deleted “motorboat or motor” preceding “vessel” in the introductory paragraph, and substituted “the person” for “he” near the beginning of subdivision (b)(2); added

the subsection (b)(2) designation; in subsection (b)(2), substituted “subsections (b) and (b1) of this section” for “this subsection or subsection (b) above” at the end of the first sentence and substituted “subsections (b), (b1), and (b2) of this section” for “this subsection and subsection (b) above” at the end of the second sentence; added subsection (b)(3); and added subsection (e).

## § 75A-10.2. Proof of ownership of a vessel.

(a) In all actions to recover damages for injury to the person or to property or for the death of a person, arising out of an accident or collision involving a vessel, proof of ownership of such vessel at the time of the accident or collision shall be prima facie evidence that the vessel was being operated and used with the authority, consent and knowledge of the owner in the very transaction out of which the injury or cause of action arose.

(b) Proof of the certificate of number stating the identification number awarded to the vessel in the name of any person, firm, or corporation as required by this Chapter, or proof of the licensing, registration, or documentation of the vessel as required by other state or federal law in the name of any person, firm, or corporation, shall for the purpose of any such action, be prima facie evidence of ownership and that the vessel was then being operated by and under the control of a person for whose conduct the owner was legally responsible, for the owner’s benefit, and within the course and scope of the operator’s employment. (1971, c. 652, s. 1; 2006-185, s. 1.)

**Effect of Amendments.** — Session Laws 2006-185, s. 1, effective January 1, 2007, and applicable to offenses committed on or after January 1, 2007, substituted “vessel” for “motorboat” in the section catchline; in subsection (a), substituted “a vessel,” for “motorboats or vessels as said terms are described in G.S. 75A-2,” deleted “motorboat or” preceding “vessel,” substituted “the accident” for “such accident” near the middle, substituted “the vessel”

for “said motorboat or vessel” in the middle, and substituted “the injury” for “said injury” near the end; and, in subsection (b), inserted “identification” near the beginning, deleted “motorboat or” preceding “vessel”, substituted “the vessel” for “said motorboat or vessel” twice in the middle, substituted “the operator’s” for “his” at the end, and made punctuation changes.

## § 75A-11. Duty of operator involved in collision, accident, casualty, or other occurrence.

(a) For the purposes of this section, the term “occurrence” means a collision, accident, casualty, or other similar occurrence involving a vessel. The operator of a vessel involved in an occurrence, so far as the operator is able to do so without serious danger to the operator’s vessel, crew, and passengers (if any), shall render persons affected by the occurrence any assistance as may be practicable and necessary in order to save them from or minimize any danger caused by the occurrence, and also to give the operator’s name, address, and

identification of the operator's vessel in writing to any person injured and to the owner of any property damaged in the occurrence.

(b) If an occurrence results in the death, injury, or disappearance indicating death or injury of a person or damage to a vessel or other property of two thousand dollars (\$2,000) or more, or if there is complete loss of any vessel, the operator of the vessel shall file with the Commission a full description of the occurrence, including any information the agency may, by rule, require. If an occurrence results in death, disappearance, or injury, the operator of the vessel shall file the report with the Commission within 48 hours of the occurrence. If the occurrence results in vessel or property damage, or complete loss of any vessel, the operator of the vessel shall file the report with the Commission within 10 days of the occurrence. When the operator of the vessel cannot submit the report, the owner of the vessel shall submit the report. Reports filed pursuant to this subsection shall not be admissible as evidence.

(c) When, as a result of an occurrence that involves a vessel or its equipment, a person dies or disappears from a vessel, the operator of the vessel shall, without delay and by the most expeditious means available, notify the nearest law enforcement agency of all of the following:

- (1) The date, time, and exact location of the occurrence.
- (2) The name of each person who died or disappeared.
- (3) The certificate of number and name of the vessel.
- (4) The name and address of the vessel owner or owners and the vessel operator.

(d) If the operator of the vessel cannot give notice required by this section, each person on board the vessel shall notify the law enforcement agency or determine that notice has been given. Upon receiving notice under this section, a law enforcement agency shall immediately provide the Commission and the United States Coast Guard with the information required by this section. (1959, c. 1064, s. 11; 1999-248, s. 3; 2006-185, s. 1.)

**Effect of Amendments.** — Session Laws January 1, 2007, rewrote subsections (a) and 2006-185, s. 1, effective January 1, 2007, and (b) and added subsections (c) and (d). applicable to offenses committed on or after

## § 75A-12. Furnishing information to agency of United States.

In accordance with any request duly made by an authorized official or agency of the United States, any information compiled or otherwise available to the Commission pursuant to G.S. 75A-11(b) shall be transmitted to the requesting official or agency of the United States. (1959, c. 1064, s. 12; 2006-185, s. 1.)

**Effect of Amendments.** — Session Laws preceding "Commission" near the middle and 2006-185, s. 1, effective January 1, 2007, and substituted "the requesting" for "said" near the applicable to offenses committed on or after end. January 1, 2007, deleted "Wildlife Resources"

## § 75A-13. Water skis, surfboards, etc.

(a) No person shall operate a vessel on any water of this State for towing a person or persons on water skis, a surfboard, or similar device unless at least one of the following conditions is met:

- (1) There is in the vessel a person, in addition to the operator, in a position to observe the progress of the person or persons being towed.
- (2) The persons being towed wear a personal flotation device.
- (3) The vessel is equipped with a rear view mirror.



(b) No person shall operate a vessel on any water of this State towing a person or persons on water skis, a surfboard, or similar device, nor shall any person engage in water skiing, surfboarding, or similar activity at any time between the hours from one hour after sunset to one hour before sunrise.

(c) The provisions of subsections (a) and (b) of this section do not apply to a performer engaged in a professional exhibition.

(d) No person shall operate or manipulate any vessel, tow rope, or other device by which the direction or location of water skis, a surfboard, or similar device may be affected or controlled in such a way as to cause the water skis, surfboard, or similar device, or any person thereon to collide with any object or person. (1959, c. 1064, s. 13; 2006-185, s. 1.)

**Effect of Amendments.** — Session Laws 2006-185, s. 1, effective January 1, 2007, and applicable to offenses committed on or after January 1, 2007, in subsection (a), in the introductory paragraph, deleted “or” preceding “a surfboard” near the middle, substituted “unless at least one of the following conditions is met:” for “unless there” at the end, added the subdivision designations, in subdivision (a)(1), substituted “There is in the vessel” for “is in such a

vessel” and substituted “towed.” for “towed or unless the skiers”, substituted “The persons being towed wear a personal flotation device” for “wear a life preserver or unless the boat” in subdivision (a)(2), and added “The vessel” at the beginning of subdivision (a)(3); and deleted “or a person or persons engaged in an activity authorized under G.S. 75A-14” following “exhibition” at the end of subsection (c).

### § 75A-13.1. Skin and scuba divers.

(a) No person shall engage in skin diving or scuba diving in the waters of this State that are open to boating, or assist in such diving, without displaying a diver’s flag from a mast, buoy, or other structure at the place of diving; and no person shall display such flag except when diving operations are under way or in preparation.

(b) The diver’s flag shall be square, not less than 12 inches on a side, and shall be of red background with a diagonal white stripe, of a width equal to one fifth of the flag’s height, running from the upper corner adjacent to the mast downward to the opposite outside corner.

(c) No operator of a vessel under way in the waters of this State shall permit the vessel to approach closer than 50 feet to any structure from which a diver’s flag is then being displayed, except where the flag is so positioned as to constitute an unreasonable obstruction to navigation; and no person shall engage in skin diving or scuba diving or display a diver’s flag in any locality that will unreasonably obstruct vessels from making legitimate navigational use of the water.

(d) A person who violates a provision of this section is guilty of a Class 3 misdemeanor and shall only be subject to a fine not to exceed twenty-five dollars (\$25.00). (1969, c. 97, s. 1; 2006-185, s. 1.)

**Effect of Amendments.** — Session Laws 2006-185, s. 1, effective January 1, 2007, and applicable to offenses committed on or after January 1, 2007, substituted “that” for “which”

in the middle of subsection (a); in subsection (c), substituted “the” for “such” twice and substituted “that” for “at which the same” near the end; and added subsection (d).

### § 75A-13.3. Personal watercraft.

(a) No person shall operate a personal watercraft on the waters of this State at any time between sunset and sunrise. For purposes of this section, “personal watercraft” means a small vessel that uses an outboard or propeller-driven motor, or an inboard motor powering a water jet pump, as its primary source of motive power and which is designed to be operated by a person sitting,



standing, or kneeling on, or being towed behind the vessel, rather than in the conventional manner of sitting or standing inside the vessel.

(a1) No person shall operate a personal watercraft on the waters of this State at greater than no-wake speed within 100 feet of an anchored or moored vessel, a dock, pier, swim float, marked swimming area, swimmers, surfers, persons engaged in angling, or any manually operated propelled vessel, unless the personal watercraft is operating in a narrow channel. No person shall operate a personal watercraft in a narrow channel at greater than no-wake speed within 50 feet of an anchored or moored vessel, a dock, pier, swim float, marked swimming area, swimmers, surfers, persons engaged in angling, or any manually operated propelled vessel.

(b) Except as otherwise provided in this subsection, no person under 16 years of age shall operate a personal watercraft on the waters of this State, and it is unlawful for the owner of a personal watercraft or a person who has temporary or permanent responsibility for a person under the age of 16 to knowingly allow that person to operate a personal watercraft. A person of at least 14 years of age but under 16 years of age may operate a personal watercraft on the waters of this State if:

- (1) The person is accompanied by a person of at least 18 years of age who physically occupies the watercraft; or
- (2) The person (i) possesses on his or her person while operating the watercraft, identification showing proof of age and a boating safety certification card issued by the Commission or proof of other satisfactory completion of a boating safety education course approved by the National Association of State Boating Law Administrators (NASBLA); and (ii) produces that identification and certification card upon the request of an officer of the Commission or local law enforcement agency.

(b1) A person under 16 years of age who operates a personal watercraft in violation of the provisions of subsection (b) of this section is guilty of an infraction as provided in G.S. 14-3.1.

(c) No livery shall lease, hire, or rent a personal watercraft to or for operation by a person under 16 years of age, except as provided in subsection (b) of this section.

(c1) No person, firm, or corporation shall engage in the business of renting personal watercraft to the public for operation by the rentee unless the person, firm, or corporation has secured insurance for the liability of the person, firm, or corporation and that of the rentee, in such an amount as is hereinafter provided, from an insurance company duly authorized to sell liability insurance in this State. Each personal watercraft rented must be covered by a policy of liability insurance insuring the owner and rentee and their agents and employees while in the performance of their duties against loss from any liability imposed by law for damages including damages for care and loss of services because of bodily injury to or death of any person and injury to or destruction of property caused by accident arising out of the operation of such personal watercraft, subject to the following minimum limits: three hundred thousand dollars (\$300,000) per occurrence.

(c2) A vessel livery that fails to carry liability insurance in violation of subsection (c1) of this section is guilty of a Class 2 misdemeanor and shall only be subject to a fine not to exceed one thousand dollars (\$1,000).

(d) No person shall operate a personal watercraft on the waters of this State, nor shall the owner of a personal watercraft knowingly allow another person to operate that personal watercraft on the waters of this State, unless:

- (1) Each person riding on or being towed behind the vessel is wearing a type I, type II, type III, or type V personal flotation device approved by the United States Coast Guard. Inflatable personal flotation devices do not satisfy this requirement; and

- (2) In the case of a personal watercraft equipped by the manufacturer with a lanyard-type engine cut-off switch, the lanyard is securely attached to the person, clothing, or flotation device of the operator at all times while the personal watercraft is being operated in such a manner to turn off the engine if the operator dismounts while the watercraft is in operation.
- (d1) No person shall operate a personal watercraft towing another person on water skis, a surfboard, or similar device unless:
- (1) The personal watercraft has on board, in addition to the operator, an observer who shall monitor the progress of the person or persons being towed, or the personal watercraft is equipped with a rearview mirror; and
  - (2) The total number of persons operating, observing, and being towed does not exceed the number of passengers identified by the manufacturer as the maximum safe load for the vessel.
- (e) A personal watercraft must at all times be operated in a reasonable and prudent manner. Maneuvers that endanger life, limb, or property shall constitute reckless operation of a vessel as provided in G.S. 75A-10, and include any of the following:
- (1) Unreasonably or unnecessarily weaving through congested vessel traffic.
  - (2) Jumping the wake of another vessel within 100 feet of the other vessel or when visibility around the other vessel is obstructed.
  - (3) Intentionally approaching another vessel in order to swerve at the last possible moment to avoid collision.
  - (4) Repealed by Session Laws 2000-52, s. 2.
  - (5) Operating contrary to the “rules of the road” or following too closely to another vessel, including another personal watercraft. For purposes of this subdivision, “following too closely” means proceeding in the same direction and operating at a speed in excess of 10 miles per hour when approaching within 100 feet to the rear or 50 feet to the side of another vessel that is underway unless that vessel is operating in a narrow channel, in which case a personal watercraft may operate at the speed and flow of other vessel traffic.
- (f) The provisions of this section do not apply to a performer engaged in a professional exhibition, a person or persons engaged in an activity authorized under G.S. 75A-14, or a person attempting to rescue another person who is in danger of losing life or limb.
- (f1) For purposes of this section, “narrow channel” means a segment of the waters of the State 300 feet or less in width.
- (g) Repealed by Session Laws 1999-447, s. 1.
- (h) Nothing in this section prohibits units of local government, marine commissions, or local lake authorities from regulating personal watercraft pursuant to the provisions of G.S. 160A-176.2 or any other law authorizing such regulation, provided that the regulations are more restrictive than the provisions of this section or regulate aspects of personal watercraft operation that are not covered by this section. Whenever a unit of local government, marine commission, or local lake authority regulates personal watercraft pursuant to this subsection, it shall conspicuously post signs that are reasonably calculated to provide notice to personal watercraft users of the stricter regulations. (1997-129, s. 1; 1999-447, s. 1; 2000-52, ss. 1-4; 2005-161, s. 1; 2006-185, s. 1.)

**Effect of Amendments. —**

Session Laws 2006-185, s. 1, effective January 1, 2007, and applicable to offenses committed on or after January 1, 2007, substituted

“that” for “which” near the beginning of the second sentence in subsection (a); in paragraph (b)(2), substituted “boating” for “boater” near the beginning and deleted “Wildlife Resources”



preceding "Commission" twice; added subsection (b1); in subsection (c1), in the first sentence, substituted "No" for "It shall be unlawful for any" at the beginning, substituted "shall engage" for "to engage," substituted "the" for "such," substituted "the liability of the person, firm or corporation and that of the" for "his own liability and that of his" near the middle, and deleted "such" preceding "personal" near the beginning of the second sentence; added sub-

section (c2); substituted "the vessel" for "such vessel" in the first sentence of paragraph (d)(1); substituted "skis, a surfboard, or similar device" for "skis or other devices" near the end of the introductory paragraph of subsection (d1); in subsection (e), substituted "include any of the following" for "include" at the end of the introductory paragraph and made minor punctuation and stylistic changes.

### § 75A-14.1. Lake Norman No-Wake Zone.

It is unlawful to operate a vessel at greater than no-wake speed within 50 yards of a vessel launching area, bridge, dock, pier, marina, vessel storage structure, or vessel service area on the waters of Lake Norman. (1997-129, s. 4; 1997-257, s. 10; 1998-217, s. 49; 2006-185, s. 1.)

**Effect of Amendments.** — Session Laws 2006-185, s. 1, effective January 1, 2007, and applicable to offenses committed on or after January 1, 2007, substituted "vessel" for "boat"

three times in the first sentence and deleted the former second sentence which read: "No-wake speed is idle speed or slow speed creating no appreciable wake."

### § 75A-15. Rules on water safety; adoption of the United States Aids to Navigation System.

(a) In accordance with subsection (b) of this section, the Commission is empowered to adopt rules, for the local water in question, as to:

- (1) Operation of vessels, including restrictions concerning speed zones, and type of activity conducted.
- (2) Promotion of boating and water safety generally by occupants of vessels, swimmers, fishermen, and others using the water.
- (3) Placement and maintenance of navigation aids and markers, in conformity with governing provisions of law.

Prior to the adoption of any rules, the Commission shall investigate the water recreation and safety needs of the local water in question. In conducting the investigation, the Commission in its discretion may hold public hearings on the rules proposed and the general needs of the local water in question. After completion of the investigation and application of standards, the Commission may in its discretion adopt the rules requested, adopt them in an amended form, or refuse to adopt them. After adoption, the Commission may amend or repeal the rules after first holding a public hearing.

(b) Any subdivision of this State may, but only after public notice, make formal application to the Commission for rules on waters within the subdivision's territorial limits as to the matters listed in subsection (a) of this section. The Commission may adopt rules applicable to local areas of water defined by the Commission that are found to be heavily used for water recreation purposes by persons from other areas of the State and as to which there is not coordinated local interest in regulation.

(b1) The Commission may adopt rules to prohibit entry of vessels into public swimming areas and to establish speed zones at public vessel launching ramps, marinas, or vessel service areas and on other congested water areas where there are demonstrated water safety hazards. Enforcement of rules adopted pursuant to this subsection shall be dependent upon placement and maintenance of regulatory markers in accordance with the United States Aids to Navigation System by the Commission or an agency designated by the Commission.



(c) The United States Aids to Navigation System, as established by 33 Code of Federal Regulations Part 62 (July 1, 2005 edition), is hereby adopted for use on the waters of North Carolina. The Commission is authorized to adopt rules implementing the marking system and may:

- (1) Modify provisions as necessary to meet the special water recreational and safety needs of this State, provided that the modifications do not depart in any essential manner from the uniform standards being adopted in other states.
- (2) Modify provisions as necessary to conform with amendments to the marking system that may be proposed for adoption by the states.
- (3) Enact supplementary standards regarding design, construction, placement, and maintenance of markers.
- (4) Enact clarifying rules as to matters not covered with precision in the United States Aids to Navigation System.
- (5) Enact implementing rules as to matters left to State discretion in the United States Aids to Navigation System.
- (6) Enact rules forbidding or restricting the placement of markers either throughout the State or in certain classes or areas of waters without prior permission having been obtained from the Commission or some agency or official designated by the Commission.

(c1) It is unlawful to place or maintain any marker of the sort covered by the marking system in the waters of North Carolina that does not conform to or is in violation of the marking system and the implementing rules of the Commission.

(d) Rules enacted under the authority of subsections (a), (b), and (b1) of this section shall supersede all local rules in conflict or incompatible with such rules. As used in this subsection, "local rules" shall include provisions relating to boating, water safety, or other recreational use of local waters in special local, or private acts, in ordinances or rules of local governing bodies, or in ordinances or rules of local water authorities. Except as may be authorized in subsections (a), (b), and (b1) of this section, no local rules may be made respecting the United States Aids to Navigation System and its implementation or respecting supplemental safety equipment on vessels.

(e) The Commission may adopt rules prohibiting entry or use by vessels or swimmers of waters of the State immediately surrounding impoundment structures and powerhouses associated with electric generating facilities that are found to pose a hazard to water safety. This subsection shall not apply to the Person-Caswell Lake Authority, Carolina Power and Light Company Lake (Hyc0). (1959, c. 1064, s. 15; 1965, c. 394; 1969, c. 1093, s. 4; 1977, c. 424; 1983 (Reg. Sess., 1984), c. 1082, ss. 4, 5; 1987, c. 827, s. 5; 1993 (Reg. Sess., 1994), c. 753, s. 3; 2006-185, s. 1.)

**Effect of Amendments.** — Session Laws applicable to offenses committed on or after 2006-185, s. 1, effective January 1, 2007, and January 1, 2007, rewrote the section.

## § 75A-16.1. Boating safety course.

(a) The Commission shall institute and coordinate a statewide course of instruction in boating safety, and in so doing may cooperate with any political subdivision of the State or with any reputable organization having as one of its objectives the promotion of boating safety.

(b) The Commission shall designate those persons or agencies authorized to conduct the course of instruction, and this designation shall be valid until revoked by the Commission. Within 30 days of completion of a course of instruction, a designated person or agency shall submit to the Commission a

list of the names of all persons who successfully completed the course of instruction conducted by the designated person or agency.

(c) The Commission may conduct the course in boating safety using Commission personnel or other persons at times or in areas in which competent agencies are unable or unwilling to meet the demand for instruction.

(d) The Commission shall issue a boating safety certification card to each person who successfully completes the course of instruction.

(e) The Commission shall adopt rules to provide for the course of instruction and the issuance of boating safety certification cards consistent with the purposes of this section.

(f) Any person who presents a fictitious boating safety certification card or who attempts to obtain a boating safety certification card through fraud is guilty of a Class 2 misdemeanor. (2006-185, s. 1.)

**Editor's Note.** — Session Laws 2006-185, s. 1, and applicable to offenses committed on or after 3, makes this section effective January 1, 2007, January 1, 2007.

## § 75A-17. Enforcement of Chapter.

(a) Every wildlife protector and every other law-enforcement officer of this State and its subdivisions shall have the authority to enforce the provisions of this Chapter and in the exercise thereof shall have authority to stop any vessel subject to this Chapter. Wildlife protectors or other law enforcement officers of this State, after having identified themselves as law enforcement officers, shall have authority to board and inspect any vessel subject to this Chapter.

(b) In order to secure broader enforcement of the provisions of this Chapter, the Commission is authorized to enter into an agreement with the Department of Environment and Natural Resources whereby the enforcement personnel of the Department shall assume responsibility for enforcing the provisions of this Chapter in the territory and area normally policed by enforcement personnel of the Commission and whereby the Commission shall contribute a share of the expense of such personnel according to a ratio of time and effort expended by them in enforcing the provisions of this Chapter, when the ratio has been agreed upon by both of the contracting agencies. The agreement may be modified from time to time as conditions may warrant.

(c) Law enforcement vessels may use a flashing blue light on the waters of this State whenever they are engaged in law enforcement or public safety activities. The use of a blue light by any other vessel is prohibited. A person other than a law enforcement officer who activates, installs, or operates a flashing blue light on a vessel other than a law enforcement vessel is guilty of a Class 1 misdemeanor.

(d) A siren may not be used on any vessel other than an official law enforcement vessel or other official emergency response vessel.

(e) Vessels operated on the waters of this State shall stop when directed to do so by a law enforcement officer. When stopped, vessels shall remain at idle speed, or shall maneuver in such a way as to permit the officer to come alongside the vessel. Law enforcement officers may direct vessels to stop by using a flashing blue light, a siren, or an oral command by officers in uniform. A person who violates this subsection is guilty of a Class 2 misdemeanor.

(f) Vessels operated on the waters of this State shall slow to a no-wake speed when passing within 100 feet of a law enforcement vessel that is displaying a flashing blue light unless the vessel is in a narrow channel. Vessels operated on the waters of this State in a narrow channel shall slow to a no-wake speed when passing within 50 feet of a law enforcement vessel that is displaying a flashing blue light. A person who violates this subsection is guilty of a Class 3 misdemeanor. (1959, c. 1064, s. 17; 1965, c. 957, s. 9; 1973, c. 1262, ss. 28, 86;



1977, c. 771, s. 4; 1989, c. 727, s. 218(17); 1997-443, s. 11A.119(a); 2006-185, s. 1.)

**Effect of Amendments.** — Session Laws 2006-185, s. 1, effective January 1, 2007, and applicable to offenses committed on or after January 1, 2007, in subsection (a), substituted “Chapter. Wildlife protectors or other law enforcement officers of this state” for “Chapter; and” and substituted “themselves as law enforcement officers,” for “himself in his official capacity;”, in subsection (b), in the first sen-

tence, deleted “Wildlife Resources” preceding “Commission” twice, substituted “enforcement personnel of the Commission” for “such enforcement personnel” near the middle, and substituted “the ratio” for “such ratio” near the end, and substituted “The agreement” for “Such agreement” near the beginning of the second sentence; and added subsections (c) through (f).

§ 75A-18. Penalties.

(a) Except as otherwise provided, a person who violates a provision of this Article or who violates a rule adopted under authority of this Chapter is guilty of a Class 3 misdemeanor and shall only be subject to a fine not to exceed two hundred and fifty dollars (\$250.00) for each violation. This limitation shall not apply in a case where a more severe penalty is prescribed in this Chapter.

(b) through (e) Repealed by Session Laws 2006-185, s. 1. (1959, c. 1064, s. 18; 1965, c. 634, s. 3; c. 793; 1969, c. 97, s. 2; 1979, c. 761, s. 8; 1985, c. 615, ss. 6, 7; 1989, c. 742, s. 2; 1993, c. 539, ss. 566, 1285; 1994, Ex. Sess., c. 24, s. 14(c); 1997-129, s. 3; 1999-447, s. 2; 2006-185, s. 1.)

**Effect of Amendments.** — Session Laws 2006-185, s. 1, effective January 1, 2007, and applicable to offenses committed on or after January 1, 2007, rewrote the section.

§ 75A-19. Operation of vessels by manufacturers, dealers, etc.

Notwithstanding any other provisions of this Chapter, the Commission may adopt rules regarding the operation of vessels by manufacturers, distributors, dealers, and demonstrators as the Commission may deem necessary and proper. (1959, c. 1064, s. 181/2; 2006-185, s. 1.)

**Effect of Amendments.** — Session Laws 2006, s. 1, effective January 1, 2007, and applicable to offenses committed on or after January 1, 2007, substituted “vessels” for “watercraft” in the section catchline and near the middle, de-

leted “Wildlife Resources” preceding “Commission” near the beginning and substituted “adopt rules” for “promulgate such rules and regulations” near the middle.

ARTICLE 4.

*Vessel Titling Act.*

§ 75A-32. Short title.

This Article shall be known as the Vessel Titling Act. (1989, c. 739, s. 1; 2006-185, s. 2.)

**Editor’s Note.** — Session Laws 2006-185, s. 2, effective January 1, 2007, and applicable to offenses committed on or after that date, rewrote the Article 4 heading, which formerly read: “Watercraft Titling Act”.

**Effect of Amendments.** — Session Laws 2006-185, s. 2, effective January 1, 2007, and applicable to offenses committed on or after January 1, 2007, substituted “Vessel” for “Watercraft” near the end.



### § 75A-33. Definitions.

The definitions set forth in G.S. 75A-2 shall apply to this Article, unless the context clearly requires a different meaning. (1989, c. 739, s. 1; 2006-185, s. 2.)

**Effect of Amendments.** — Session Laws 2006-185, s. 2, effective January 1, 2007, and applicable to offenses committed on or after January 1, 2007, rewrote the section.

### § 75A-34. Who may apply for certificate of title; authority of employees of Commission.

(a) Any owner of a motorized vessel or sailboat 14 feet or longer or any personal watercraft, as defined in G.S. 75A-13.3(a), that is applying for a certificate of number for the first time in this State pursuant to G.S. 75A-5(a), and any new owner of a motorized vessel or sailboat 14 feet or longer or any personal watercraft to whom ownership is being transferred under G.S. 75A-5(c) shall apply to the Commission for a certificate of title for that vessel. Any other vessel may be titled in this State at the owner's option. A vessel may not be titled in this State if it is titled in another state, unless the current title is surrendered along with the application for a certificate of title in this State. The Commission shall issue a certificate of title upon reasonable evidence of ownership, which may be established by affidavit, bill of sale, manufacturer's statement of origin, certificate of title in this State, certificate of number or title from another state, or other document satisfactory to the Commission. Only one certificate of title may be issued for any vessel in this State. A vessel may not be titled in this State if it is documented with the United States Coast Guard. The Commission shall issue a certificate of title upon receipt of a completed application, along with the appropriate fee and reasonable evidence of ownership. The Commission shall require a manufacturer's statement of origin for all new vessels being issued a certificate of number and a certificate of title for the first time. The Commission may request a pencil tracing of the hull identification number (serial number) for vessels being transferred, in order to positively identify the vessel before issuance of a certificate of title for that vessel.

(b) Employees of the Commission are vested with the power to administer oaths and to take acknowledgements and affidavits incidental to the administration and enforcement of this section. They shall receive no compensation for these services. (1989, c. 739, s. 1; 2006-185, s. 2.)

**Effect of Amendments.** — Session Laws 2006-185, s. 2, effective January 1, 2007, and applicable to offenses committed on or after January 1, 2007, rewrote subsection (a), which read: "Any owner of any watercraft in this State, which is not titled elsewhere, may apply

to the Commission for a certificate of title. The Commission shall issue a certificate of title upon reasonable evidence of ownership, which may be established by affidavits, bills of sale, or other similar documents."

### § 75A-35. Form and contents of application.

(a) The owner or the owner's attorney shall apply for a certificate of title for a vessel. The application shall contain the name, residence, and mailing address of the owner, the county where the vessel is taxed, proof of ownership, and a statement of all liens or encumbrances upon the vessel in the order of their priority. The application shall also contain the names and addresses of all persons having any interest in the vessel.

(b) Every application for a certificate of title for a vessel shall contain a brief description of the vessel to be titled, including the name of the manufacturer, certificate of number, hull identification number, length, type, and principal

material of construction, model year, and purchase information. It shall also include the name and address of the previous owner or owners from whom the vessel was obtained. If the vessel has an outboard motor of greater than 25 horsepower, the application shall also contain identification of the motor, including the serial number and manufacturer. The application shall be made on forms prescribed and furnished by the Commission and shall contain other information as may be required by the Commission. (1989, c. 739, s. 1; 2006-185, s. 2.)

**Effect of Amendments.** — Session Laws 2006-185, s. 2, effective January 1, 2007, and applicable to offenses committed on or after January 1, 2007, rewrote the section.

### § 75A-36. Notice by owner of change of address.

Whenever any person, after applying for or obtaining the certificate of title of a vessel, moves from the address shown on the application or certificate of title, that person shall, within 30 days of moving, notify the Commission of the change of address on a form acceptable to the Commission. (1989, c. 739, s. 1; 2006-185, s. 2.)

**Effect of Amendments.** — Session Laws 2006-185, s. 2, effective January 1, 2007, and applicable to offenses committed on or after January 1, 2007, in the first paragraph, substituted “vessel” for “watercraft,” substituted “on the application or” for “in the application or upon the,” substituted “days of moving” for “days,” and substituted “of the change of address on a form acceptable to the commission” for “in writing of his change of address” at the end; and deleted the former second paragraph which read: “A fee of ten dollars (\$10.00) shall be imposed upon anyone failing to comply with this section within the time prescribed.”

### § 75A-37. Certificate of title as evidence; duration; transfer of title.

(a) A certificate of title is prima facie evidence of the ownership of a vessel. A certificate of title shall remain in force for the life of the vessel.

(b) Upon the sale, assignment, or transfer of a vessel for which a certificate of title has been issued under this Article, the legal holder of the certificate of title shall deliver it to the purchaser or transferee. The assignment on the certificate must be completed showing transfer of ownership to the purchaser or transferee and settlement of all outstanding liens and encumbrances. The new owner shall submit the assigned certificate of title to the Commission, accompanied by evidence satisfactory to the Commission that all outstanding liens have been released, with the application for transfer of title. The application shall contain all the information required by the Commission for the transfer in order to identify the vessel and the new owner. The application shall show any and all new liens and encumbrances on the vessel, in order of priority, incurred by the owner. The nature of the new liens and encumbrances shall also be given, along with the name and address of all secured parties. (1989, c. 739, s. 1; 2006-185, s. 2.)

**Effect of Amendments.** — Session Laws 2006-185, s. 2, effective January 1, 2007, and applicable to offenses committed on or after January 1, 2007, rewrote the section.

### § 75A-38. Commission’s records; fees.

(a) The Commission shall maintain a record of any title it issues.

(b) The Commission shall charge a fee of twenty dollars (\$20.00) to issue a new or transfer certificate of title. The Commission shall charge a fee of ten



dollars (\$10.00) for each duplicate title it issues and for the recording of a supplemental lien. (1989, c. 739, s. 1; 2006-185, s. 2.)

**Effect of Amendments.** — Session Laws 2006-185, s. 2, effective January 1, 2007, and applicable to offenses committed on or after January 1, 2007, in subsection (b), substituted “to issue a new or transfer certificate of title.

The Commission shall charge a fee of” for “for issue of each certificate of title, and” and substituted “duplicate title it issues and for the” for “transfer of title, duplicate title, or” near the end.

## § 75A-39. Duplicate certificate of title.

The Commission may issue a duplicate certificate of title plainly marked “duplicate” across its face upon application by the person entitled to hold the certificate if the Commission is satisfied that the original certificate has been lost, stolen, mutilated, destroyed, or has become illegible. Mutilated or illegible certificates shall be returned to the Commission with the application for a duplicate. If a duplicate certificate of title has been issued and the lost or stolen original is recovered, the original shall be promptly surrendered to the Commission. A duplicate certificate of title, not bearing the word “duplicate” across its face, shall be issued for anyone having an address change or name change so long as the original title is surrendered and the appropriate fees paid as provided in G.S. 75A-38(b). If the original certificate of title is not surrendered to the Commission, the duplicate certificate of title shall be plainly marked “duplicate” across its face. (1989, c. 739, s. 1; 2006-185, s. 2.)

**Effect of Amendments.** — Session Laws 2006-185, s. 2, effective January 1, 2007, and applicable to offenses committed on or after January 1, 2007, deleted “for cancellation” fol-

lowing “Commission” at the end of the third sentence and added the fourth and fifth sentences.

## § 75A-40. Certificate to show security interests.

The Commission, after receiving an application for a certificate of title for a vessel, shall, upon issuing the certificate of title to the owner, show upon the face of the certificate of title all security interests in the order of their priority as shown in the application. (1989, c. 739, s. 1; 2006-185, s. 2.)

**Effect of Amendments.** — Session Laws 2006-185, s. 2, effective January 1, 2007, and applicable to offenses committed on or after

January 1, 2007, substituted “for a vessel,” for “to a watercraft,” near the beginning of the section.

## § 75A-41. Security interests subsequently created.

Except for security interests in vessels that are inventory held for sale, security interests created in vessels by the voluntary act of the owner after the original issue of title to the owner must be shown on the certificate of title. In such cases, the owner shall file an application with the Commission on a form furnished for that purpose, setting forth all security interests and other information as the Commission requires. The Commission, if satisfied that it is proper that the security interests be recorded, shall upon surrender of the certificate of title covering the vessel, issue a new certificate of title showing any security interests in the order of the priority according to the date of the filing of the application. For the purpose of recording the subsequent security interest, the Commission may require any secured party to deliver the certificate of title to the Commission. The newly issued certificate shall be sent or delivered to the secured party of first priority listed on the certificate of title. (1989, c. 739, s. 1; 2000-169, s. 38; 2006-185, s. 2.)



**Effect of Amendments.** — Session Laws 2006-185, s. 2, effective January 1, 2007, and applicable to offenses committed on or after January 1, 2007, substituted “vessels” for “watercraft” twice in the first sentence; in the second sentence, substituted “form” for “blank” and substituted “all security” for “the security”; in the third sentence, substituted “security in-

terests be recorded, shall” for “same be recorded and”, substituted “vessel,” for “watercraft, shall thereupon”, and substituted “any security” for “their security”; and substituted “of first priority listed on the certificate of title” for “from whom the prior certificate was obtained” at the end of the last sentence.

## § 75A-42. Certificate as notice of security interest.

A certificate of title, when issued by the Commission showing a security interest, shall be deemed adequate notice to the State, creditors, and purchasers that a security interest in the vessel exists. No other recording or filing of the creation or reservation of a security interest in the county or city wherein the purchaser or debtor resides or elsewhere is necessary and shall not be required. Vessels, other than those that are inventory held for sale, for which a certificate of title is currently in effect, shall be exempt from the provisions of G.S. 25-9-309, 25-9-310, 25-9-312, 25-9-320, 25-9-322, 25-9-323, 25-9-324, 25-9-331, 25-9-404, 25-9-405, 25-9-406, and 25-9-501 to 25-9-526 for so long as the certificate of title remains in effect. (1989, c. 739, s.1; 2000-169, s. 39; 2006-185, s. 2.)

**Effect of Amendments.** — Session Laws 2006-185, s. 2, effective January 1, 2007, and applicable to offenses committed on or after January 1, 2007, substituted “vessel exists. No other” for “watercraft exists and the,” deleted

“not” preceding “necessary,” and, in the last sentence, substituted “Vessels” for “Watercraft” at the beginning and inserted a comma following “effect” near the middle.

## § 75A-43. Security interest may be filed within 30 days after purchase.

If application for the recordation of a security interest to be placed upon a vessel is filed in the principal office of the Commission within 30 days from the date of the applicant’s purchase of the vessel, it shall be valid to all persons, including the State, as if the recordation had been done on the day the security interest was acquired. (1989, c. 739, s. 1; 2006-185, s. 2.)

**Effect of Amendments.** — Session Laws 2006-185, s. 2, effective January 1, 2007, and applicable to offenses committed on or after

January 1, 2007, substituted “vessel” for “watercraft” twice.

## § 75A-44. Priority of security interests shown on certificates.

Except for security interests in vessels that are inventory held for sale, security interests shown upon the certificates of title issued by the Commission pursuant to applications for certificates shall have priority over any other liens or security interests against the vessel however created and recorded, except for a mechanics lien for repairs, provided that the mechanic furnishes the holder of any recorded lien who may request it with an itemized sworn statement of the work done and materials supplied for which the lien is claimed. (1989, c. 739, s.1; 2000-169, s. 40; 2006-185, s. 2.)

**Effect of Amendments.** — Session Laws 2006-185, s. 2, effective January 1, 2007, and applicable to offenses committed on or after

January 1, 2007, substituted “vessels” for “watercraft” at the beginning and substituted “vessel” for “watercraft” near the middle.

### § 75A-45. Legal holder of certificate of title subject to security interest.

The certificate of title of a vessel shall be delivered to the person holding the security interest having first priority upon the vessel and retained by that person until the entire amount of the security interest is fully paid by the owner of the vessel. The certificate of title shall then be delivered to the secured party next in order of priority and so on, or, if none, then to the owner of the vessel. (1989, c. 739, s. 1; 2006-185, s. 2.)

**Effect of Amendments.** — Session Laws 2006-185, s. 2, effective January 1, 2007, and applicable to offenses committed on or after

January 1, 2007, substituted “vessel” for “watercraft” throughout this section.

### § 75A-46. Release of security interest shown on certificate of title.

An owner, upon securing the release of any security interest upon a vessel shown upon the certificate of title issued for the vessel, may exhibit the documents evidencing the release, signed by the person or persons making the release, and the certificate of title to the Commission. When it is impossible to secure the release from the secured party, the owner may exhibit to the Commission any available evidence showing that the debt secured has been satisfied, together with a statement by the owner under oath that the debt has been paid. If the Commission determines that the secured debt has been satisfied in full, the Commission shall issue to the owner either a new certificate of title in proper form or an endorsement or rider showing the release of the security interest which the Commission shall attach to the outstanding certificate of title. (1989, c. 739, s. 1; 2006-185, s. 2.)

**Effect of Amendments.** — Session Laws 2006-185, s. 2, effective January 1, 2007, and applicable to offenses committed on or after January 1, 2007, substituted “vessel” for “watercraft” twice in the first sentence; and substi-

tuted “If the Commission determines that the secured debt has been satisfied in full,” for “When the Commission is satisfied as to the genuineness and regularity of the satisfied debt,” at the beginning of the last sentence.

### § 75A-47. Surrender of certificate required when security interest paid.

It is unlawful and constitutes a Class 1 misdemeanor for a secured party who holds a certificate of title as provided in this Article to refuse or fail to surrender the certificate of title to the person legally entitled to it within 10 days after the security interest has been paid and satisfied. (1989, c. 739, s. 1; 1993, c. 539, s. 567; 1994, Ex. Sess., c. 24, s. 14(c); 2006-185, s. 2.)

**Effect of Amendments.** — Session Laws 2006-185, s. 2, effective January 1, 2007, and applicable to offenses committed on or after

January 1, 2007, substituted “the security” for “his security” near the end of the section.

### § 75A-48. Levy of execution, etc.

A levy made by virtue of an execution or other proper court order, upon a vessel for which a certificate of title has been issued by the Commission, shall constitute a lien, subsequent to security interests previously recorded by the Commission and subsequent to security interests in inventory held for sale and perfected as otherwise permitted by law, if and when the officer making the

levy reports to the Commission at its principal office, on forms provided by the Commission, that the levy has been made and that the vessel levied upon has been seized by and is in the custody of the officer. Should the lien thereafter be satisfied or should the vessel levied upon and seized thereafter be released by the officer, the officer shall immediately report that fact to the Commission at its principal office. After a levy and seizure by an officer and before the officer reports the levy and seizure to the Commission, any person who fraudulently assigns, transfers, causes the certificate of title to be assigned or transferred, or causes a security interest to be shown upon the certificate of title, is guilty of a Class 1 misdemeanor. (1989, c. 739, s. 1; 1993, c. 539, s. 568; 1994, Ex. Sess., c. 24, s. 14(c); 2006-185, s. 2.)

**Effect of Amendments.** — Session Laws 2006-185, s. 2, effective January 1, 2007, and applicable to offenses committed on or after January 1, 2007, substituted “vessel” for “watercraft” throughout the section; substituted “the officer” for “he” near the end of the next to the last sentence; and rewrote the last sentence, which read: “Any owner who, after a levy

and seizure by an officer and before the officer reports the levy and seizure to the Commission, fraudulently assigns or transfers his title to or interest in the watercraft, or causes the certificate of title to be assigned or transferred, or causes a security interest to be shown upon such certificate of title, is guilty of a Class 1 misdemeanor.”

## **§ 75A-49. Registration prima facie evidence of ownership; rebuttal.**

A valid certificate of number issued under the provisions of this Chapter, or any similar document issued under the jurisdiction of any other state or country, shall be prima facie evidence of ownership of a vessel and entitlement to a certificate of title under the provisions of this Article, but ownership established by such documents shall be subject to rebuttal. (1989, c. 739, s. 1; 2006-185, s. 2.)

**Effect of Amendments.** — Session Laws 2006-185, s. 2, effective January 1, 2007, and applicable to offenses committed on or after January 1, 2007, rewrote this section which read: “Issuance of registration under the provisions of this Chapter shall be prima facie evi-

dence of ownership of a watercraft and entitlement to a certificate of title under the provisions of this Article, but the registration and certificate of title shall be subject to rebuttal.”



Chapter 75D.

Racketeer Influenced and Corrupt Organizations.

§ 75D-1. Short title.

CASE NOTES

**Weight-loss Center.** — In an action brought against a weight loss center and other defendants, the trial court did not err in concluding that plaintiff failed to establish a cause of action under the Racketeer Influenced and Corrupt Organizations Act. *Jacobs v. Physicians Weight Loss Ctr. of Am., Inc.*, 173 N.C. App. 663, 620 S.E.2d 232, 2005 N.C. App. LEXIS 2280 (2005).

§ 75D-3. Definitions.

CASE NOTES

**Cited** in *Jacobs v. Physicians Weight Loss Ctr. of Am., Inc.*, 173 N.C. App. 663, 620 S.E.2d 232, 2005 N.C. App. LEXIS 2280 (2005).

§ 75D-4. Prohibited activities.

CASE NOTES

**Cited** in *Jacobs v. Physicians Weight Loss Ctr. of Am., Inc.*, 173 N.C. App. 663, 620 S.E.2d 232, 2005 N.C. App. LEXIS 2280 (2005).

**Chapter 77.**  
**Rivers, Creeks, and Coastal Waters.**

**ARTICLE 3.**

*Lands Adjoining Coastal Waters.*

**§ 77-20. Seaward boundary of coastal lands.**

**CASE NOTES**

**Dismissal of Suit Upheld.** — Dismissal of a suit brought by a group of beachfront landowners against the State of North Carolina, the State of North Carolina Department of Environment and Natural Resources, the Coastal Resources Commission, the Division of Coastal Management, and its director, was upheld on appeal because the landowners failed to allege in their complaint sufficient allegations to establish that the State of North Carolina as-

serted any claim of title to their land under G.S. 41-10.1 to have constituted a waiver of the state's sovereign immunity with regard to the landowners' suit to prevent the general public from interfering with their use of certain beach property, which the landowners claimed was deeded to them. *Fabrikant v. Currituck County*, 174 N.C. App. 30, 621 S.E.2d 19, 2005 N.C. App. LEXIS 2219 (2005).

## Chapter 84.

### Attorneys-at-Law.

#### Article 4.

#### North Carolina State Bar.

Sec.

84-20. Compensation of councilors.

#### ARTICLE 1.

#### *Qualifications of Attorney; Unauthorized Practice of Law.*

### § 84-2.1. “Practice law” defined.

#### CASE NOTES

#### **Bankruptcy Petition Preparers. —**

Where pro se bankruptcy debtors retained a petition preparer to complete their bankruptcy petition and accompanying schedules and forms, the preparer engaged in the unauthorized practice of law by advising the debtors concerning an unlisted creditor and by maintaining a website which explained legal options and concepts related to bankruptcy. *In re Medley*, — Bankr. —, 2005 Bankr. LEXIS 2290 (Bankr. M.D.N.C. Nov. 10, 2005).

**Scrivening.** — Although the North Carolina

courts apparently have not addressed the issue, most courts have concluded that although a non-attorney may not create a document for another person or advise on how the document should be prepared, merely typing or “scrivening” a petition or legal document for another person does not constitute the practice of law. This distinction has been made in dealing with petition preparers under 11 U.S.C.S. § 110. *In re Lazarus*, — Bankr. —, 2005 Bankr. LEXIS 1093 (Bankr. M.D.N.C. Mar. 14, 2005).

### § 84-4. Persons other than members of State Bar prohibited from practicing law.

#### CASE NOTES

#### **Preparation of Bankruptcy Petition. —**

Where pro se bankruptcy debtors retained a petition preparer to complete their bankruptcy petition and accompanying schedules and forms, the preparer engaged in the unauthorized practice of law by advising the debtors concerning an unlisted creditor and by main-

taining a website that explained legal options and concepts related to bankruptcy. *In re Medley*, — Bankr. —, 2005 Bankr. LEXIS 2290 (Bankr. M.D.N.C. Nov. 10, 2005).

**Applied in** *In re Lazarus*, — Bankr. —, 2005 Bankr. LEXIS 1093 (Bankr. M.D.N.C. Mar. 14, 2005).

### § 84-7. District attorneys, upon application, to bring injunction or criminal proceedings.

#### CASE NOTES

**Cited in** *In re Medley*, — Bankr. —, 2005 Bankr. LEXIS 2290 (Bankr. M.D.N.C. Nov. 10, 2005).



## § 84-8. Punishment for violations; legal clinics of law schools excepted.

### CASE NOTES

**Cited in** *In re Medley*, — Bankr. —, 2005 Bankr. LEXIS 2290 (Bankr. M.D.N.C. Nov. 10, 2005).

### ARTICLE 4.

#### *North Carolina State Bar.*

## § 84-20. Compensation of councilors.

The members of the Council and members of committees when actually engaged in the performance of their duties, including committees sitting upon disbarment proceedings, shall receive as compensation for the time spent in attending meetings an amount to be determined by the Council, subject to approval of the North Carolina Supreme Court, and shall receive actual expenses of travel and subsistence while engaged in their duties provided that for transportation by use of private automobile the expense of travel shall not exceed the business standard mileage rate set by the Internal Revenue Service per mile of travel. The Council shall determine per diem and mileage to be paid. The allowance fixed by the Council shall be paid by the secretary-treasurer of the North Carolina State Bar upon presentation of appropriate documentation by each member. (1933, c. 210, s. 6; 1935, c. 34; 1953, c. 1310, s. 2; 1971, c. 13, s. 1; 1995, c. 431, s. 13; 2006-66, s. 22.23; 2006-221, s. 24.)

**Editor's Note.** — Session Laws 2006-66, s. 1.2, provides: "This act shall be known as 'The Current Operations and Capital Improvements Appropriations Act of 2006.'"

Session Laws 2006-66, s. 28.6 is a severability clause.

**Effect of Amendments.** — Session Laws

2006-66, s. 22.23, as added by Session Laws 2006-221, s. 24, effective July 1, 2006, substituted "the business standard mileage rate set by the Internal Revenue Service per mile of travel" for "the rate per mile allowed by G.S. 138.6" at the end of the first sentence.

## § 84-28. Discipline and disbarment.

### CASE NOTES

II. Sanctions.

III. Appeals.

#### II. SANCTIONS.

**Admonishment.** — Disciplinary commission did not err by ordering the issuance of an admonition as opposed to a less serious sanction for the attorney's misconduct in stating on his letterhead and website that he had been published in the federal appellate court reporter; a showing of public harm was not required and such discipline was within the statutory limits of G.S. 84-28. *N.C. State Bar v. Culbertson*, — N.C. App. —, 627 S.E.2d 644, 2006 N.C. App. LEXIS 720 (2006).

attorney's statements on his letterhead and website to the effect that the attorney had been published in the federal appellate court reporter were inherently misleading in multiple respects was supported by the "whole record" test; analysis of the whole record showed that the disciplinary commission's finding was supported by substantial evidence and no abuse of discretion was shown in thus ordering as discipline that he be admonished. *N.C. State Bar v. Culbertson*, — N.C. App. —, 627 S.E.2d 644, 2006 N.C. App. LEXIS 720 (2006).

#### III. APPEALS.

**"Whole Record" Test.** —

Disciplinary commission's finding that the

Chapter 87.

Contractors.

Article 1.

General Contractors.

- Sec.  
87-1.1. Exception for licensees under Article 2 or 4.  
87-1.2. Exception for specified Department of Transportation contractors.  
87-10. Application for license; examination; certificate; renewal.

- Sec.  
87-87. Authority to adopt rules, regulations, and procedures.  
87-88. General standards and requirements.  
87-97. (See Editor's note for effective date) Permitting, inspection, and testing of private drinking water wells.  
87-98. Emergency Drinking Water Fund.

Article 7.

North Carolina Well Construction Act.

- 87-85. Definitions.

ARTICLE 1.

General Contractors.

§ 87-1.1. Exception for licensees under Article 2 or 4.

G.S. 87-1 shall not apply to a licensee under Article 2 or 4 of this Chapter of the General Statutes, G.S. 87-43 shall not apply to a licensee under Article 2 of this Chapter of the General Statutes, and G.S. 87-21(a)(5) shall not apply to a licensee under Article 4 of this Chapter of the General Statutes when the licensee is bidding and contracting directly with the owner of a public building project if: (i) a licensed general contractor performs all work that falls within the classifications in G.S. 87-10(b) and the State Licensing Board of General Contractor's rules; and (ii) the total amount of the general contracting work so classified does not exceed a percentage of the total bid price pursuant to rules established by the Board; and (iii) a licensee with the appropriate license under Article 2 or Article 4 of this Chapter performs all work that falls within the classifications in Article 2 and Article 4 of this Chapter. (2003-231, s. 1; 2006-241, s. 2; 2006-259, s. 43; 2006-261, s. 3.)

**Editor's Note.** — Session Laws 2006-261, s. 3, effective August 27, 2006, made identical amendments to G.S. 87-1.1 as those made by 2006-241, s. 2, but was repealed by Session Laws 2006-259, s. 43, effective August 23, 2006.

Session Laws 2006-261, s. 6, is a severability clause.  
**Effect of Amendments.** — Session Laws 2006-241, s. 2, effective August 13, 2006, rewrote the section.

§ 87-1.2. Exception for specified Department of Transportation contractors.

The letting of contracts for the types of projects specified in G.S. 136-28.14 shall not be subject to the licensing requirement of this Article. (2006-261, s. 2.)

**Editor's Note.** — Session Laws 2006-261, s. 7, made this section effective August 27, 2006.

Session Laws 2006-261, s. 6, is a severability clause.

## **§ 87-10. Application for license; examination; certificate; renewal.**

(a) Anyone seeking to be licensed as a general contractor in this State shall file an application for an examination on a form provided by the Board, at least 30 days before any regular or special meeting of the Board. The Board may require the applicant to pay the Board or a provider contracted by the Board an examination fee not to exceed one hundred dollars (\$100.00) and pay to the Board a license fee not to exceed one hundred twenty-five dollars (\$125.00) if the application is for an unlimited license, one hundred dollars (\$100.00) if the application is for an intermediate license, or seventy-five dollars (\$75.00) if the application is for a limited license. The fees accompanying any application or examination shall be nonrefundable. The holder of an unlimited license shall be entitled to act as general contractor without restriction as to value of any single project; the holder of an intermediate license shall be entitled to act as general contractor for any single project with a value of up to seven hundred thousand dollars (\$700,000); the holder of a limited license shall be entitled to act as general contractor for any single project with a value of up to three hundred fifty thousand dollars (\$350,000); and the license certificate shall be classified in accordance with this section. Before being entitled to an examination an applicant must show to the satisfaction of the Board from the application and proofs furnished that the applicant is possessed of a good character and is otherwise qualified as to competency, ability, integrity, and financial responsibility, and that the applicant has not committed or done any act, which, if committed or done by any licensed contractor would be grounds under the provisions hereinafter set forth for the suspension or revocation of contractor's license, or that the applicant has not committed or done any act involving dishonesty, fraud, or deceit, or that the applicant has never been refused a license as a general contractor nor had such license revoked, either in this State or in another state, for reasons that should preclude the granting of the license applied for, and that the applicant has never been convicted of a felony involving moral turpitude, relating to building or contracting, or involving embezzlement or misappropriation of funds or property entrusted to the applicant: Provided, no applicant shall be refused the right to an examination, except in accordance with the provisions of Chapter 150B of the General Statutes.

(b) The Board shall conduct an examination, either oral or written, of all applicants for license to ascertain, for the classification of license for which the applicant has applied: (i) the ability of the applicant to make a practical application of the applicant's knowledge of the profession of contracting; (ii) the qualifications of the applicant in reading plans and specifications, knowledge of relevant matters contained in the North Carolina State Building Code, knowledge of estimating costs, construction, ethics, and other similar matters pertaining to the contracting business; (iii) the knowledge of the applicant as to the responsibilities of a contractor to the public and of the requirements of the laws of the State of North Carolina relating to contractors, construction, and liens; and (iv) the applicant's knowledge of requirements of the Sedimentation Pollution Control Act of 1973, Article 4 of Chapter 113A of the General Statutes, and the rules adopted pursuant to that Article. If the results of the examination of the applicant shall be satisfactory to the Board, then the Board shall issue to the applicant a certificate to engage as a general contractor in the State of North Carolina, as provided in said certificate, which may be limited into five classifications as follows:

(1) Building contractor, which shall include private, public, commercial, industrial and residential buildings of all types.

(1a) Residential contractor, which shall include any general contractor constructing only residences which are required to conform to the



residential building code adopted by the Building Code Council pursuant to G.S. 143-138.

- (2) Highway contractor.
- (3) Public utilities contractors, which shall include those whose operations are the performance of construction work on the following subclassifications of facilities:
  - a. Water and sewer mains, water service lines, and house and building sewer lines as defined in the North Carolina State Building Code, and water storage tanks, lift stations, pumping stations, and appurtenances to water storage tanks, lift stations, and pumping stations.
  - b. Water and wastewater treatment facilities and appurtenances thereto.
  - c. Electrical power transmission facilities, and primary and secondary distribution facilities ahead of the point of delivery of electric service to the customer.
  - d. Public communication distribution facilities.
  - e. Natural gas and other petroleum products distribution facilities; provided the General Contractors Licensing Board may issue license to a public utilities contractor limited to any of the above subclassifications for which the general contractor qualifies.
- (4) Specialty contractor, which shall include those whose operations as such are the performance of construction work requiring special skill and involving the use of specialized building trades or crafts, but which shall not include any operations now or hereafter under the jurisdiction, for the issuance of license, by any board or commission pursuant to the laws of the State of North Carolina.

(b1) Public utilities contractors constructing house and building sewer lines as provided in sub-subdivision a. of subdivision (3) of subsection (b) of this section shall, at the junction of the public sewer line and the house or building sewer line, install as an extension of the public sewer line a cleanout at or near the property line that terminates at or above the finished grade. Public utilities contractors constructing water service lines as provided in sub-subdivision a. of subdivision (3) of subsection (b) of this section shall terminate the water service lines at a valve, box, or meter at which the facilities from the building may be connected. Public utilities contractors constructing fire service mains for connection to fire sprinkler systems shall terminate those lines at a flange, cap, plug, or valve inside the building one foot above the finished floor. All fire service mains shall comply with the NFPA standards for fire service mains as incorporated into and made applicable by Volume V of the North Carolina Building Code.

(c) If an applicant is an individual, examination may be taken by his personal appearance for examination, or by the appearance for examination of one or more of his responsible managing employees, and if a copartnership or corporation, or any other combination or organization, by the examination of one or more of the responsible managing officers or members of the personnel of the applicant, and if the person so examined shall cease to be connected with the applicant, then in such event the license shall remain in full force and effect for a period of 90 days thereafter, and then be canceled, but the applicant shall then be entitled to a reexamination, all pursuant to the rules to be promulgated by the Board: Provided, that the holder of such license shall not bid on or undertake any additional contracts from the time such examined employee shall cease to be connected with the applicant until said applicant's license is reinstated as provided in this Article.

(d) Anyone failing to pass this examination may be reexamined at any regular meeting of the Board upon payment of an examination fee. Anyone

requesting to take the examination a third or subsequent time shall submit a new application with the appropriate examination and license fees.

(e) A certificate of license shall expire on the thirty-first day of December following its issuance or renewal and shall become invalid 60 days from that date unless renewed, subject to the approval of the Board. Renewals may be effected any time during the month of January without reexamination, by the payment of a fee to the secretary of the Board. The fee shall not exceed one hundred twenty-five dollars (\$125.00) for an unlimited license, one hundred dollars (\$100.00) for an intermediate license, and seventy-five dollars (\$75.00) for a limited license. No later than November 30 of each year, the Board shall mail written notice of the amount of the renewal fees for the upcoming year to the last address of record for each general contractor licensed pursuant to this Article. Renewal applications shall be accompanied by evidence of continued financial responsibility satisfactory to the Board. Renewal applications received by the Board after January shall be accompanied by a late payment of ten dollars (\$10.00) for each month or part after January. After a lapse of two years no renewal shall be effected and the applicant shall fulfill all requirements of a new applicant as set forth in this section. (1925, c. 318, s. 9; 1931, c. 62, s. 2; 1937, c. 328; c. 429, s. 3; 1941, c. 257, s. 1; 1953, c. 805, s. 2; c. 1041, s. 3; 1971, c. 246, s. 3; 1973, c. 1036, ss. 1, 2; c. 1331, s. 3; 1975, c. 279, ss. 2, 3; 1979, c. 713, s. 2; 1981, c. 739, ss. 1, 2; 1985, c. 630, ss. 2, 3; 1989, c. 431; 1993, c. 112, ss. 1, 2; c. 553, s. 26; 1999-123, s. 1; 1999-379, s. 7; 1999-427, s. 1; 2001-140, s. 1; 2001-296, s. 1; 2005-381, ss. 1, 2, 3; 2006-241, s. 1.)

**Effect of Amendments. —**

Session Laws 2006-241, s. 1, effective August

13, 2006, substituted “90 days” for “30 days” near the middle of subsection (c).

## ARTICLE 7.

### *North Carolina Well Construction Act.*

#### § 87-85. Definitions.

As used in this Article, unless the context otherwise requires:

- (1) “Abandoned well” means a well whose use has been discontinued, or which is in such a state of disrepair that continued use for obtaining groundwater or other useful purpose is impracticable.
- (2) “Aquifer” means a geologic formation, group of such formations, or a part of such a formation that is water bearing.
- (3) “Artesian well” means a well tapping a confined or artesian aquifer.
- (4) “Environmental Management Commission” means the North Carolina Environmental Management Commission or its successor, unless otherwise indicated.
- (5) “Construction of wells” means all acts necessary to construct wells for any intended purpose or use, including the location and excavation of the well; placement of casings, screens and fittings; development and testing.
- (5a) “Department” means the Department of Environment and Natural Resources unless otherwise indicated.
- (6) “Installation of pumps and pumping equipment” means the procedure employed in the placement and preparation for operation of pumps and pumping equipment, including all construction involved in making entrances to the well and establishing seals.
- (7) “Municipality” means a city, town, county, district, or other public body created by or pursuant to State law, or any combination thereof acting cooperatively or jointly.



- (8) “Nonpotable mineralized water” means brackish, saline, or other water containing minerals of such quantity or type as to render the water unsafe, harmful or generally unsuitable for human consumption and general use.
- (9) “Person” shall mean any and all persons, including individuals, firms, partnerships, associations, public or private institutions, municipalities or political subdivisions, governmental agencies, or private or public corporations organized or existing under the laws of this State or any other state or country.
- (10) “Polluted water” means water containing organic or other contaminants of such type and quantity as to render it unsafe, harmful or unsuitable for human consumption and general use.
- (10a) “Private drinking water well” means any excavation that is cored, bored, drilled, jetted, dug, or otherwise constructed to obtain groundwater for human consumption and that serves or is proposed to serve 14 or fewer service connections or that serves or is proposed to serve 24 or fewer individuals. The term “private drinking water well” includes a well that supplies drinking water to a transient noncommunity water system as defined in 40 Code of Federal Regulations § 141.2 (July 1, 2003 Edition).
- (11) “Pumps” and “pumping equipment” means any equipment or materials utilized or intended for use in withdrawing or obtaining groundwater including well seals.
- (12) “Repair” means work involved in deepening, reaming, sealing, installing or changing casing depths, perforating, screening, or cleaning, acidizing or redevelopment of a well excavation, or any other work which results in breaking or opening the well seal.
- (13) “Water supply well” means any well intended or usable as a source of water supply, but not to include a well constructed by an individual on land which is owned or leased by him, appurtenant to a single-family dwelling, and intended for domestic use (including household purposes, farm livestock, or gardens).
- (14) “Well” means any excavation that is cored, bored, drilled, jetted, dug or otherwise constructed for the purpose of locating, testing or withdrawing groundwater or for evaluating, testing, developing, draining or recharging any groundwater reservoirs or aquifer, or that may control, divert, or otherwise cause the movement of water from or into any aquifer.
- (15) “Well driller,” “driller” or “water well contractor” means any person, firm, or corporation engaged in the business of constructing wells.
- (16) “Well seal” means an approved arrangement or device used to cap a well or to establish and maintain a junction between the casing or curbing of a well and the piping or equipment installed therein, the purpose or function of which is to prevent pollutants from entering the well at the upper terminal.
- (17) “Operation of wells” means the process, frequency, and duration of withdrawing water or other fluids from a well by any means. (1967, c. 1157, s. 3; 1973, c. 1262, s. 23; 1977, c. 771, s. 4; 1987, c. 496, s. 1; 1989, c. 727, s. 218(21); 1997-358, s. 4; 1997-443, s. 11A.119(a); 2006-202, s. 1.)

**Effect of Amendments.** — Session Laws 2006-202, s. 1, effective August 7, 2006, added subdivision (10a).



## § 87-87. Authority to adopt rules, regulations, and procedures.

The Environmental Management Commission shall adopt rules governing the location, construction, repair, and abandonment of wells, the operation of water wells or well systems with a designed capacity of 100,000 gallons per day or greater, and the installation and repair of pumps and pumping equipment. The Environmental Management Commission shall be responsible for the administration of this Article and shall:

- (1) Hold public hearings, upon not less than 30 days' prior notice setting forth the date, place, and time of hearing, and the proposed rules and regulations to be considered at said public hearing, which notice shall be published in one or more newspapers having general circulation throughout the State, in connection with proposed rules and regulations and amendments thereto.
- (2) Enforce the provisions of this Article, and any rules and regulations not inconsistent with the provisions of this Article adopted pursuant thereto.
- (3) Establish procedures and forms for the submission, review, approval, and rejection of applications, notifications, and reports required under this Article.
- (4) Issue such additional regulations as may be necessary to carry out the provisions of this Article.
- (5) Neither adopt nor enforce any rule or regulation that concerns the civil liability of an owner to a well driller for any costs or expenses of drilling and installing a well for the owner.
- (6) Adopt rules governing the permitting and inspection by the Commission of private drinking water wells with a designed capacity of 100,000 gallons per day or greater.
- (7) Adopt rules governing the permitting and inspection by local health departments of private drinking water wells pursuant to G.S. 87-97. (1967, c. 1157, s. 5; 1973, c. 1262, s. 23; 1985, c. 728, s. 4; 1987, c. 496, s. 4; 2006-202, s. 2.)

**Effect of Amendments.** — Session Laws 2006-202, s. 2, effective August 7, 2006, in the introductory paragraph, substituted “adopt rules” for “adopt, and may from time to time amend, rules and regulations not inconsistent with this Article” near the beginning, substituted “equipment. The Environmental Man-

agement Commission” for “equipment, and” near the end, and substituted “Article and shall” for “Article. With respect thereto it shall” at the end; added paragraphs (6) and (7); and made minor punctuation and stylistic changes throughout the section.

## § 87-88. General standards and requirements.

(a) **Prior Permission.** — Prior permission shall be obtained from the Environmental Management Commission for the construction of (i) any water well or of well systems with a designed capacity of 100,000 gallons per day or greater; and (ii) of any well in a geographical area where the Environmental Management Commission finds, after public hearings, such permission to be reasonably necessary to protect the groundwater resources and the public welfare, safety and health, taking into consideration other applicable State laws; provided, however, that the Environmental Management Commission shall not reject any application under this subsection for permission to construct a well except upon the ground that the well would not be in compliance with a provision of this Article or with a rule or regulation of the Environmental Management Commission adopted pursuant to the provisions of G.S. 87-87 of this Article. Notification of approval or rejection of an application for permission to construct a well shall be given the applicant

within a period of 15 days after receipt of such application. Private drinking water wells (i) with a designed capacity of 100,000 gallons per day or greater or (ii) that are to be constructed in a geographical area where the Environmental Management Commission has found that prior permission is necessary shall be subject to permitting and inspection by the Environmental Management Commission and shall not be subject to permitting and inspection by a local health department. All other private drinking water wells shall be subject to permitting and inspection by the local health department as provided in G.S. 87-97.

(b) Reports. — Any person completing or abandoning any well shall furnish the Environmental Management Commission a certified record of the construction or abandonment of such well within a period of 30 days after completion of construction or abandonment.

(c) Prevention of Contamination. — Every well shall be constructed and maintained in a condition whereby it is not a source or channel of contamination of the groundwater supply or any aquifer. Wells subject to the provisions of subdivision (a)(i) of this section shall be operated in such a way that they shall not cause the violation of applicable groundwater quality standards. Contamination as used herein shall mean the act of introducing into water foreign materials of such a nature, quality, and quantity as to cause degradation of the quality of the water.

(d) Valves and Casing on Flowing Artesian Wells. — Valves and casing on all flowing artesian wells shall be maintained in a condition so that the flow of water can be completely stopped when the well is not being put to a beneficial use. Valves shall be closed when a beneficial use is not being made.

(e) Access Port. — Every water-supply well and such other wells, as may be specified by the Environmental Management Commission, shall be equipped with a usable access port or air line and to be a minimum of 0.5 inch inside diameter opening so that the position of the water level can be determined at any time. Such port shall be installed and maintained in such manner as to prevent entrance of water or foreign material.

(f) Mineralized Water. — Whenever a water-bearing stratum or aquifer that contains nonpotable mineralized water is encountered in well construction, the stratum shall be adequately cased or cemented off as conditions may require so that contamination of the overlying or underlying groundwater zones will not occur.

(g) Polluted Water. — In constructing any well, all water-bearing zones that are known to contain polluted water shall be adequately cased or cemented off so that pollution of the overlying and underlying groundwater zones will not occur.

(h) Well Test. — Every water-supply well shall be tested for capacity by a method and for a period of time acceptable to the Department and depending on the intended use of the well.

(i) Chlorination of the Well. — Upon completion of the well construction and pump installation, all water-supply wells installed for the purpose of obtaining groundwater for human consumption shall be sterilized in accordance with standards for sterilization of drinking water wells established by the U.S. Public Health Service.

(j) Use of Well for Recharge or Disposal. — No well shall be used for recharge, injection or disposal purposes without prior permission from the Environmental Management Commission.

(k) Abandonment of Wells. —

- (1) Temporary Abandonment: When any well is temporarily removed from service, the top of the well shall be sealed with a water-tight cap or seal.
- (2) Permanent Abandonment: Any well that is to be permanently abandoned shall be filled, plugged, or sealed in such a manner as to prevent



the well from being a channel allowing the vertical movement of water and a source of contamination of the groundwater supply.

- (3) Abandonment of Water Supply Wells for Other Use: Any water supply well that is removed from service as a potable water supply source may be used for other purposes, including, but not limited to, irrigation, commercial use, or industrial use, and such well is not subject to either subdivision (1) or (2) of this subsection during its use for other purposes. (1967, c. 1157, s. 6; 1973, c. 476, s. 128; c. 1262, s. 23; 1987, c. 496, s. 4; 1989, c. 727, s. 14; 1998-212, s. 14.9B(a); 2006-202, s. 3; 2006-259, s. 50(a).)

**Effect of Amendments.** — Session Laws 2006-202, s. 3, effective August 7, 2006, added the last two sentences in subsection (a); and substituted “human consumption and all private drinking water wells” for “domestic con-

sumption” in the middle of subsection (i).

Session Laws 2006-259, s. 50(a), effective August 23, 2006, deleted “and all private drinking water wells” following “human consumption” in subsection (i).

## **§ 87-97. (See Editor’s note for effective date) Permitting, inspection, and testing of private drinking water wells.**

(a) **Mandatory Local Well Programs.** — Each county, through the local health department that serves the county, shall implement a private drinking water well permitting, inspection, and testing program. Local health departments shall administer the program and enforce the minimum well construction, permitting, inspection, repair, and testing requirements set out in this Article and rules adopted pursuant to this Article.

(b) **Permit Required.** — Except for those wells required to be permitted by the Environmental Management Commission pursuant to G.S. 87-88, no person shall:

- (1) Construct or assist in the construction of a private drinking water well unless a construction permit has been obtained from the local health department.
- (2) Repair or assist in the repair of a private drinking water well unless a repair permit has been obtained from the local health department, except that a permit shall not be required for the repair or replacement of a pump or tank.

(c) **Permit Not Required for Maintenance or Pump Repair or Replacement.** — A repair permit shall not be required for any private drinking water well maintenance work that does not involve breaking or opening the well seal. A repair permit shall not be required for any private drinking water well repair work that involves only the repair or replacement of a pump or tank.

(d) **Well Site Evaluation.** — The local health department shall conduct a field investigation to evaluate the site on which a private drinking water well is proposed to be located before issuing a permit pursuant to this section. The field investigation shall determine whether there is any abandoned well located on the site, and if so, the construction permit shall be conditioned upon the proper closure of all abandoned wells located on the site in accordance with the requirements of this Article and rules adopted pursuant to this Article. If a private drinking water well is proposed to be located on a site on which a wastewater system subject to the requirements of Article 11 of Chapter 130A of the General Statutes is located or proposed to be located, the application for a construction permit shall be accompanied by a plat, as defined in G.S. 130A-334.

(e) **Issuance of Permit.** — The local health department shall issue a construction permit or repair permit if it determines that a private drinking



water well can be constructed or repaired and operated in compliance with this Article and rules adopted pursuant to this Article. The local health department may impose any conditions on the issuance of a construction permit or repair permit that it determines to be necessary to ensure compliance with this Article and rules adopted pursuant to this Article.

(f) Expiration and Revocation. — A construction permit or repair permit shall be valid for a period of five years except that the local health department may revoke a permit at any time if it determines that there has been a material change in any fact or circumstance upon which the permit is issued. The foregoing shall be prominently stated on the face of the permit. The validity of a construction permit or a repair permit shall not be affected by a change in ownership of the site on which a private drinking water well is proposed to be located or is located if the location of the well is unchanged and the well and the facility served by the well remain under common ownership.

(f1) Chlorination of the Well. — Upon completion of construction of a private drinking water well, the well shall be sterilized in accordance with the standards of drinking water wells established by the United States Public Health Service.

(g) Certificate of Completion. — Upon completion of construction of a private drinking water well or repair of a private drinking water well for which a permit is required under this section, the local health department shall inspect the well to determine whether it was constructed or repaired in compliance with the construction permit or repair permit. If the local health department determines that the private drinking water well has been constructed or repaired in accordance with the requirements of the construction permit or repair permit, the construction and repair requirements of this Article, and rules adopted pursuant to this Article, the local health department shall issue a certificate of completion. No person shall place a private drinking water well into service without first having obtained a certificate of completion. No person shall return a private drinking water well that has undergone repair to service without first having obtained a certificate of completion.

(h) Drinking Water Testing. — Within 30 days after it issues a certificate of completion for a newly constructed private drinking water well, the local health department shall test the water obtained from the well or ensure that the water obtained from the well has been sampled and tested by a certified laboratory in accordance with rules adopted by the Commission for Health Services. The water shall be tested for the following parameters: arsenic, barium, cadmium, chromium, copper, fluoride, lead, iron, magnesium, manganese, mercury, nitrates, nitrites, selenium, silver, sodium, zinc, pH, and bacterial indicators.

(i) Commission for Health Services to Adopt Drinking Water Testing Rules. — The Commission for Health Services shall adopt rules governing the sampling and testing of well water and the reporting of test results. The rules shall allow local health departments to designate third parties to collect and test samples and report test results. The rules shall also provide for corrective action and retesting where appropriate. The Commission for Health Services may by rule require testing for additional parameters if the Commission makes a specific finding that testing for the additional parameters is necessary to protect public health.

(j) Test Results. — The local health department shall provide test results to the owner of the newly constructed private drinking water well and, to the extent practicable, to any leaseholder of a dwelling unit or other facility served by the well at the time the water is sampled.

(k) Registry of Permits and Test Results. — Each local health department shall maintain a registry of all private drinking water wells for which a construction permit or repair permit is issued. The registry shall specify the

physical location of each private drinking water well and shall include the results of all tests of water from each well. The local health department shall retain a record of the results of all tests of water from a private drinking water well until the well is properly closed in accordance with the requirements of this Article and rules adopted pursuant to this Article.

(l) **Authority Not Limited.** — This section shall not be construed to limit any authority of local boards of health, local health departments, the Department of Health and Human Services, or the Commission for Health Services to protect public health. (2006-202, s. 4; 2006-259, ss. 50(b), 50(c), 51.)

**Editor's Note.** — Session Laws 2006-202, s. 8, makes this section, as enacted by 2006-202, s. 4, effective July 1, 2008, except that subsection (i) is effective August 7, 2006.

Session Laws 2006-259, s. 50(b), effective August 23, 2006, amended G.S. 87-97 “as enacted by Section 4 of House Bill 2873” (Session Laws 2006-202), by adding subsection (f1), contingent on House Bill 2873 becoming law, which it did.

**Effect of Amendments.** — Session Laws 2006-259, ss. 50(a), (b), and 51, effective August 23, 2006, added subsection (f1); inserted “the construction repair requirements of” near the middle of subsection (g); and substituted “well or ensure that the water obtained from the well has been sampled and tested by a certified laboratory in accordance with rules adopted by the Commission for Health Services. The water shall be tested” for “well” in subsection (h).

## § 87-98. Emergency Drinking Water Fund.

(a) The Emergency Drinking Water Fund is established within the Department.

(b) The Fund may be used to pay for notification, to the extent practicable, of persons aged 18 and older who reside in any dwelling unit, and the senior official in charge of any business, at which drinking water is supplied from a private drinking water well that is located within 1,500 feet of, and at risk from, known groundwater contamination. The senior official in charge of the business shall take reasonable measures to notify all employees of the business of the groundwater contamination, including posting a notice of the contamination in a form and at a location that is readily accessible to the employees of the business. The funds may also be used to cover the costs of testing private drinking water wells for contamination and for the provision of alternative drinking water supplies to persons whose drinking water well is contaminated.

(c) The Department shall disburse monies from the Fund based on financial need and on the risk to public health posed by groundwater contamination and shall give priority to the provision of services under this section to instances when an alternative source of funds is not available. The funds shall not be used for remediation of groundwater contamination. Nothing in this section expands, contracts, or modifies the obligation of responsible parties under Article 9 or 10 of Chapter 130A of the General Statutes, this Article, or Article 21A of this Chapter to assess contamination, identify receptors, or remediate groundwater or soil contamination.

(d) The Department shall establish criteria by which the Department is to evaluate applications and disburse funds from this Fund and may adopt any rules necessary to implement this section. (2006-255, s. 5.2.)

**Editor's Note.** — Session Laws 2006-255, s. 14 makes this section effective August 23, 2006.



## Chapter 88B.

### Cosmetic Art.

Sec.	Sec.
88B-2. Definitions.	88B-18. Examinations.
88B-9. Qualifications for licensing as an esthetician.	88B-21. Renewals; expired licenses; inactive status.
88B-11. Qualifications for licensing teachers.	88B-22. Licenses required; criminal penalty.

#### § 88B-2. Definitions.

The following definitions apply in this Chapter:

- (1) Apprentice. — A person who is not a manager or operator and who is engaged in learning the practice of cosmetic art under the direction and supervision of a cosmetologist.
- (2) Board. — The North Carolina Board of Cosmetic Art Examiners.
- (3) Booth. — A workstation located within a licensed cosmetic art shop that is operated primarily by one individual in performing cosmetic art services for consumers.
- (4) Booth renter. — A person who rents a booth in a cosmetic art shop.
- (5) Cosmetic art. — All or any part or combination of cosmetology, esthetics, or manicuring, including the systematic manipulation with the hands or mechanical apparatus of the scalp, face, neck, shoulders, hands, and feet. Practices included within this subdivision shall not include the practice of massage or bodywork therapy as set forth in Article 36 of Chapter 90 of the General Statutes.
- (6) Cosmetic art school. — Any building or part thereof where cosmetic art is taught.
- (7) Cosmetic art shop. — Any building or part thereof where cosmetic art is practiced for pay or reward, whether direct or indirect.
- (8) Cosmetologist. — Any individual who is licensed to practice all parts of cosmetic art.
- (8a) Cosmetology. — The act of arranging, dressing, curling, waving, cleansing, cutting, singeing, bleaching, coloring, or similar work upon the hair of a person by any means, including the use of hands, mechanical or electrical apparatus, or appliances or by use of cosmetic or chemical preparations or antiseptics.
- (9) Cosmetology teacher. — An individual licensed by the Board to teach all parts of cosmetic art.
- (10) Esthetician. — An individual licensed by the Board to practice only that part of cosmetic art that constitutes skin care.
- (11) Esthetician teacher. — An individual licensed by the Board to teach only that part of cosmetic art that constitutes skin care.
- (11a) Esthetics. — Refers to any of the following practices: giving facials; applying makeup; performing skin care; removing superfluous hair from the body of a person by use of creams, tweezers, or waxing; applying eyelashes to a person, including the application of eyelash extensions, brow or lash color; beautifying the face, neck, arms, or upper part of the human body by use of cosmetic preparations, antiseptics, tonics, lotions, or creams; surface manipulation in relation to skin care; or cleaning or stimulating the face, neck, ears, arms, hands, bust, torso, legs, or feet of a person by means of hands, devices, apparatus, or appliances along with the use of cosmetic preparations, antiseptics, tonics, lotions, or creams.
- (12) Manicuring. — The care and treatment of the fingernails, toenails, cuticles on fingernails and toenails, and the hands and feet, including



the decoration of the fingernails and the application of nail extensions and artificial nails. The term “manicuring” shall not include the treatment of pathologic conditions.

- (13) Manicurist. — An individual licensed by the Board to practice only that part of cosmetic art that constitutes manicuring.
- (14) Manicurist teacher. — An individual licensed by the Board to teach manicuring.
- (15) Shampooing. — The application and removal of commonly used, room temperature, liquid hair cleaning and hair conditioning products. Shampooing does not include the arranging, dressing, waving, coloring, or other treatment of the hair. (1933, c. 179, ss. 2-4, 8, 9; 1963, c. 1257, s. 1; 1981, c. 615, ss. 3, 7; 1993, c. 22, s. 1; 1998-230, s. 2; 2006-212, s. 1.)

**Effect of Amendments.** — Session Laws 2006-212, s. 1, effective August 8, 2006, rewrote subdivision (5); and added subdivisions (8a) and (11a).

## § 88B-9. Qualifications for licensing as an esthetician.

The Board shall issue a license to practice as an esthetician to any individual who meets all of the following requirements:

- (1) Successful completion of at least 600 hours of an esthetics curriculum in an approved cosmetic art school.
- (2) Passage of an examination conducted by the Board.
- (3) Payment of the fees required by G.S. 88B-20. (1998-230, s. 2; 2006-212, s. 3.)

**Effect of Amendments.** — Session Laws 2006-212, s. 3, effective August 8, 2006, substituted “esthetics” for “esthetician” in subdivision (1).

## § 88B-11. Qualifications for licensing teachers.

(a) Applicants for any teacher’s license issued by the Board shall meet all of the following requirements:

- (1) Possession of a high school diploma or a high school graduation equivalency certificate.
- (2) Payment of the fees required by G.S. 88B-20.

(b) The Board shall issue a license to practice as a cosmetology teacher to any individual who meets the requirements of subsection (a) of this section and who meets all of the following:

- (1) Holds in good standing a cosmetologist license issued by the Board.
- (2) Submits proof of either practice of cosmetic art in a cosmetic art shop, or any Board-approved employment capacity in the cosmetic arts industry, for a period equivalent to five years of full-time work immediately prior to application or successful completion of at least 800 hours of a cosmetology teacher curriculum in an approved cosmetic art school.
- (3) Passes an examination for cosmetology teachers conducted by the Board.

(c) The Board shall issue a license to practice as an esthetician teacher to any individual who meets the requirements of subsection (a) of this section and who meets all of the following:

- (1) Holds in good standing a cosmetologist or an esthetician license issued by the Board.
- (2) Submits proof of either practice as an esthetician in a cosmetic art shop, or any Board-approved employment capacity in the cosmetic

arts industry, for a period equivalent to three years of full-time work immediately prior to application or successful completion of at least 650 hours of an esthetician teacher curriculum in an approved cosmetic art school.

(3) Passes an examination for esthetician teachers conducted by the Board.

(d) The Board shall issue a license to practice as a manicurist teacher to any individual who meets the requirements of subsection (a) of this section and who meets all of the following:

(1) Holds in good standing a cosmetologist or manicurist license issued by the Board.

(2) Submits proof of either practice as a manicurist in a cosmetic art shop, or any Board-approved employment capacity in the cosmetic arts industry, for a period equivalent to two years of full-time work immediately prior to application or successful completion of at least 320 hours of a manicurist teacher curriculum in an approved cosmetic art school.

(3) Passes an examination for manicurist teachers conducted by the Board. (1998-230, s. 2; 2006-212, s. 5.)

**Effect of Amendments.** — Session Laws 2006-212, s. 5, effective August 8, 2006, inserted “or any Board-approved employment ca-

capacity in the cosmetic arts industry” following “cosmetic art shop” in subdivisions (b)(2), (c)(2), and (d)(2).

## § 88B-18. Examinations.

(a) Repealed by Session Laws 2006-212, s. 2, effective August 8, 2006.

(b) Each examination shall have both a practical and a written portion.

(c) Examinations for applicants for apprentice, cosmetologist, teacher, esthetician, and manicurist licenses shall be given in at least three locations in the State that are geographically scattered. The examinations shall be administered in Board-approved facilities.

(d) An applicant for a cosmetologist, esthetician, manicurist, or teacher’s license who fails to pass the examination three times may not reapply to take the examination again until after the applicant has successfully completed any additional requirements prescribed by the Board. (1933, c. 179, ss. 16, 17; 1935, c. 54, s. 4; 1973, c. 1360, ss. 3, 4; 1975, c. 857, s. 5; 1985, c. 559, s. 1; 1989, c. 650, s. 3; 1995, c. 541, s. 2; 1998-230, s. 2; 2006-212, s. 2.)

**Effect of Amendments.** — Session Laws 2006-212, s. 2, effective August 8, 2006, repealed subsection (a), relating to filing an application for examination; in subsection (c),

rewrote the former last two sentences as the present last sentence; and substituted “cosmetologist, esthetician, manicurist, or teacher’s license” for “cosmetologist” in subsection (d).

## § 88B-21. Renewals; expired licenses; inactive status.

(a) Each license to operate a cosmetic art shop shall be renewed on or before the first day of February of each year. As provided in G.S. 88B-20, a late fee shall be charged for licenses renewed after February 1. Any license not renewed by March 1 of each year shall expire. A cosmetic art shop whose license has been expired for one year or less shall have the license reinstated immediately upon payment of the reinstatement fee, the late fee, and all unpaid license fees. The licensee shall submit to the Board, as a part of the renewal process, a list of all licensed cosmetologists who practice cosmetic art in the shop and shall identify each as an employee or a booth renter.

(b) Cosmetologist licenses shall be renewed on or before October 1 every three years beginning October 1, 1998. A late fee shall be charged for renewals



after that date. Any license not renewed shall expire on October 1 of the year that renewal is required. The Board may develop and implement a plan for staggered license renewal and may prorate license fees to implement such a plan.

(c) Apprentice, esthetician, and manicurist licenses shall be renewed annually on or before October 1 of each year. A late fee shall be charged for the renewal of licenses after that date. Any license not renewed shall expire on October 1 of that year.

(d) Teacher licenses shall be renewed every two years on or before October 1. A late fee shall be charged for the renewal of licenses after that date. Any license not renewed shall expire on October 1 of that year.

(e) Prior to renewal of a license, a teacher, cosmetologist, esthetician, or manicurist shall annually complete eight hours of Board-approved continuing education for each year of the licensing cycle. A cosmetologist may complete up to 24 hours of required continuing education at any time within the cosmetologist's three-year licensing cycle. Licensees shall submit written documentation to the Board showing that they have satisfied the requirements of this subsection. A licensee who is in active practice as a cosmetologist, esthetician, or manicurist, has practiced for at least 10 consecutive years in that profession and is 60 years of age or older does not have to meet the continuing education requirements of this subsection. A licensee who is in active practice as a cosmetologist and, as of October 1, 2004, has at least 20 consecutive years of experience as a cosmetologist, does not have to meet the continuing education requirements of this subsection, but shall report any continuing education classes completed to the Board, whether the continuing education classes are Board-approved or not. Promotion of products and systems shall be allowed at continuing education given in-house or at trade shows. Continuing education classes may also be offered in secondary languages as needed. No member of the Board may offer continuing education courses as required by this section.

(f) If an apprentice, cosmetologist, esthetician, manicurist, or teacher fails to renew his or her license within five years following the expiration date, the licensee shall be required to pass an examination as prescribed by the Board before the license will be reinstated.

(g) Cosmetic art school licenses shall be renewed on or before October 1 of each year. A late fee shall be charged for licenses renewed after that date. Any license not renewed by November 1 of that year shall expire. A cosmetic art school whose license has been expired for one year or less shall have its license reinstated upon payment of the reinstatement fee, the late fee, and all unpaid license fees.

(h) Upon request by a licensee for inactive status, the Board may place the licensee's name on the inactive list so long as the licensee is in good standing with the Board. An inactive licensee is not required to complete continuing education requirements. An inactive licensee shall not practice cosmetic art for consideration. However, the inactive licensee may continue to purchase supplies as accorded an active licensee. When the inactive licensee desires to be removed from the inactive list and return to active practice, the inactive licensee shall notify the Board of his or her desire to return to active status and pay the required fee as determined by the Board. As a condition of returning to active status, the Board may require the licensee to complete eight to 24 hours of continuing education pursuant to subsection (e) of this section. (1933, c. 179, ss. 1, 25; 1957, c. 1184, s. 4; 1973, c. 256, s. 3; c. 450, s. 3; c. 1481, ss. 1, 2; 1975, c. 7; c. 857, ss. 1, 7; 1977, cc. 155, 472; 1981, c. 615, ss. 1, 2; 1983 (Reg. Sess., 1984), c. 990; 1985, c. 125; 1985, c. 559, s. 3; (Reg. Sess., 1986), c. 833; 1987 (Reg. Sess., 1988), c. 965; 1993, c. 22, s. 2; c. 54, s. 1; 1995 (Reg. Sess., 1996), c. 605, s. 15; 1998-230, s. 2; 2004-142, s. 1; 2006-212, s. 6.)



**Effect of Amendments. —**

Session Laws 2006-212, s. 6, effective August

8, 2006, inserted the fourth sentence in subsection (e).

**§ 88B-22. Licenses required; criminal penalty.**

(a) Except as provided in this Chapter, no person may practice or attempt to practice cosmetic art for pay or reward in any form, either directly or indirectly, without being licensed as an apprentice, cosmetologist, esthetician, or manicurist by the Board.

(b) Except as provided in this Chapter, no person may practice cosmetic art or any part of cosmetic art, for pay or reward in any form, either directly or indirectly, outside of a licensed cosmetic art shop.

(c) No person may open or operate a cosmetic art shop in this State unless a license has been issued by the Board for that shop.

(d) An individual licensed as an esthetician or manicurist may practice only that part of cosmetic art for which the individual is licensed.

(d1) No person may teach cosmetic art in a Board-approved cosmetic art school unless the person is a teacher licensed under this Chapter. A guest lecturer may be exempt from the requirements of this subsection upon approval by the Board.

(e) An apprentice licensed under the provisions of this Chapter shall apprentice under the direct supervision of a cosmetologist. An apprentice shall not operate a cosmetic art shop.

(f) A violation of this Chapter is a Class 3 misdemeanor. (1933, c. 179, ss. 1, 11, 28; 1949, c. 505, s. 2; 1973, c. 476, s. 128; c. 1481, ss. 1, 2; 1975, c. 7; c. 857, ss. 1, 8; 1977, cc. 155, 472; 1981, c. 614, s. 2; c. 615, ss. 1, 2, 17; 1983 (Reg. Sess., 1984), c. 990; 1985, c. 125; 1985 (Reg. Sess., 1986), c. 833; 1987 (Reg. Sess., 1988), c. 965; 1989 (Reg. Sess., 1990), c. 1013, s. 3; 1993, c. 22, s. 2; c. 54, s. 1; c. 539, s. 608; 1994, Ex. Sess., c. 24, s. 14(c); 1995 (Reg. Sess., 1996), c. 605, s. 15; 1998-230, s. 2; 2006-212, s. 4.)

**Effect of Amendments. —** Session Laws

2006-212, s. 4, effective August 8, 2006, added subsection (d1).

## Chapter 90.

### Medicine and Allied Occupations.

#### Article 1.

##### Practice of Medicine.

Sec.

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90-270.32. Renewal of license; lapse; revival.

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## ARTICLE 1.

*Practice of Medicine.***§ 90-2. Medical Board.**

## CASE NOTES

**Cited in** *In re Lustgarten*, — N.C. App. —, 629 S.E.2d 886, 2006 N.C. App. LEXIS 1200 (2006).

**§ 90-6. Rules governing applicants for license, examinations, etc.; appointment of subcommittees.**

**Editor's Note.** — Session Laws 2006-144, s. 10(a) and (b), provide: "(a) The subcommittee of the North Carolina Medical Board and the subcommittee of the Board of Nursing, directed to work jointly to develop rules to govern the performance of medical acts by registered nurses pursuant to G.S. 90-6(b), shall examine adding the provisions of G.S. 90-14(a) to their joint rules that set forth grounds for action against a registered nurse's approval to perform medical acts.

"(b) The subcommittee of the North Carolina Medical Board and the subcommittee of the North Carolina Board of Pharmacy, directed to work jointly to develop rules to govern the performance of medical acts by clinical pharmacist practitioners pursuant to G.S. 90-6(c), shall examine adding the provisions of G.S. 90-14(a) to the joint rules that set forth grounds for action against a clinical pharmacist practitioner's approval to perform medical acts."

**§ 90-14. Revocation, suspension, annulment or denial of license.**

(a) The Board shall have the power to place on probation with or without conditions, impose limitations and conditions on, publicly reprimand, assess monetary redress, issue public letters of concern, mandate free medical services, require satisfactory completion of treatment programs or remedial or educational training, fine, deny, annul, suspend, or revoke a license, or other authority to practice medicine in this State, issued by the Board to any person who has been found by the Board to have committed any of the following acts or conduct, or for any of the following reasons:

- (1) Immoral or dishonorable conduct.
- (2) Producing or attempting to produce an abortion contrary to law.
- (3) Made false statements or representations to the Board, or who has willfully concealed from the Board material information in connection with an application for a license.
- (4) Repealed by Session Laws 1977, c. 838, s. 3.
- (5) Being unable to practice medicine with reasonable skill and safety to patients by reason of illness, drunkenness, excessive use of alcohol, drugs, chemicals, or any other type of material or by reason of any physical or mental abnormality. The Board is empowered and authorized to require a physician licensed by it to submit to a mental or physical examination by physicians designated by the Board before or after charges may be presented against the physician, and the results of the examination shall be admissible in evidence in a hearing before the Board.
- (6) Unprofessional conduct, including, but not limited to, departure from, or the failure to conform to, the standards of acceptable and prevailing medical practice, or the ethics of the medical profession, irrespective



of whether or not a patient is injured thereby, or the committing of any act contrary to honesty, justice, or good morals, whether the same is committed in the course of the physician's practice or otherwise, and whether committed within or without North Carolina. The Board shall not revoke the license of or deny a license to a person solely because of that person's practice of a therapy that is experimental, nontraditional, or that departs from acceptable and prevailing medical practices unless, by competent evidence, the Board can establish that the treatment has a safety risk greater than the prevailing treatment or that the treatment is generally not effective.

- (7) Conviction in any court of a crime involving moral turpitude, or the violation of a law involving the practice of medicine, or a conviction of a felony; provided that a felony conviction shall be treated as provided in subsection (c) of this section.
- (8) By false representations has obtained or attempted to obtain practice, money or anything of value.
- (9) Has advertised or publicly professed to treat human ailments under a system or school of treatment or practice other than that for which the physician has been educated.
- (10) Adjudication of mental incompetency, which shall automatically suspend a license unless the Board orders otherwise.
- (11) Lack of professional competence to practice medicine with a reasonable degree of skill and safety for patients. In this connection the Board may consider repeated acts of a physician indicating the physician's failure to properly treat a patient. The Board may, upon reasonable grounds, require a physician to submit to inquiries or examinations, written or oral, as the Board deems necessary to determine the professional qualifications of such licensee. In order to annul, suspend, deny, or revoke a license of an accused person, the Board shall find by the greater weight of the evidence that the care provided was not in accordance with the standards of practice for the procedures or treatments administered.
- (11a) Not actively practiced medicine or practiced as a physician assistant, or having not maintained continued competency, as determined by the Board, for the two-year period immediately preceding the filing of an application for an initial license from the Board or a request, petition, motion, or application to reactivate an inactive, suspended, or revoked license previously issued by the Board. The Board is authorized to adopt any rules or regulations it deems necessary to carry out the provisions of this subdivision.
- (12) Promotion of the sale of drugs, devices, appliances or goods for a patient, or providing services to a patient, in such a manner as to exploit the patient, and upon a finding of the exploitation, the Board may order restitution be made to the payer of the bill, whether the patient or the insurer, by the physician; provided that a determination of the amount of restitution shall be based on credible testimony in the record.
- (13) Having a license to practice medicine or the authority to practice medicine revoked, suspended, restricted, or acted against or having a license to practice medicine denied by the licensing authority of any jurisdiction. For purposes of this subdivision, the licensing authority's acceptance of a license to practice medicine voluntarily relinquished by a physician or relinquished by stipulation, consent order, or other settlement in response to or in anticipation of the filing of administrative charges against the physician's license, is an action against a license to practice medicine.

(14) The failure to respond, within a reasonable period of time and in a reasonable manner as determined by the Board, to inquiries from the Board concerning any matter affecting the license to practice medicine.

(15) The failure to complete an amount not to exceed 150 hours of continuing medical education during any three consecutive calendar years pursuant to rules adopted by the Board.

The Board may, in its discretion and upon such terms and conditions and for such period of time as it may prescribe, restore a license so revoked or otherwise acted upon, except that no license that has been revoked shall be restored for a period of two years following the date of revocation.

(b) The Board shall refer to the North Carolina Physicians Health Program all physicians and physician assistants whose health and effectiveness have been significantly impaired by alcohol, drug addiction or mental illness. Sexual misconduct shall not constitute mental illness for purposes of this subsection.

(c) A felony conviction shall result in the automatic revocation of a license issued by the Board, unless the Board orders otherwise or receives a request for a hearing from the person within 60 days of receiving notice from the Board, after the conviction, of the provisions of this subsection. If the Board receives a timely request for a hearing in such a case, the provisions of G.S. 90-14.2 shall be followed.

(d) Repealed by Session Laws 2006-144, s. 4, effective October 1, 2006, and applicable to acts or omissions that occur on or after that date.

(e) The Board and its members and staff shall not be held liable in any civil or criminal proceeding for exercising, in good faith, the powers and duties authorized by law.

(f) A person, partnership, firm, corporation, association, authority, or other entity acting in good faith without fraud or malice shall be immune from civil liability for (i) reporting, investigating, or providing an expert medical opinion to the Board regarding the acts or omissions of a licensee or applicant that violate the provisions of subsection (a) of this section or any other provision of law relating to the fitness of a licensee or applicant to practice medicine and (ii) initiating or conducting proceedings against a licensee or applicant if a complaint is made or action is taken in good faith without fraud or malice. A person shall not be held liable in any civil proceeding for testifying before the Board in good faith and without fraud or malice in any proceeding involving a violation of subsection (a) of this section or any other law relating to the fitness of an applicant or licensee to practice medicine, or for making a recommendation to the Board in the nature of peer review, in good faith and without fraud and malice.

(g) Prior to taking action against any licensee who practices integrative medicine for providing care not in accordance with the standards of practice for the procedures or treatments administered, the Board shall consult with a licensee who practices integrative medicine. (C.S., s. 6618; 1921, c. 47, s. 4; Ex. Sess. 1921, c. 44, s. 6; 1933, c. 32; 1953, c. 1248, s. 2; 1969, c. 612, s. 4; c. 929, s. 6; 1975, c. 690, s. 4; 1977, c. 838, s. 3; 1981, c. 573, ss. 9, 10; 1987, c. 859, ss. 6-10; 1993, c. 241, s. 1; 1995, c. 405, s. 4; 1997-443, s. 11A.118(a); 1997-481, s. 1; 2000-184, s. 5; 2003-366, ss. 3, 4; 2006-144, s. 4.)

**Editor's Note.** — Session Laws 2006-144, s. 10(a)-(c), provides: “(a) The subcommittee of the North Carolina Medical Board and the subcommittee of the Board of Nursing, directed to work jointly to develop rules to govern the performance of medical acts by registered nurses pursuant to G.S. 90-6(b), shall examine adding the provisions of G.S. 90-14(a) to their joint

rules that set forth grounds for action against a registered nurse's approval to perform medical acts.

“(b) The subcommittee of the North Carolina Medical Board and the subcommittee of the North Carolina Board of Pharmacy, directed to work jointly to develop rules to govern the performance of medical acts by clinical phar-



macist practitioners pursuant to G.S. 90-6(c), shall examine adding the provisions of G.S. 90-14(a) to the joint rules that set forth grounds for action against a clinical pharmacist practitioner's approval to perform medical acts.

"(c) The North Carolina Medical Board, the Board of Nursing, and the North Carolina Board of Pharmacy shall report to the Chairs of the House Committee on Health, the Senate Committee on Health Care, the House Select Committee on Health Care, and the Subcommittee on Patient Safety, Quality and Accountability of the House Select Committee on Health Care on the adoption of the provisions of G.S. 90-14(a) as part of the joint rules governing the practice of medical acts for nurse practitioners and clinical pharmacist practitioners. The boards shall file their reports no later than September 1, 2006."

**Effect of Amendments.** — Session Laws 2006-144, s. 4, effective October 1, 2006, and applicable to acts or omissions that occur on or after that date, inserted "place on probation with or without conditions, impose limitations and conditions on, publicly reprimand, assess

monetary redress, issue public letters of concern, mandate free medical services, require satisfactory completion of treatment programs or remedial or educational training, fine" in the introductory language of subsection (a); deleted "by members of the Board or by other physicians licensed to practice medicine in this State," following "written or oral" in the middle of subdivision (a)(11); added subdivision (a)(11a); in the concluding paragraph of subsection (a), deleted the former first sentence, and substituted "otherwise acted upon" for "rescinded"; in subsection (b), substituted "North Carolina Physicians Health Program" for "State Medical Society Physician Health and Effectiveness Committee" near the beginning, inserted "and physician assistants" following "all physicians" near the middle, and added the last sentence; repealed subsection (d) relating to confidential information; and substituted "reporting, investigating, or providing an expert medical opinion to the Board regarding" for "reporting or" near the beginning of subsection (f).

#### CASE NOTES

##### **Unprofessional Conduct.** —

Trial court erred in affirming the North Carolina Medical Board's suspension of a doctor for unprofessional conduct as the doctor did not testify that another doctor had "tried to temporize his findings and write a note that was benevolent" until he was pressed to do so on cross-examination and the doctor did not actually state that the other doctor had "falsified" a medical record or use the terms "liar" or "lying"

to describe the other doctor or his conduct; the doctor's opinion that a patient had an elevated intracranial pressure was based on substantial evidence, including CAT-scan results, mood changes in the patient, pain-medication-resistant headaches being experienced by the patient, and the lack of ventricular flow. In re Lustgarten, — N.C. App. —, 629 S.E.2d 886, 2006 N.C. App. LEXIS 1200 (2006).

### § 90-14.5. Use of hearing committee and depositions.

(a) The Board, in its discretion, may designate in writing three or more of its members to conduct hearings as a hearing committee to take evidence.

(b) Evidence and testimony may be presented at hearings before the Board or a hearing committee in the form of depositions before any person authorized to administer oaths in accordance with the procedure for the taking of depositions in civil actions in the superior court.

(c) The hearing committee shall submit a recommended decision that contains findings of fact and conclusions of law to the Board. Before the Board makes a final decision, it shall give each party an opportunity to file written exceptions to the recommended decision made by the hearing committee and to present oral arguments to the Board. A quorum of the Board will issue a final decision. (1953, c. 1248, s. 3; 2006-144, s. 5.)

**Effect of Amendments.** — Session Laws 2006-144, s. 5, effective October 1, 2006, and applicable to hearings held on or after that

date, substituted "hearing committee and" for "trial examiner" in the section heading; and rewrote the section.



**§ 90-14.13. Reports of disciplinary action by health care institutions; reports of professional liability insurance awards or settlements; immunity from liability.**

(a) The chief administrative officer of every licensed hospital or other health care institution, including Health Maintenance Organizations, as defined in G.S. 58-67-5, preferred providers, as defined in G.S. 58-50-56, and all other provider organizations that issue credentials to physicians who practice medicine in the State, shall, after consultation with the chief of staff of that institution, report to the Board the following actions involving a physician's privileges to practice in that institution within 30 days of the date that the action takes effect:

- (1) A summary revocation, summary suspension, or summary limitation of privileges, regardless of whether the action has been finally determined.
- (2) A revocation, suspension, or limitation of privileges that has been finally determined by the governing body of the institution.
- (3) A resignation from practice or voluntary reduction of privileges.
- (4) Any action reportable pursuant to Title IV of P.L. 99-660, the Health Care Quality Improvement Act of 1986, as amended, not otherwise reportable under subdivisions (1), (2), or (3) of this subsection.

(a1) A hospital is not required to report:

- (1) The suspension or limitation of a physician's privileges for failure to timely complete medical records unless the suspension or limitation is the third within the calendar year for failure to timely complete medical records. Upon reporting the third suspension or limitation, the hospital shall also report the previous two suspensions or limitations.
- (2) A resignation from practice due solely to the physician's completion of a medical residency, internship, or fellowship.

(a2) The Board shall report all violations of subsection (a) of this section known to it to the licensing agency for the institution involved. The licensing agency for the institution involved is authorized to order the payment of a civil penalty of two hundred fifty dollars (\$250.00) for a first violation and five hundred dollars (\$500.00) for each subsequent violation if the institution fails to report as required under subsection (a) of this section.

(b) Any licensed physician who does not possess professional liability insurance shall report to the Board any award of damages or any settlement of any malpractice complaint affecting his or her practice within 30 days of the award or settlement.

(c) The chief administrative officer of each insurance company providing professional liability insurance for physicians who practice medicine in North Carolina, the administrative officer of the Liability Insurance Trust Fund Council created by G.S. 116-220, and the administrative officer of any trust fund or other fund operated or administered by a hospital authority, group, or provider shall report to the Board within 30 days any of the following:

- (1) Any award of damages or settlement of any claim or lawsuit affecting or involving a person licensed under this Article that it insures.
- (2) Any cancellation or nonrenewal of its professional liability coverage of a physician, if the cancellation or nonrenewal was for cause.
- (3) A malpractice payment that is reportable pursuant to Title IV of P.L. 99-660, the Health Care Quality Improvement Act of 1986, as amended, not otherwise reportable under subdivision (1) or (2) of this subsection.

(d) The Board shall report all violations of this section to the Commissioner of Insurance. The Commissioner of Insurance is authorized to order the

payment of a civil penalty of two hundred fifty dollars (\$250.00) for a first violation and five hundred dollars (\$500.00) for each subsequent violation against an insurer for failure to report as required under this section.

(e) The Board may request details about any action covered by this section, and the licensees or officers shall promptly furnish the requested information. The reports required by this section are privileged, not open to the public, confidential and are not subject to discovery, subpoena, or other means of legal compulsion for release to anyone other than the Board or its employees or agents involved in application for license or discipline, except as provided in G.S. 90-16. Any officer making a report required by this section, providing additional information required by the Board, or testifying in any proceeding as a result of the report or required information shall be immune from any criminal prosecution or civil liability resulting therefrom unless such person knew the report was false or acted in reckless disregard of whether the report was false. (1981, c. 573, s. 14; 1987, c. 859, s. 11; 1995, c. 405, s. 8; 1997-481, s. 2; 1997-519, s. 3.14; 2006-144, s. 6.)

**Editor's Note.** — Session Laws 2006-144, s. 10(d), provides: "The North Carolina Medical Board shall examine the provisions of G.S. 90-14.13 and may develop policies or guidance governing the reporting requirements of that section. The Medical Board may recommend additional legislation, if necessary, to implement these policies prior to the convening of the

2007 General Assembly."

**Effect of Amendments.** — Session Laws 2006-144, s. 6, effective October 1, 2006, and applicable to awards entered or settlements entered into on or after that date, added "reports of professional liability insurance awards or settlements;" to the section heading; and rewrote the section.

## **§ 90-16. Self-reporting requirements; confidentiality of Board investigative information; cooperation with law enforcement; patient protection; Board to keep public records.**

(a) The North Carolina Medical Board shall keep a regular record of its proceedings in a book kept for that purpose, together with the names of the members of the Board present, the names of the applicants for license, and other information as to its actions. The North Carolina Medical Board shall cause to be entered in a separate book the name of each applicant to whom a license is issued to practice medicine or surgery, along with any information pertinent to such issuance. The North Carolina Medical Board shall publish the names of those licensed in three daily newspapers published in the State of North Carolina, within 30 days after granting the same. A transcript of any such entry in the record books, or certificate that there is not entered therein the name and proficiency or date of granting such license of a person charged with the violation of the provisions of this Article, certified under the hand of the secretary and the seals of the North Carolina Medical Board, shall be admitted as evidence in any court of this State when it is otherwise competent.

(b) The Board may in a closed session receive evidence involving or concerning the treatment of a patient who has not expressly or impliedly consented to the public disclosure of such treatment as may be necessary for the protection of the rights of such patient or of the accused physician and the full presentation of relevant evidence.

(c) All records, papers, investigative files, investigative reports, other investigative information and other documents containing information in the possession of or received or gathered by the Board, or its members or employees as a result of investigations, inquiries or interviews conducted in connection with a licensing, complaint or, disciplinary matter, or report of professional liability insurance awards or settlements pursuant to G.S. 90-



14.13, shall not be considered public records within the meaning of Chapter 132 of the General Statutes and are privileged, confidential, and not subject to discovery, subpoena, or other means of legal compulsion for release to any person other than the Board, its employees or agents involved in the application for license or discipline of a licensee holder, except as provided in subsection (d) of this section. For purposes of this subsection, investigative information includes information relating to the identity of, and a report made by, a physician or other person performing an expert review for the Board.

(d) The Board shall provide the licensee or applicant with access to all information in its possession that the Board intends to offer into evidence in presenting its case in chief at the contested hearing on the matter, subject to any privilege or restriction set forth by rule, statute, or legal precedent, upon written request from a licensee or applicant who is the subject of a complaint or investigation, or from the licensee's or applicant's counsel, unless good cause is shown for delay. The Board is not required to provide any of the following:

- (1) A Board investigative report.
- (2) The identity of a non-testifying complainant.
- (3) Attorney-client communications, attorney work product, or other materials covered by a privilege recognized by the Rules of Civil Procedure or the Rules of Evidence.

(e) Information furnished to a licensee or applicant, or counsel for a licensee or applicant, under subsection (d) of this section shall be subject to discovery or subpoena between and among the parties in a civil case in which the licensee is a party.

(f) Any notice or statement of charges against any licensee, or any notice to any licensee of a hearing in any proceeding shall be a public record within the meaning of Chapter 132 of the General Statutes, notwithstanding that it may contain information collected and compiled as a result of any such investigation, inquiry or interview; and provided, further, that if any such record, paper or other document containing information theretofore collected and compiled by the Board, as hereinbefore provided, is received and admitted in evidence in any hearing before the Board, it shall thereupon be a public record within the meaning of Chapter 132 of the General Statutes.

(g) In any proceeding before the Board, in any record of any hearing before the Board, and in the notice of the charges against any licensee (notwithstanding any provision herein to the contrary) the Board may withhold from public disclosure the identity of a patient who has not expressly or impliedly consented to the public disclosure of treatment by the accused physician.

(h) If investigative information in the possession of the Board, its employees, or agents indicates that a crime may have been committed, the Board shall report the information to the appropriate law enforcement agency.

(i) The Board shall cooperate with and assist a law enforcement agency conducting a criminal investigation of a licensee by providing information that is relevant to the criminal investigation to the investigating agency. Information disclosed by the Board to an investigative agency remains confidential and may not be disclosed by the investigating agency except as necessary to further the investigation.

(j) All persons licensed under this Article shall self-report to the Board within 30 days of arrest or indictment any of the following:

- (1) Any felony arrest or indictment.
- (2) Any arrest for driving while impaired or driving under the influence.
- (3) Any arrest or indictment for the possession, use, or sale of any controlled substance.

(k) The Board, its members and staff, may release confidential or nonpublic



information to any health care licensure board in this State or another state about the issuance, denial, annulment, suspension, or revocation of a license, or the voluntary surrender of a license by a licensee of the Board, including the reasons for the action, or an investigative report made by the Board. The Board shall notify the licensee within 60 days after the information is transmitted. A summary of the information that is being transmitted shall be furnished to the licensee. If the licensee requests in writing within 30 days after being notified that the information has been transmitted, the licensee shall be furnished a copy of all information so transmitted. The notice or copies of the information shall not be provided if the information relates to an ongoing criminal investigation by any law enforcement agency or authorized Department of Health and Human Services personnel with enforcement or investigative responsibilities. (1858-9, c. 258, s. 12; Code, s. 3129; Rev., s. 4500; C.S., s. 6620; 1921, c. 47, s. 6; 1977, c. 838, s. 5; 1993 (Reg. Sess., 1994), c. 570, s. 6; 1995, c. 94, s. 17; 1997-481, s. 4; 2006-144, s. 7.)

**Effect of Amendments.** — Session Laws wrote the section heading; and rewrote the 2006-144, s. 7, effective October 1, 2006, re- section.

## ARTICLE 1B.

### *Medical Malpractice Actions.*

## § 90-21.12. Standard of health care.

### CASE NOTES

#### **Qualification of Expert Witness as to Standard of Care. —**

Because plaintiffs' sole standard of care expert was not competent to testify regarding the standard of care under G.S. 90-20.12 as it existed in 1998, the trial court correctly concluded that plaintiffs had failed to forecast sufficient evidence to meet one of the essential elements of their medical malpractice claim and that summary judgment should be granted. *Purvis v. Moses H. Cone Mem'l Hosp. Serv. Corp.*, — N.C. App. —, 624 S.E.2d 380, 2006 N.C. App. LEXIS 128 (2006).

Neurologist, who practiced in Baltimore, Maryland and was a professor at John Hopkins University School of Medicine, could testify, as an expert witness, about the relevant standard of care at a county regional medical center in North Carolina, as he established that he was familiar with the community or a similar community by his previous work at Duke University Medical Center for three years, where he completed his residency and fellowship; additionally, he testified that he was familiar with the standard of care for neurologists practicing in the relevant area from his previous personal experience working in North Carolina, his ex-

perience with patients that were sent from outlying areas, as well as his studying the demographic data of the county where the regional medical center was located. *Billings v. Rosenstein*, 174 N.C. App. 191, 619 S.E.2d 922, 2005 N.C. App. LEXIS 2293 (2005).

In a wrongful death action based on a medical specialist's medical malpractice, the trial court erred in failing to allow the specialist to cross-examine the medical expert for the decedent's estate as to whether the other treating doctor, a former codefendant, acted in accordance with the standard of care, because evidence of the former co-defendant's standard of care was relevant to show whether the specialist's conduct was the proximate cause of the injury, as G.S. 90-21.12 permits a physician, otherwise qualified under G.S. 8C-1, Rule 702, to testify regarding the applicable standard of care in a medical malpractice case. However, any error was harmless because there was other expert testimony admitted for both parties that contained the same substance, and it could not be said that a different outcome would have resulted. *Böykin v. Kim*, 174 N.C. App. 278, 620 S.E.2d 707, 2005 N.C. App. LEXIS 2396 (2005).

## ARTICLE 1C.

*Physicians and Hospital Reports.***§ 90-21.20B. Access to medical information for law enforcement purposes.**

(a) Notwithstanding any other provision of law, if a person is involved in a vehicle crash:

- (1) Any health care provider who is providing medical treatment to the person shall, upon request, disclose to any law enforcement officer investigating the crash the following information about the person: name, current location, and whether the person appears to be impaired by alcohol, drugs, or another substance.
- (2) Law enforcement officers shall be provided access to visit and interview the person upon request, except when the health care provider requests temporary privacy for medical reasons.
- (3) A health care provider shall disclose a certified copy of all identifiable health information related to that person as specified in a search warrant or an order issued by a judicial official.

(b) A prosecutor or law enforcement officer receiving identifiable health information under this section shall not disclose this information to others except as necessary to the investigation or otherwise allowed by law.

(c) A certified copy of identifiable health information, if relevant, shall be admissible in any hearing or trial without further authentication.

(d) As used in this section, "health care provider" has the same meaning as in G.S. 90-21.11. (2006-253, s. 17.)

**Editor's Note.** — Session Laws 2006-253, s. 2006, and applicable to offenses committed on 17, makes this section effective December 1, or after that date.

## ARTICLE 1D.

*Peer Review.***§ 90-21.22. Peer review agreements.**

(a) The North Carolina Medical Board may, under rules adopted by the Board in compliance with Chapter 150B of the General Statutes, enter into agreements with the North Carolina Medical Society and its local medical society components, and with the North Carolina Academy of Physician Assistants for the purpose of conducting peer review activities. Peer review activities to be covered by such agreements shall include investigation, review, and evaluation of records, reports, complaints, litigation and other information about the practices and practice patterns of physicians licensed by the Board, and of physician assistants approved by the Board, and shall include programs for impaired physicians and impaired physician assistants. Agreements between the Academy and the Board shall be limited to programs for impaired physicians and physician assistants and shall not include any other peer review activities.

(b) Peer review agreements shall include provisions for the society and for the Academy to receive relevant information from the Board and other sources, conduct the investigation and review in an expeditious manner, provide assurance of confidentiality of nonpublic information and of the review process, make reports of investigations and evaluations to the Board, and to do other



related activities for promoting a coordinated and effective peer review process. Peer review agreements shall include provisions assuring due process.

(c) Each society which enters a peer review agreement with the Board shall establish and maintain a program for impaired physicians licensed by the Board. The Academy, after entering a peer review agreement with the Board, shall either enter an agreement with the North Carolina Medical Society for the inclusion of physician assistants in the Society's program for impaired physicians, or shall establish and maintain the Academy's own program for impaired physician assistants. The purpose of the programs shall be to identify, review, and evaluate the ability of those physicians and physician assistants to function in their professional capacity and to provide programs for treatment and rehabilitation. The Board may provide funds for the administration of impaired physician and impaired physician assistant programs and shall adopt rules with provisions for definitions of impairment; guidelines for program elements; procedures for receipt and use of information of suspected impairment; procedures for intervention and referral; monitoring treatment, rehabilitation, post-treatment support and performance; reports of individual cases to the Board; periodic reporting of statistical information; assurance of confidentiality of nonpublic information and of the review process.

(d) Upon investigation and review of a physician licensed by the Board, or a physician assistant approved by the Board, or upon receipt of a complaint or other information, a society which enters a peer review agreement with the Board, or the Academy if it has a peer review agreement with the Board, as appropriate, shall report immediately to the Board detailed information about any physician or physician assistant licensed or approved by the Board if:

- (1) The physician or physician assistant constitutes an imminent danger to the public or to himself by reason of impairment, mental illness, physical illness, the commission of professional sexual boundary violations, or any other reason;
- (2) The physician or physician assistant refuses to cooperate with the program, refuses to submit to treatment, or is still impaired after treatment and exhibits professional incompetence; or
- (3) It reasonably appears that there are other grounds for disciplinary action.

(e) Any confidential patient information and other nonpublic information acquired, created, or used in good faith by the Academy or a society pursuant to this section shall remain confidential and shall not be subject to discovery or subpoena in a civil case. No person participating in good faith in the peer review or impaired physician or impaired physician assistant programs of this section shall be required in a civil case to disclose any information acquired or opinions, recommendations, or evaluations acquired or developed solely in the course of participating in any agreements pursuant to this section.

(f) Peer review activities conducted in good faith pursuant to any agreement under this section shall not be grounds for civil action under the laws of this State and are deemed to be State directed and sanctioned and shall constitute State action for the purposes of application of antitrust laws. (1987, c. 859, s. 15; 1993, c. 176, s. 1; 1995, c. 94, s. 23; 2006-144, s. 8.)

**Effect of Amendments.** — Session Laws 2006-144, s. 8, effective October 1, 2006, added “by reason of impairment, mental illness, phys-

ical illness, the commission of professional sexual boundary violations, or any other reason” at the end of subdivision (d)(1).

#### CASE NOTES

**Disclosure of physician drug abuse.** — Nothing in G.S. 90-21.22 evinces a legislative

intent to insulate a participant from disclosing the details of his drug abuse merely because he



related the details of his drug abuse to a medical society administering an impaired physicians program during the course of his participation in that program. *Armstrong v. Barnes*,

171 N.C. App. 287, 614 S.E.2d 371, 2005 N.C. App. LEXIS 1262 (2005), cert. denied, 360 N.C. 60, 621 S.E.2d 173 (2005).

## § 90-21.22A. Medical review and quality assurance committees.

### CASE NOTES

**Information not immune from discovery.** — Physician, as an original source, could not invoke G.S. 131E-95(b) and G.S. 90-21.22A(c) to shield himself from answering deposition questions during a malpractice suit regarding the details of his drug abuse merely because he disclosed those details during credentialing committee proceedings and the details were presumably included in the committee's records. *Armstrong v. Barnes*, 171 N.C. App. 287, 614 S.E.2d 371, 2005 N.C. App. LEXIS 1262 (2005), cert. denied, 360 N.C. 60, 621 S.E.2d 173 (2005).

**Section Did Not Apply to Nursing Homes.** — G.S. 90-21.22A did not provide privilege protection to nursing homes; 2003 version of G.S. 131E-107 applied to nursing homes, but did not provide privilege from dis-

covery for materials produced by peer review committees, so a trial court did not err in holding that nursing home peer review reports were not privileged. *Windman v. Britthaven, Inc.*, 173 N.C. App. 630, 619 S.E.2d 522, 2005 N.C. App. LEXIS 2113 (2005).

**Interlocutory Appeal of Order Compelling Production Was Proper.** — Because a corporation asserted that ordered documents were protected from discovery under G.S. 90-21.22A, and that assertion was not frivolous or insubstantial, the discovery order compelling production of the documents affected a substantial right and the appeal fell under an exception to the rule that there was no right to appeal from an interlocutory order. *Windman v. Britthaven, Inc.*, 173 N.C. App. 630, 619 S.E.2d 522, 2005 N.C. App. LEXIS 2113 (2005).

### ARTICLE 2.

### *Dentistry.*

## § 90-29.4. Intern permit.

The North Carolina State Board of Dental Examiners may, in the exercise of the discretion of said Board, issue to a person who is not licensed to practice dentistry in this State and who is a graduate of a dental school, college, or institution approved by said Board, an intern permit authorizing such person to practice dentistry under the supervision or direction of a dentist duly licensed to practice in this State, subject to the following particular conditions:

- (1) An intern permit shall be valid for no more than one year from the date the permit was issued. The Board may, in its discretion, renew the permit for not more than five additional one-year periods. However, no person who has attempted and failed a Board-approved written or clinical examination shall be granted an intern permit or intern permits embracing or covering an aggregate time span of more than 72 calendar months. An intern permit holder who has held an unrestricted dental license in a Board-approved state or jurisdiction for the five years immediately preceding the issuance of an intern permit in this State may, in the Board's discretion, have the intern permit renewed for additional one-year periods beyond 72 months if the intern permit holder's approved employing institution comes before the Board on the permit holder's behalf for each subsequent annual renewal;
- (2) The holder of a valid intern permit may practice dentistry only under the supervision or direction of one or more dentists duly licensed to practice in this State;
- (3) The holder of a valid intern permit may practice dentistry only (i) as

- an employee in a hospital, sanatorium, or a like institution which is licensed or approved by the State of North Carolina and approved by the North Carolina State Board of Dental Examiners; (ii) as an employee of a nonprofit health care facility serving low-income populations and approved by the State Health Director or his designee and approved by the North Carolina State Board of Dental Examiners; or (iii) as an employee of the State of North Carolina or an agency or political subdivision thereof, or any other governmental entity within the State of North Carolina, when said employment is approved by the North Carolina State Board of Dental Examiners;
- (4) The holder of a valid intern permit shall receive no fee or fees or compensation of any kind or nature for dental services rendered by him other than such salary or compensation as might be paid to him by the entity specified in subdivision (3) above wherein or for which said services are rendered;
  - (5) The holder of a valid intern permit shall not, during the term of said permit or any renewal thereof, change the place of his internship without first securing the written approval of the North Carolina State Board of Dental Examiners;
  - (6) The practice of dentistry by the holder of a valid intern permit shall be strictly limited to the confines of and to the registered patients of the hospital, sanatorium or institution to which he is attached or to the persons officially served by the governmental entity by whom he is employed;
  - (7) Any person seeking an intern permit shall first file with the North Carolina State Board of Dental Examiners such papers and documents as are required by said Board, together with the application fee authorized by G.S. 90-39. A fee authorized by G.S. 90-39 shall be paid for any renewal of said intern permit. Such person shall further supply to the Board such other documents, materials or information as the Board may request;
  - (8) Any person seeking an intern permit or who is the holder of a valid intern permit shall comply with such limitations as the North Carolina State Board of Dental Examiners may place or cause to be placed, in writing, upon such permit, and shall comply with such rules and regulations as the Board might promulgate relative to the issuance and maintenance of said permit in the practice of dentistry relative to the same;
  - (9) The holder of an intern permit shall be subject to the provisions of G.S. 90-41. (1971, c. 755, s. 3; 1997-481, s. 7; 2002-37, s. 10; 2006-41, s. 1.)

**Effect of Amendments.** — Session Laws 2006-41, s. 1, effective June 29, 2006, rewrote subdivision (1).

## ARTICLE 4A.

### *North Carolina Pharmacy Practice Act.*

## **§ 90-85.6. Board of Pharmacy; creation; membership; qualification of members.**

### CASE NOTES

**Pharmacy Board Lacked Authority to Regulate Pharmacist Hours.** — Pharmacy board's authority to regulate pharmacies did not extend to regulating pharmacist working



hours as set out in its proposed rule; the North Carolina Department of Labor was the only entity with authority to regulate working hours of pharmacists in pharmacies, and such regu-

lation was solely through the Wage and Hour Act, G.S. 95-25.1. N.C. Bd. of Pharm. v. Rules Review Comm'n, 174 N.C. App. 301, 620 S.E.2d 893, 2005 N.C. App. LEXIS 2362 (2005).

## § 90-85.21. Pharmacy permit.

### CASE NOTES

**Pharmacy Board Lacked Authority to Regulate Pharmacist Hours.** — Pharmacy board's authority to regulate pharmacies did not extend to regulating pharmacist working hours as set out in its proposed rule; the North Carolina Department of Labor was the only

entity with authority to regulate working hours of pharmacists in pharmacies, and such regulation was solely through the Wage and Hour Act, G.S. 95-25.1. N.C. Bd. of Pharm. v. Rules Review Comm'n, 174 N.C. App. 301, 620 S.E.2d 893, 2005 N.C. App. LEXIS 2362 (2005).

## § 90-85.27. Definitions.

### Editor's Note. —

Session Laws 2006-66, s. 10.3(a), effective July 1, 2006, repealed Session Laws 2005-276, s. 10.11(a), pertaining to the dispensing of generic drugs.

Session Laws 2006-66, s. 10.3(e), provides: "Services and Payment Bases. — Funds appropriated for Medicaid services shall be expended in accordance with the following schedule of services and payment bases. All services and payments are subject to the language at the end of this subsection. Unless otherwise provided, services and payment bases will be as prescribed in the State Plan as established by the Department of Health and Human Services and may be changed with the approval of the Director of the Budget.

"(1) Hospital inpatient.

"(2) Hospital outpatient. — Eighty percent (80%) of allowable costs or a prospective reimbursement plan as established by the Department of Health and Human Services.

"(3) Nursing facilities. — Nursing facilities providing services to Medicaid recipients who also qualify for Medicare must be enrolled in the Medicare program as a condition of participation in the Medicaid program. State facilities are not subject to the requirement to enroll in the Medicare program. Residents of nursing facilities who are eligible for Medicare coverage of nursing facility services must be placed in a Medicare-certified bed. Medicaid shall cover facility services only after the appropriate services have been billed to Medicare. The Division of Medical Assistance shall allow nursing facility providers sufficient time from the effective date of this act to certify additional Medicare beds if necessary. In determining the date that the requirements of this subdivision become effective, the Division of Medical Assistance shall consider the regulations governing certification of Medicare beds and the length of time required for this process to be completed.

"(4) Physicians, certified nurse midwife services, nurse practitioners. — Fee schedules as development by the Department of Health and Human Services.

"(5) Community Alternative Program, EPSDT Screens. — Payments in accordance with rate schedule developed by the Department of Health and Human Services.

"(6) Home health and related services, durable medical equipment. — Payments according to reimbursement plans developed by the Department of Health and Human Services.

"(7) Hearing aids. — Wholesale cost plus dispensing fee to provider.

"(8) Rural health clinical services. — Provider-based, reasonable cost; non-provider-based, single-cost reimbursement rate per clinic visit.

"(9) Family planning. — Negotiated rate for local health departments. For other providers see specific services, e.g. hospitals, physicians.

"(10) Independent laboratory and X-ray services. — Uniform fee schedules as developed by the Department of Health and Human Services.

"(11) Ambulatory surgical centers.

"(12) Private duty nursing, clinic services, prepaid health plans.

"(13) Intermediate care facilities for the mentally retarded.

"(14) Chiropractors, podiatrists, optometrists, dentists.

"(15) Limitations on Dental Coverage. — Dental services shall be provided on a restricted basis in accordance with criteria adopted by the Department to implement this subsection.

"(16) Medicare Buy-In. — Social Security Administration premium.

"(17) Ambulance services. — Uniform fee schedules as developed by the Department of Health and Human Services. Public ambulance providers will be reimbursed at cost.



“(18) Optical supplies. — Payment for materials is made to a contractor in accordance with 42 C.F.R. § 431.54(d). Fees paid to dispensing providers are negotiated fees established by the State agency based on industry charges.

“(19) Medicare crossover claims. — The Department shall apply Medicaid medical policy to Medicare claims for dually eligible recipients. The Department shall pay an amount up to the actual coinsurance or deductible or both, in accordance with the State Plan, as approved by the Department of Health and Human Services.

“(20) Physical therapy, occupational therapy, and speech therapy. — Services limited to EPSDT-eligible children. Payments are to be made only to qualified providers at rates negotiated by the Department of Health and Human Services. Physical therapy, occupational therapy, and speech therapy services are subject to prior approval and utilization review.

“(21) Personal care services.

“(22) Case management services. — Reimbursement in accordance with the availability of funds to be transferred within the Department of Health and Human Services.

“(23) Hospice.

“(24) Medically necessary prosthetics or orthotics. — In order to be eligible for reimbursement, providers must be licensed or certified by the occupational licensing board or the certification authority having authority over the provider's license or certification. Medically necessary prosthetics and orthotics are subject to prior approval and utilization review.

“(25) Health insurance premiums.

“(26) Medical care/other remedial care. — Services not covered elsewhere in this section include related services in schools; health professional services provided outside the clinic setting to meet maternal and infant health goals; and services to meet federal EPSDT mandates.

“(27) Pregnancy-related services. — Covered services for pregnant women shall include nutritional counseling, psychosocial counseling, and predelivery and postpartum home visits by maternity care coordinators and public health nurses.

“(28) Drugs. — Reimbursements. Reimbursements shall be available for prescription drugs as allowed by federal regulations plus a professional services fee per month, excluding refills for the same drug or generic equivalent during the same month. Payments for drugs are subject to the provisions of this subdivision or in accordance with the State Plan adopted by the Department of Health and Human Services, consistent with federal reimbursement regulations. Payment of the professional services fee shall be made in accordance with the State Plan adopted by the Department of Health and Human Services, consistent with federal reim-

bursement regulations. The professional services fee shall be five dollars and sixty cents (\$5.60) per prescription for generic drugs and four dollars (\$4.00) per prescription for brand-name drugs. Adjustments to the professional services fee shall be established by the General Assembly. In addition to the professional services fee, the Department may pay an enhanced fee for pharmacy services.

“Limitations on quantity. — The Department of Health and Human Services may establish authorizations, limitations, and reviews for specific drugs, drug classes, brands, or quantities in order to manage effectively the Medicaid pharmacy program, except that the Department shall not impose limitations on brand-name medications for which there is a generic equivalent in cases where the prescriber has determined, at the time the drug is prescribed, that the brand-name drug is medically necessary and has written on the prescription order the phrase “medically necessary”. In addition to the entities listed in subsection (a) of this section, the Department shall report to the Joint Legislative Commission on Governmental Operations on authorizations, limitations, and reviews established under this subparagraph, including limitations on monthly brand-name and generic prescriptions as well as restrictions on the total number of medications. The Department shall submit the report not later than May 1, 2006.

“Dispensing of generic drugs. — Notwithstanding G.S. 90-85.27 through G.S. 90-85.31, or any other law to the contrary, under the Medical Assistance Program (Title XIX of the Social Security Act), and except as otherwise provided in this subsection for atypical antipsychotic drugs and drugs listed in the narrow therapeutic index, a prescription order for a drug designated by a trade or brand name shall be considered to be an order for the drug by its established or generic name, except when the prescriber has determined, at the time the drug is prescribed, that the brand-name drug is medically necessary and has written on the prescription order the phrase “medically necessary”. An initial prescription order for an atypical antipsychotic drug or a drug listed in the narrow therapeutic drug index that does not contain the phrase “medically necessary” shall be considered an order for the drug by its established or generic name, except that a pharmacy shall not substitute a generic or established name prescription drug for subsequent brand or trade name prescription orders of the same prescription drug without explicit oral or written approval of the prescriber given at the time the order is filled. Generic drugs shall be dispensed at a lower cost to the Medical Assistance Program rather than trade or brand-name drugs. As used in this subsection, “brand name” means the proprietary name the

manufacturer places upon a drug product or on its container, label, or wrapping at the time of packaging; and "established name" has the same meaning as in section 502(e)(3) of the Federal Food, Drug, and Cosmetic Act as amended, 21 U.S.C. § 352(e)(3).

"Prior authorization. — The Department of Health and Human Services shall not impose prior authorization requirements or other restrictions under the State Medical Assistance Program on medications prescribed for Medicaid recipients for the treatment of: (i) mental illness, including, but not limited to, medications for schizophrenia, bipolar disorder, and major depressive disorder, or (ii) HIV/AIDS.

"(29) Other mental health services. — Unless otherwise covered by this section, coverage is limited to:

"a. Services as defined by the Division of Mental Health, Developmental Disabilities, and Substance Abuse Services and approved by the Centers for Medicare and Medicaid Services (CMS) when provided in agencies meeting the requirements of the rules established by the Commission for Mental Health, Developmental Disabilities, and Substance Abuse Services and reimbursement is made in accordance with a State Plan developed by the Department of Health and Human Services not to exceed the upper limits established in federal regulations, and

"b. For children eligible for EPSDT services provided by:

"1. Licensed or certified psychologists, licensed clinical social workers, certified clinical nurse specialists in psychiatric mental health advanced practice, nurse practitioners certified as clinical nurse specialists in psychiatric mental health advanced practice, licensed psychological associates, licensed professional counselors, licensed marriage and family therapists, certified clinical addictions specialists, and certified clinical supervisors, when Medicaid-eligible children are referred by the Community Care of North Carolina primary care physician, a Medicaid-enrolled psychiatrist, or the area mental health program or local management entity, and

"2. Institutional providers of residential services as defined by the Division of Mental Health, Developmental Disabilities, and Substance Abuse Services and approved by the Centers for Medicare and Medicaid Services (CMS) for children and Psychiatric Residential Treatment Facility services that meet federal and State requirements as defined by the Department.

"c. For Medicaid-eligible adults, services provided by licensed or certified psychologists, licensed clinical social workers, certified clinical nurse specialists in psychiatric mental health advanced practice, and nurse practitioners certified as clinical nurse specialists in psychiatric

mental health advanced practice, licensed psychological associates, licensed professional counselors, licensed marriage and family therapists, licensed clinical addictions specialists, and licensed clinical supervisors, Medicaid-eligible adults may be self-referred.

"d. Payments made for services rendered in accordance with this subdivision shall be to qualified providers in accordance with approved policies and the State Plan. Nothing in sub-subdivision b. or c. of this subdivision shall be interpreted to modify the scope of practice of any service provider, practitioner, or licensee, nor to modify or attenuate any collaboration or supervision requirement related to the professional activities of any service provider, practitioner, or licensee. Nothing in sub-subdivision b. or c. of this subdivision shall be interpreted to require any private health insurer or health plan to make direct third-party reimbursements or payments to any service provider, practitioner, or licensee.

"e. The Department of Health and Human Services shall not enroll licensed psychological associates, licensed professional counselors, licensed marriage and family therapists, licensed clinical addiction specialists, and licensed clinical supervisors until all of the following conditions have been met:

"1. The fiscal impact of payments to these qualified providers has been projected;

"2. Funding for any projected requirements in excess of budgeted Division of Medical Assistance funding has been identified from within State funds appropriated to the Department of Health and Human Services, Division of Mental Health, Developmental Disabilities, and Substance Abuse Services to support area mental health programs or county programs, or identified from other sources; and

"3. Approval has been obtained from the Office of State Budget and Management to transfer these State or other source funds from the Division of Mental Health, Developmental Disabilities, and Substance Abuse Services to the Division of Medical Assistance. Upon approval and implementation, the Department of Health and Human Services shall, on a quarterly basis, provide a status report to the Office of State Budget and Management and the Fiscal Research Division.

"Notwithstanding G.S. 150B-21.1(a), the Department of Health and Human Services may adopt temporary rules in accordance with Chapter 150B of the General Statutes further defining the qualifications of providers and referral procedures in order to implement this subdivision. Coverage policy for services defined by the Division of Mental Health, Developmental Disabilities, and Substance Abuse Services under sub-subdivisions a. and b.2 of this subdivision shall be established by the Division of Medical Assistance."



Session Laws 2006-66, s. 1.2, provides: “This act shall be known as ‘The Current Operations and Capital Improvements Appropriations Act of 2006’.”

Session Laws 2006-66, s. 28.3, provides: “Except for statutory changes or other provisions that clearly indicate an intention to have effects

beyond the 2006 2007 fiscal year, the textual provisions of this act apply only to funds appropriated for, and activities occurring during, the 2006 2007 fiscal year.”

Session Laws 2006-66, s. 28.6 is a severability clause.

## § 90-85.32. Rules pertaining to filling, refilling, transfer, and mail or common-carrier delivery of prescription orders.

### CASE NOTES

**Pharmacy Board Lacked Authority to Regulate Pharmacist Hours.** — Pharmacy board’s authority to regulate pharmacies did not extend to regulating pharmacist working hours as set out in its proposed rule; the North Carolina Department of Labor was the only

entity with authority to regulate working hours of pharmacists in pharmacies, and such regulation was solely through the Wage and Hour Act, G.S. 95-25.1. *N.C. Bd. of Pharm. v. Rules Review Comm’n*, 174 N.C. App. 301, 620 S.E.2d 893, 2005 N.C. App. LEXIS 2362 (2005).

### ARTICLE 4B.

#### *Pharmacy Quality Assurance Protection Act.*

## § 90-85.46. Definitions.

The following definitions shall apply in this Article:

- (1) Board. — The North Carolina Board of Pharmacy.
- (2) Pharmacy quality assurance program. — A program pertaining to one of the following:
  - a. A pharmacy association created under G.S. 90-85.4 or incorporated under Chapter 55A of the General Statutes that evaluates the quality of pharmacy services and alleged medication errors and incidents and makes recommendations to improve the quality of pharmacy services.
  - b. A program established by a person or entity holding a valid pharmacy permit pursuant to G.S. 90-85.21 or G.S. 90-85.21A to evaluate the quality of pharmacy services and alleged medication errors and incidents and make recommendations to improve the quality of pharmacy services.
  - c. A quality assurance committee or medical or peer review committee established by a health care provider licensed under this Chapter or a health care facility licensed under Chapter 122C, 131D, or 131E of the General Statutes that includes evaluation of the quality of pharmacy services and alleged medication errors and incidents and makes recommendations to improve the quality of pharmacy services. (2005-427, s. 3; 2006-259, s. 16(a).)

**Effect of Amendments.** — Session Laws 2006-259, s. 16(a), effective August 23, 2006, substituted “G.S. 90-85.21A” for “G.S. 90-85.21(a)” in the middle of subdivision (2)(b).

## § 90-85.47. Pharmacy quality assurance program required; limited liability; discovery.

- (a) Every person or entity holding a valid pharmacy permit pursuant to G.S.



90-85.21 or G.S. 90-85.21A shall establish or participate in a pharmacy quality assurance program as defined under G.S. 90-85.46(2), to evaluate the following:

- (1) The quality of the practice of pharmacy.
- (2) The cause of alleged medication errors and incidents.
- (3) Pharmaceutical care outcomes.
- (4) Possible improvements for the practice of pharmacy.
- (5) Methods to reduce alleged medication errors and incidents.

(b) There shall be no monetary liability on the part of, or no cause of action for damages arising against, any member of a duly appointed pharmacy quality assurance program or any pharmacy or pharmacist furnishing information to a pharmacy quality assurance program or any person, including a person acting as a witness or incident reporter to or investigator for a pharmacy quality assurance program, for any act or proceeding undertaken or performed within the scope of the functions of the pharmacy quality assurance program.

(c) This section shall not be construed to confer immunity from liability on any professional association, pharmacy or pharmacist, or health care provider while performing services other than as a member of a pharmacy quality assurance program or upon any person, including a person acting as a witness or incident reporter to or investigator for a pharmacy quality assurance program, for any act or proceeding undertaken or performed outside the scope of the functions of the pharmacy quality assurance program. Except as provided in subsection (a) or (b) of this section, where a cause of action would arise against a pharmacy, pharmacist, or an individual health care provider, the cause of action shall remain in effect.

(d) The proceedings of a pharmacy quality assurance program, the records and materials it produces, and the materials it considers shall be confidential and not considered public records within the meaning of G.S. 132-1 or G.S. 58-2-100 and shall not be subject to discovery or introduction into evidence in any civil action, administrative hearing or Board investigation against a pharmacy, pharmacist, pharmacy technician, a pharmacist manager or a permittee or a hospital licensed under Chapter 122C or Chapter 131E of the General Statutes or that is owned or operated by the State, which civil action, administrative hearing or Board Investigation results from matters that are the subject of evaluation and review by the pharmacy quality assurance program. No person who was in attendance at a meeting of the pharmacy quality assurance program shall be required to testify in any civil action, administrative hearing or Board investigation as to any evidence or other matters produced or presented during the proceedings of the pharmacy quality assurance program or as to any findings, recommendations, evaluations, opinions, or other actions of the pharmacy quality assurance program or its members. However, information, documents, or records otherwise available are not immune from discovery or use in a civil action merely because they were presented during proceedings of the pharmacy quality assurance program. Documents otherwise available as public records within the meaning of G.S. 132-1 do not lose their status as public records merely because they were presented or considered during proceedings of the pharmacy quality assurance program. A member of the pharmacy quality assurance program may testify in a civil or administrative action but cannot be asked about the person's testimony before the pharmacy quality assurance program or any opinions formed as a result of the pharmacy quality assurance program. Nothing in this subsection shall preclude:

- (1) A pharmacy, pharmacist, pharmacy technician, or other person or any

agent or representative of a pharmacy, pharmacist, pharmacy technician or other person participating on a pharmacy quality assurance program may use otherwise privileged, confidential information for legitimate internal business or professional purposes of the pharmacy quality assurance program.

- (2) A pharmacy, pharmacist, pharmacy technician, other person participating on the committee, or any person or organization named as a defendant in a civil action, a respondent in an administrative proceeding, or a pharmacy, pharmacist, or pharmacy technician subject to a Board investigation as a result of participation in the pharmacy quality assurance program may use otherwise privileged, confidential information in the pharmacy quality assurance program or person's own defense. A plaintiff in the civil action or the agency in the administrative proceeding may disclose records or determinations of or communications to the pharmacy quality assurance program in rebuttal to information given by the defendant, respondent, or pharmacist subject to Board investigation.

(e) Upon the Board providing written notice to the pharmacy permittee's designated agent under G.S. 90-85.21(a) and pharmacist of an investigation against the pharmacist, including the specific reason for the Board investigation, the pharmacy permittee's designated agent shall compile and provide documentation within 10 days of the receipt of the notice of any alleged medication error or incident committed by the pharmacist in the 12 months preceding the receipt of the notice, that the pharmacy permittee has knowledge of, when:

- (1) The alleged medication error or incident resulted in any of the following:
  - a. A visit to a physician or an emergency room attributed to the alleged medication incident or error.
  - b. Hospitalization requiring an overnight stay or longer.
  - c. A fatality.
- (2) The Board has initiated a disciplinary proceeding against the pharmacist as a result of the investigation. Unless the documentation relates to an alleged medication error or incident that was specifically the cause of the investigation, the Board may review the documentation only after the Board has made findings of fact and conclusions of law pursuant to G.S. 150B-42(a) and may use the documentation in determining the remedial action the pharmacist shall undergo as part of the disciplinary action imposed by the Board. The documentation shall be released only to the Board or its designated employees pursuant to this subsection and shall not otherwise be released except as required by law.

The documentation provided to the Board shall not include the proceedings and records of a pharmacy quality assurance program or information prepared by the pharmacy solely for consideration by or upon request of a pharmacy quality assurance program.

(f) Nothing in this section shall preclude the Board from obtaining information concerning a specific alleged medication error or incident that is the subject of a Board investigation resulting from a complaint to the Board. (2005-427, s. 3; 2006-259, s. 16(b).)

**Effect of Amendments.** — Session Laws 2006-259, s. 16(b), effective August 23, 2006, substituted "G.S. 90-85.21A" for "G.S.

90-85.21(a)" in the introductory paragraph of subsection (a).



## ARTICLE 5.

*North Carolina Controlled Substances Act.***§ 90-87. Definitions.**

## CASE NOTES

II. "Deliver" or "Delivery."

III. "Manufacture."

**II. "DELIVER" OR "DELIVERY."**

**In Exchange For Work.** — Exchanging methamphetamine, a controlled substance under G.S. 90-87(5), G.S. 90-90(3), for work was a sale of a controlled substance. *State v. Yelton*, — N.C. App. —, 623 S.E.2d 594, 2006 N.C. App. LEXIS 44 (2006).

**III. "MANUFACTURE."**

**Evidence Sufficient to Show Manufacture of Marijuana.** —

Evidence of scales and plastic bags with marijuana found in defendants' residence was sufficient evidence for the issue of manufacturing to be submitted to a jury; moreover, a co-defendant testified that one defendant used the scale and vacuum sealer found in the kitchen to weigh and package marijuana for distribution. *State v. Harrington*, 171 N.C. App. 17, 614 S.E.2d 337, 2005 N.C. App. LEXIS 1189 (2005), cert. denied, sub nom. *State v. Rattis*, 360 N.C. 70, 623 S.E.2d 36 (2005).

Evidence from a co-defendant that defendant had access to a garage at their residence where one to two thousand dime bags were found, that defendant had access to the kitchen where a scale and vacuum sealer were found, and that defendant used bags found in the garage to

distribute marijuana, when coupled with evidence that the police found, among other things, a set of scales and plastic bags containing marijuana residue in defendants bedroom, was sufficient to submit to the jury the issue of whether defendant was trafficking in marijuana by manufacture. *State v. Harrington*, 171 N.C. App. 17, 614 S.E.2d 337, 2005 N.C. App. LEXIS 1189 (2005), cert. denied, sub nom. *State v. Rattis*, 360 N.C. 70, 623 S.E.2d 36 (2005).

**Evidence Sufficient to Show Manufacture of Methamphetamine.** — Motion to dismiss the charge of possession with intent to manufacture, sell, and deliver methamphetamine was properly denied where defendant testified to knowingly assisting her husband in manufacturing methamphetamine by ordering chemistry ware for him; her testimony that 2.9 grams of methamphetamine found at her residence was for personal use was contradicted by expert testimony that indicated the items found were consistent with materials used in manufacturing methamphetamine and packaging controlled substances and that plastic bags such as those found at defendant's residence could be used to package controlled substances into smaller amounts for sale. *State v. Alderson*, 173 N.C. App. 344, 618 S.E.2d 844, 2005 N.C. App. LEXIS 2033 (2005).

**§ 90-89. Schedule I controlled substances.**

## CASE NOTES

**Indictment failed where substance alleged was not listed in G.S. 90-89.** — Indictment alleging that defendant unlawfully, willfully and feloniously did possess Methylenedioxymphetamine, a controlled substance included in Schedule I of North Caro-

lina Controlled Substances Act failed because no such substance appeared in G.S. 90-89. *State v. Ledwell*, 171 N.C. App. 328, 614 S.E.2d 412, 2005 N.C. App. LEXIS 1259 (2005), cert. denied, 360 N.C. 73, 622 S.E.2d 624 (2005).

**§ 90-90. Schedule II controlled substances.**

## CASE NOTES

**Methamphetamine.** — Exchanging methamphetamine, a controlled substance under

G.S. 90-87(5), 90-90(3), for work was a sale of a controlled substance. *State v. Yelton*, — N.C.



App. —, 623 S.E.2d 594, 2006 N.C. App. LEXIS 44 (2006).

## § 90-95. Violations; penalties.

### CASE NOTES

- I. General Consideration.
- II. Manufacture.
- IV. Possession.
  - A. In General.
  - B. Possession with Intent to Sell or Deliver.
- V. Trafficking.

#### I. GENERAL CONSIDERATION.

**Underlying Felony in Felony Murder Conviction.** — State did not have to prove that defendant knew the codefendant possessed a gun in order to for defendant to be convicted of felony murder under G.S. 14-17 based on trafficking in cocaine with a deadly weapon in violation of G.S. 90-95 under a concert of action theory; defendant's knowledge that the codefendant had a gun was irrelevant as long as the codefendant killed the victim while possession or attempting to possess the drugs, which the State substantially established was the common purpose of defendant and the codefendant. *State v. Herring*, — N.C. App. —, 626 S.E.2d 742, 2006 N.C. App. LEXIS 521 (2006).

State presented sufficient evidence that the codefendant had constructive possession of the cocaine around the time of the shooting to find that defendant, by virtue of concert of action, committed trafficking in cocaine by possession of more than 400 grams of cocaine while also possessing a deadly weapon in violation of G.S. 90-95; when the codefendant shot the victim, the codefendant obtained dominion and control over the victim and the area around him, including the cocaine, and the codefendant's shooting of the victim within moments of the codefendant stepping into the apartment with the gun to complete the gun transaction was sufficient to convict defendant of felony murder under G.S. 14-17. *State v. Herring*, — N.C. App. —, 626 S.E.2d 742, 2006 N.C. App. LEXIS 521 (2006).

**Applied** in *State v. Howell*, 169 N.C. App. 741, 611 S.E.2d 200, 2005 N.C. App. LEXIS 795 (2005), cert. denied, 360 N.C. 71, 622 S.E.2d 500 (2005).

**Cited** in *State ex rel. City of Salisbury v. Campbell*, 169 N.C. App. 829, 610 S.E.2d 799, 2005 N.C. App. LEXIS 803 (2005); *State v. Shearin*, 170 N.C. App. 222, 612 S.E.2d 371, 2005 N.C. App. LEXIS 1002 (2005), appeal dismissed, cert. denied, — N.C. —, 624 S.E.2d 369 (2005); *State v. Berryman*, 170 N.C. App.

336, 612 S.E.2d 672, 2005 N.C. App. LEXIS 1004 (2005), aff'd, — N.C. —, 624 S.E.2d 350 (2006); *State v. Edwards*, 172 N.C. App. 821, 616 S.E.2d 634, 2005 N.C. App. LEXIS 1766 (2005), cert. denied, 360 N.C. 69, 623 S.E.2d 776 (2005).

#### II. MANUFACTURE.

**Evidence Sufficient to Establish Manufacture.** —

Jury could reasonably infer that defendant used items seized from her outbuilding, such as tubing that had methamphetamine residue, acetone, and PVC piping, together with items found in her residence, to manufacture methamphetamine; thus, there was sufficient physical and testimonial evidence from which a reasonable juror could find that defendant manufactured methamphetamine within 300 feet of an elementary school, and the trial court properly denied defendant's motion to dismiss. *State v. Alderson*, 173 N.C. App. 344, 618 S.E.2d 844, 2005 N.C. App. LEXIS 2033 (2005).

#### IV. POSSESSION.

##### A. In General.

**Constructive possession has been found when, etc.** —

There was sufficient evidence to establish the constructive possession of cocaine in a drug case where the evidence showed that defendant was the only person present during the search, and papers relating to the car where the drugs were located were found with defendant's name on them. *State v. Nettles*, 170 N.C. App. 100, 612 S.E.2d 172, 2005 N.C. App. LEXIS 950 (2005).

**Constructive Possession in Vehicle.** —

Trial court's denial of defendant's motion to dismiss, as well as the denial of his post-trial motion to set aside the verdict, was proper where there was sufficient evidence to support an inference of constructive possession for purposes of defendant's possession of cocaine charge, as a police investigator saw defendant at a suspected drug dealer's home, he saw

defendant drive away with a known drug runner from the home, and the runner informed the investigator where to find drugs in the vehicle; defendant was the driver of the vehicle where the cocaine was found and all reasonable inferences provided support for the conviction. *State v. Baublitz*, 172 N.C. App. 801, 616 S.E.2d 615, 2005 N.C. App. LEXIS 1778 (2005).

**Possession In Local Confinement Facility.** — Holding cell where defendant was held upon arrest was a local confinement facility; G.S. 90-95(e)(9) is not restricted solely to individuals in custody of a local confinement facility or those actions occurring at a particular section of the facility. *State v. Dent*, — N.C. App. —, 621 S.E.2d 274, 2005 N.C. App. LEXIS 2491 (2005).

**Search and Seizure.** — Defendant's arrest and subsequent search conducted by a police officer were permissible under U.S. Const. amend. IV because the officer had sufficient probable cause, pursuant to G.S. 15A-401(b)(1) and (b)(2)(a), to believe that defendant was committing, or had committed, a felony in light of information provided by a confidential informant, to the effect that a black male matching defendant's description was selling drugs outside a local store in violation of G.S. 90-95(a)(1) and (b)(1); the informant's 14 years of personal dealings with the officer resulting in over 100 arrests and numerous convictions allowed the conclusion that the informant was reliable. *State v. Stanley*, — N.C. App. —, 622 S.E.2d 680, 2005 N.C. App. LEXIS 2707 (2005).

**Establishing Possession.** —

State was not required to show who placed opium in a parcel delivered to defendant; it was required to show defendant knew or expected that the package contained opium and intended to control its disposition or use. *State v. Rashidi*, 172 N.C. App. 628, 617 S.E.2d 68, 2005 N.C. App. LEXIS 1790 (2005), *aff'd*, 360 N.C. 166, 622 S.E.2d 493 (2005).

**Evidence Sufficient.** —

Although defendant argued that he did not expect pictures mailed to his residence from his brother in Iran to contain opium, the State offered evidence of incriminating circumstances that would permit a jury to conclude otherwise where: (1) defendant admitted that he had used opium and officers found a film canister containing traces of opium in his front pocket; (2) during a search of defendant's car, officers found in its console hand-held scales of a type frequently used to weigh drugs, a safety pin or "wire stem" coated in opium, and \$1,160 in cash; and (3) the delivery to defendant was not a random, unexpected occurrence as officers found multiple, similarly addressed packages in defendant's carport. *State v. Rashidi*, 172 N.C. App. 628, 617 S.E.2d 68, 2005 N.C. App. LEXIS 1790 (2005), *aff'd*, 360 N.C. 166, 622 S.E.2d 493 (2005).

**Evidence Sufficient to Establish Possession for the Purpose of This Section.** —

Sufficient evidence was presented to allow a jury to find that defendant knowingly possessed the opium that had been mailed to him where he received the package addressed to him at his residence and, before or shortly after law enforcement officers announced their presence, he hid the opium in a trash bag of clothes in a bedroom; this evidence supported an inference of knowing possession. *State v. Rashidi*, 172 N.C. App. 628, 617 S.E.2d 68, 2005 N.C. App. LEXIS 1790 (2005), *aff'd*, 360 N.C. 166, 622 S.E.2d 493 (2005).

**Possession of Cocaine is Considered a Felony to Support a Habitual Felon Indictment.** —

Defendant was properly sentenced as a habitual offender where the record showed that defendant had been convicted of three previous felony offenses, including possession of cocaine. *State v. Nettles*, 170 N.C. App. 100, 612 S.E.2d 172, 2005 N.C. App. LEXIS 950 (2005).

**B. Possession with Intent to Sell or Deliver.**

**Evidence Sufficient to Show Possession.**

— Despite the fact that other people resided at a house, defendant's motion to dismiss the charges of trafficking in cocaine by possession and possession with intent to sell and deliver cocaine were not dismissed at the close of the state's evidence because there was sufficient evidence to sustain the conviction based on the fact that defendant's identification was found six inches from cocaine, defendant's name was spoken on a video tape showing a party at the premises, defendant told a probation officer that he lived there, and defendant paid for cable services there. *State v. Shine*, 173 N.C. App. 699, 619 S.E.2d 895, 2005 N.C. App. LEXIS 2306 (2005).

**Evidence Sufficient to Establish Intent.**

— In a possession with intent to sell or deliver case, the trial court did not err in denying defendant's motion to dismiss based on insufficiency of the evidence because the evidence showed that: (1) the undercover officers approached defendant and asked if they could get drugs; (2) defendant advised the undercover officers that he could get them marijuana or cocaine if they gave him money first; (3) the officers gave defendant money, and he returned with two bags of marijuana and one bag of cocaine; (4) a special agent testified that the substance submitted for testing was cocaine; and (5) any conflicting testimony about the color of the baggie containing the cocaine defendant sold to the undercover officers was a discrepancy in the state's evidence, properly considered by the jury in weighing the reliabil-



ity of the evidence. *State v. Bunn*, 173 N.C. App. 729, 619 S.E.2d 918, 2005 N.C. App. LEXIS 2301 (2005).

**Defendant's motion to dismiss the charge of possession with intent to sell or deliver cocaine was properly denied, etc.** —

Trial court properly denied defendant's motion to dismiss the charge against him of possession with intent to sell or deliver cocaine where defendant at least admitted that he had constructive possession of cocaine, as defendant acknowledged that cocaine he threw behind a chair while a police officer was chasing him belonged to him, even as he contested whether three bags of a powdery substance found on the ground near where the officer first started chasing him belonged to him. *State v. McNeil*, 359 N.C. 800, 617 S.E.2d 271, 2005 N.C. LEXIS 841 (2005).

Evidence of drug paraphernalia found in various areas of the house where both defendants resided, and the testimony of a co-defendant that both defendants were engaged in the sale of marijuana and both had access to the garage where marijuana was found, were sufficient for the issue of possession to survive a motion to dismiss. *State v. Harrington*, 171 N.C. App. 17, 614 S.E.2d 337, 2005 N.C. App. LEXIS 1189 (2005), cert. denied, sub nom. *State v. Rattis*, 360 N.C. 70, 623 S.E.2d 36 (2005).

**Evidence Insufficient to Establish Intent.** —

Conviction for possession with intent to manufacture, sell, or deliver cocaine under G.S. 90-95 was reversed because there was insufficient evidence of intent; defendant did not have a substantial amount of drugs, it was not packaged in a manner consistent with sale, no unexplained cash was found, and only one piece of paraphernalia was found. *State v. Nettles*, 170 N.C. App. 100, 612 S.E.2d 172, 2005 N.C. App. LEXIS 950 (2005).

State conceded that the evidence was insufficient to sustain defendant's conviction for possession of diazepam/valium with intent to sell, under G.S. 90-95(a)(1), because there was no evidence other than defendant's possession of 30 diazepam tablets of his intent to sell, but the evidence was sufficient to sustain a conviction for misdemeanor possession of diazepam. *State v. Sanders*, 171 N.C. App. 46, 613 S.E.2d 708, 2005 N.C. App. LEXIS 1158 (2005), aff'd, 360 N.C. 170, 622 S.E.2d 492 (2005).

**Evidence Sufficient For Conviction.** — Admissible testimony and opinions of woman who, with victim who died from smoking methamphetamine and defendant, smoked an eight-ball of meth was sufficient evidence to convict defendant of possession and its sale, by exchange for work, under G.S. 90-95 and involuntary manslaughter under G.S. 14-18. *State v. Yelton*, — N.C. App. —, 623 S.E.2d 594, 2006

N.C. App. LEXIS 44 (2006).

**Conviction and Sentencing Upheld.** —

Defendant's possession with the intent to manufacture, sell, or deliver cocaine conviction, and his resulting sentence were both proper where the evidence pertaining to prior convictions for possession with intent to manufacture, sell, and deliver cocaine were properly admitted and the trial court properly gave a limiting instruction to the jury, the State and defendant stipulated as to the chain of custody and evidentiary testing procedures on what was later found to be cocaine, and it was clear from the record that the trial court relied on defendant's stipulation admitting he was a Level IV felon with ten prior record points. *State v. Renfro*, — N.C. App. —, 621 S.E.2d 221, 2005 N.C. App. LEXIS 2483 (2005).

**V. TRAFFICKING.**

**Jury Instructions.** —

In a drug case, trafficking jury instructions properly excluded a statement that the State was required to prove that defendant knowingly possessed an amount of drugs beyond a reasonable doubt because there was no such requirement under G.S. 90-95(h)(3b). *State v. Cardenas*, 169 N.C. App. 404, 610 S.E.2d 240, 2005 N.C. App. LEXIS 681 (2005).

**Evidence held sufficient, etc.**

Defendant's statement that he obtained half a kilo from an unidentified person was sufficient evidence to establish conspiracy to traffic in more than 400 grams of cocaine where defendant's statement was supported by a substantial quantity of cocaine and trafficking paraphernalia found in defendant's home and an earlier controlled buy of 26 grams of cocaine from defendant by a police informant. *State v. Sims*, — N.C. App. —, 622 S.E.2d 132, 2005 N.C. App. LEXIS 2613 (2005).

**Evidence Held Insufficient.** — Testimony by a co-defendant that defendants stored marijuana in a house where they resided and sold marijuana from an apartment was insufficient to support the charge of trafficking by transportation because no one testified to observing defendants personally or actively moving or carrying any controlled substance. *State v. Harrington*, 171 N.C. App. 17, 614 S.E.2d 337, 2005 N.C. App. LEXIS 1189 (2005), cert. denied, sub nom. *State v. Rattis*, 360 N.C. 70, 623 S.E.2d 36 (2005).

Defendant's conviction for trafficking in cocaine by transportation was reversed as: (1) there was no evidence that defendant moved the cocaine from one place to another, (2) when law enforcement arrived at the scene, defendant's vehicle containing the two kilograms of cocaine was already backed into a parking space and remained stationary during the course of the law enforcement operation, and



(3) there was no evidence as to how the vehicle arrived at the scene or whether the cocaine was moved by defendant before a confidential informant arrived. *State v. Williams*, — N.C. App. —, 630 S.E.2d 216, 2006 N.C. App. LEXIS 1219 (2006).

**Elements.** —

To convict defendant of trafficking by possession, the State had to show more than that the package was addressed to defendant and contained opium, because such proof did not necessarily establish defendant's knowledge of the contents of the package and his intent to exer-

cise control over the opium. *State v. Rashidi*, 172 N.C. App. 628, 617 S.E.2d 68, 2005 N.C. App. LEXIS 1790 (2005), *aff'd*, 360 N.C. 166, 622 S.E.2d 493 (2005).

**Substantial Assistance to Law Enforcement.** — In deciding not to reduce defendant's sentence after defendant pleaded guilty to trafficking in cocaine pursuant to a plea bargain, the trial court did not abuse its discretion in finding that defendant failed to render substantial assistance to law enforcement. *State v. Robinson*, — N.C. App. —, 628 S.E.2d 252, 2006 N.C. App. LEXIS 849 (2006).

## § 90-96. Conditional discharge and expunction of records for first offense.

### CASE NOTES

**G.S. 15A-1344(f) requirement applied to G.S. 90-96**, and except as provided in G.S. 15A-1344(f), a trial court lacked jurisdiction to revoke a defendant's probation after the expiration of the probationary term; a trial court's

revocation of defendant's probation after his probation period expired, without the specific findings of G.S. 15A-1344(f), was error. *State v. Burns*, 171 N.C. App. 759, 615 S.E.2d 347, 2005 N.C. App. LEXIS 1273 (2005).

## § 90-108. Prohibited acts; penalties.

### CASE NOTES

**Intentional Act.** —

Jury, by finding defendant guilty of maintaining a place for keeping controlled substances, inherently found that defendant did so intentionally; thus, the trial court did not err in treating defendant's violation of G.S. 90-108(a) as a felony. *State v. Harrington*, 171 N.C. App. 17, 614 S.E.2d 337, 2005 N.C. App. LEXIS 1189 (2005), *cert. denied*, *sub nom. State v. Rattis*, 360 N.C. 70, 623 S.E.2d 36 (2005).

**Maintaining Dwelling Used for Controlled Substances.** —

Defendant's motion to dismiss at the close of the state's evidence was properly denied as to the charge of maintaining a dwelling for the keeping and selling of cocaine because the evidence showed that defendant occupied the residence, paid for cable services, and defendant was visited by a probation officer there. *State v. Shine*, 173 N.C. App. 699, 619 S.E.2d 895, 2005

N.C. App. LEXIS 2306 (2005).

**Erroneous Admission of Response to Routine Booking Question Required Reversal of Conviction.** — Conviction for maintaining a dwelling place for the purpose of keeping or selling cocaine was reversed because the trial court erred in admitting into evidence defendant's response to a routine booking question about his address; the court found that the officer who presented the question fully expected to produce an incriminating response. The error was not harmless because, without that evidence, it was apparent that the evidence was insufficient to support a conviction for maintaining a dwelling for the purpose of keeping or selling cocaine. *State v. Boyd*, — N.C. App. —, 628 S.E.2d 796, 2006 N.C. App. LEXIS 854 (2006).

**Cited in** *Jacobs v. Physicians Weight Loss Ctr. of Am., Inc.*, 173 N.C. App. 663, 620 S.E.2d 232, 2005 N.C. App. LEXIS 2280 (2005).

## § 90-109.1. Treatment.

### CASE NOTES

**Mental Health Records Previously Admitted Into Evidence In Parental Rights Termination Case.** — Trial court did not err by considering mental health records of a

mother contained within the underlying file and previously admitted into evidence in proceedings to terminate her parental rights, because the mental health records challenged by

the mother were originally admitted into evidence during a permanency planning review hearing and were not challenged by the mother

at that time. In re J.B., 172 N.C. App. 1, 616 S.E.2d 264, 2005 N.C. App. LEXIS 1589 (2005).

## ARTICLE 5B.

### *Drug Paraphernalia.*

#### § 90-113.22. Possession of drug paraphernalia.

##### CASE NOTES

**Cited** in State v. Shearin, 170 N.C. App. 222, (2005), appeal dismissed, cert. denied, — N.C. 612 S.E.2d 371, 2005 N.C. App. LEXIS 1002 —, 624 S.E.2d 369 (2005).

## ARTICLE 5D.

### *Control of Methamphetamine Precursors.*

#### § 90-113.52. Pseudoephedrine: restrictions on sales.

(a) A pseudoephedrine product in the form of a tablet, caplet, or gel cap shall not be offered for retail sale loose in bottles but shall be sold only in blister packages.

(b) Pseudoephedrine products shall not be offered for retail sale by self-service, but shall be stored and sold in the following manner: Any pseudoephedrine product in the form of a tablet or caplet containing pseudoephedrine as the sole active ingredient or in combination with other active ingredients shall be stored and sold behind a pharmacy counter.

(c) A pseudoephedrine product may be sold at retail without a prescription only to a person at least 18 years of age. The retailer shall require every retail purchaser of a pseudoephedrine product to furnish photo identification. If the retailer has reasonable grounds to believe that the prospective purchaser is under 18 years of age, the retailer shall require the prospective purchaser to furnish photo identification showing the date of birth of the person. The name and address of every purchaser shall be entered in a record of disposition of pseudoephedrine products to the consumer on a form approved by the Commission. The record of disposition shall also identify each pseudoephedrine product purchased, including the number of grams the product contains and the purchase date of the transaction. The retailer shall require that every purchaser sign the form attesting to the validity of the information. The form approved by the Commission shall be constructed so that it allows for entry of information in electronic format, including electronic signature. The form shall also be constructed and maintained so as to minimize disclosure of personal information to unauthorized persons and shall contain a statement in at least 10-point boldface type at the top of every page substantially similar to the following: "NORTH CAROLINA LAW STRICTLY PROHIBITS THE PURCHASE OF MORE THAN TWO PACKAGES OF CERTAIN PRODUCTS CONTAINING PSEUDOEPHEDRINE (3.6 GRAMS TOTAL) PER DAY, AND MORE THAN THREE PACKAGES (9 GRAMS TOTAL) OF CERTAIN PRODUCTS CONTAINING PSEUDOEPHEDRINE WITHIN A 30-DAY PERIOD. BY MY SIGNATURE, I ATTEST THAT THE INFORMATION I HAVE PROVIDED IN CONNECTION WITH THIS TRANSACTION IS TRUE AND CORRECT AND THAT THIS TRANSACTION DOES NOT EXCEED THE PURCHASE RESTRICTIONS. I ACKNOWLEDGE THAT KNOWING AND



WILLFUL VIOLATION OF THE PURCHASE RESTRICTIONS OR THE FURNISHING OF FALSE INFORMATION IN CONNECTION THEREWITH MAY SUBJECT ME TO CRIMINAL PENALTIES.” If the form attesting to the validity of this information is to be signed by the purchaser in electronic format, the retailer may choose to display in a clear and conspicuous manner the statement on a sign to be placed immediately adjacent to the device on which the electronic signature will be obtained, in lieu of including the full statement in electronic format. If the retailer chooses to display the statement on a sign rather than in electronic format, the retailer shall: (i) instruct the purchaser prior to signing to read the statement; and (ii) include on the form for signature contained in the electronic device a statement substantially similar to the following: “I have read, understand, and agree with the statement just shown to me concerning the requirements under State law pertaining to pseudoephedrine purchases.” Display of the sign in this manner shall satisfy the signage requirements of G.S. 90-113.54.

(d) A retailer shall maintain a record of disposition of pseudoephedrine products to the consumer for a period of two years from the date of each transaction. A record shall be readily available within 48 hours of the time of the transaction for inspection by an authorized official of a federal, State, or local law enforcement agency. The records maintained by a retailer are privileged information and are not public records but are for the exclusive use of the retailer and law enforcement. The retailer may destroy the information after two years from the date of the transactions.

(e) This section does not apply to any pseudoephedrine product that is in the form of a liquid, liquid capsule, gel capsule, or pediatric product labeled pursuant to federal regulation primarily intended for administration to children under 12 years of age according to label instruction, except as to those specific products for which the Commission issues an order pursuant to G.S. 90-113.58 subjecting the product to requirements under this Article. (2005-434, s. 1; 2006-186, s. 1.)

**Effect of Amendments.** — Session Laws 2006-186, s. 1, effective August 3, 2006, in subsection (a), inserted “pseudoephedrine” at the beginning, and substituted “in the form of a tablet, caplet, or gel cap” for “whose sole active ingredient is pseudoephedrine in strength of 30 milligrams or more per tablet or caplet”; and in subsection (c), substituted “THE” for “A SIN-

GLE TRANSACTION”, substituted “(3.6 GRAMS TOTAL) PER DAY” for “(SIX GRAMS TOTAL),”, deleted “NO” preceding “MORE THAN THREE PACKAGES” near the middle, substituted “(9 GRAMS TOTAL)” for “(NINE GRAMS TOTAL)”, and added language “If the form attesting to the validity..the signage requirements of G.S. 90-113.54” to the end.

## § 90-113.53. Pseudoephedrine transaction limits.

(a) No person shall deliver to any one person, attempt to deliver to any one person, purchase, or attempt to purchase at retail more than two packages containing a combined total of more than 3.6 grams of any pseudoephedrine products per calendar day. This limit does not apply if the product is dispensed under a valid prescription.

(b) No person shall purchase at retail more than three packages containing a combined total of more than 9 grams of pseudoephedrine products within any 30-day period. This limit does not apply if the product is dispensed under a valid prescription.

(c) This section does not apply to any pseudoephedrine products that are in the form of liquids, liquid capsules, gel capsules, or pediatric products labeled pursuant to federal regulation primarily intended for administration to children under 12 years of age according to label instruction, except as to those specific products for which the Commission issues an order pursuant to G.S. 90-113.58 subjecting the product to requirements under this Article. (2005-434, s. 1; 2006-186, s. 2.)



**Effect of Amendments.** — Session Laws 2006-186, s. 2, effective August 3, 2006, rewrote the first sentence in subsection (a); and substituted “9 grams” for “nine grams” in subsection (b).

§ 90-113.54. Posting of signs.

(a) A retailer shall post a sign or placard in a clear and conspicuous manner in the area of the premises where the pseudoephedrine products are offered for sale substantially similar to the following: “North Carolina law strictly prohibits the purchase of more than two packages (3.6 grams total) of certain products containing pseudoephedrine per day, and more than three packages (9 grams total) of certain products containing pseudoephedrine within a 30-day period. This store will maintain a record of all sales of these products which may be accessible to law enforcement officers.

(b) This section does not apply to any pseudoephedrine products that are in the form of liquids, liquid capsules, gel capsules, or pediatric products labeled pursuant to federal regulation primarily intended for administration to children under 12 years of age according to label instruction, except as to those specific products for which the Commission issues an order pursuant to G.S. 90-113.58 subjecting the product to requirements under this Article. (2005-434, s. 1; 2006-186, s. 3.)

**Effect of Amendments.** — Session Laws 2006-186, s. 3, effective August 3, 2006, in subsection (a), substituted “substantially similar to the following” for “stating”, substituted “the purchase” for “a single transaction purchase”, substituted “3.6 grams total” for “six grams total”, inserted “certain” preceding “products containing”, inserted “per day” following “pseudoephedrine”, deleted “no” preceding “more than three grams total”, and substituted “9 grams total” for “nine grams total”; and added subsection (b).

§ 90-113.61. Regulation of pseudoephedrine products in the form of liquids, liquid capsules, gel capsules, and pediatric products.

Except as to those specific products for which the Commission issues an order pursuant to G.S. 90-113.58 subjecting the product to requirements under this Article, any pseudoephedrine products that are in the form of liquids, liquid capsules, gel capsules, or pediatric products labeled pursuant to federal regulation primarily intended for administration to children under 12 years of age according to label instruction shall not be subject to requirements under this Article, but such products shall be subject to the requirements of the Combat Methamphetamine Act of 2005, Title VII of the USA PATRIOT Improvement and Reauthorization Act of 2005, P.L. 109-177. (2006-186, s. 4.)

**Editor’s Note.** — Session Laws 2006-186, s. 5, made this section effective September 30, 2006.

ARTICLE 9A.

*Nursing Practice Act.*

§ 90-171.20. Definitions.

CASE NOTES

**Nurses were not liable for obeying a doctor’s order** unless that order was so obviously negligent as to lead any reasonable person to anticipate that substantial injury would

result to the patient from its execution; even if there was a fact issue regarding the doctor's negligence in deciding to perform a mid-forceps delivery, that evidence did not establish that the negligence was so obvious as to require the

nurses to refuse to obey the doctor. *Daniels v. Durham County Hosp. Corp.*, 171 N.C. App. 535, 615 S.E.2d 60, 2005 N.C. App. LEXIS 1370 (2005).

### **§ 90-171.21. Board of Nursing; composition; selection; vacancies; qualifications; term of office; compensation.**

(a) The Board shall consist of 14 members. Eight members shall be registered nurses. Three members shall be licensed practical nurses. Three members shall be representatives of the public.

(b) Selection. — The North Carolina Board of Nursing shall conduct an election each year to fill vacancies of nurse members of the Board scheduled to occur during the next year. Nominations of candidates for election of registered nurse members shall be made by written petition signed by not less than 10 registered nurses eligible to vote in the election. Nominations of candidates for election of licensed practical nurse members shall be made by written petition signed by not less than 10 licensed practical nurses eligible to vote in the election. Every licensed registered nurse holding an active license shall be eligible to vote in the election of registered nurse board members. Every licensed practical nurse holding an active license shall be eligible to vote in the election of licensed practical nurse board members. The list of nominations shall be filed with the Board after January 1 of the year in which the election is to be held and no later than midnight of the first day of April of such year. Before preparing ballots, the Board shall notify each person who has been duly nominated of the person's nomination and request permission to enter the person's name on the ballot. A member of the Board who is nominated for reelection and who does not withdraw the member's name from the ballot is disqualified to participate in conducting the election. Elected members shall begin their term of office on January 1 of the year following their election.

Nominations of persons to serve as public members of the Board may be made to the Governor or the General Assembly by any citizen or group within the State. The Governor shall appoint one public member to the Board, and the General Assembly shall appoint two public members to the Board. Of the public members appointed by the General Assembly, one shall be appointed by the General Assembly upon the recommendation of the President Pro Tempore of the Senate, and one shall be appointed by the General Assembly upon the recommendation of the Speaker of the House of Representatives.

Board members shall be commissioned by the Governor upon their election or appointment.

(c) Vacancies. — All unexpired terms of Board members appointed by the General Assembly shall be filled within 45 days after the term is vacated. The Governor shall fill all other unexpired terms on the Board within 30 days after the term is vacated. For vacancies of registered nurse or licensed practical nurse members, the Governor shall appoint the person who received the next highest number of votes to those elected members at the most recent election for board members. Appointees shall serve the remainder of the unexpired term and until their successors have been duly elected or appointed and qualified.

(d) Qualifications. — Of the eight registered nurse members on the Board, one shall be a nurse administrator employed by a hospital or a hospital system, who shall be accountable for the administration of nursing services and not directly involved in patient care; one shall be an individual who meets the requirements to practice as a certified registered nurse anesthetist, a certified



nurse midwife, a clinical nurse specialist, or a nurse practitioner; two shall be staff nurses, defined as individuals who are primarily involved in direct patient care regardless of practice setting; one shall be an at-large registered nurse who meets the requirements of sub-subdivisions (1) a., a1., and b. of this subsection, but is not currently an educator in a program leading to licensure or any other degree-granting program; and three shall be nurse educators. Minimum ongoing employment requirements for every registered nurse and licensed practical nurse shall include continuous employment equal to or greater than fifty percent (50%) of a full-time position that meets the criteria for the specified Board member position. Of the three nurse educators, one shall be a practical nurse educator, one shall be an associate degree or diploma nurse educator, and one shall be a baccalaureate or higher degree nurse educator. All nurse educators shall meet the minimum education requirement as established by the Board's education program standards for nurse faculty. Candidates eligible for election to the Board as nurse educators are not eligible for election as the at-large member.

- (1) Except for the at-large member, every registered nurse member shall meet the following criteria:
  - a. Hold a current, unencumbered license to practice as a registered nurse in North Carolina.
  - a1. Be a resident of North Carolina.
  - b. Have a minimum of five years of experience as a registered nurse.
  - c. Have been engaged continuously in a position that meets the criteria for the specified Board position for at least three years immediately preceding election.
  - d. Show evidence that the employer of the registered nurse is aware that the nurse intends to serve on the Board.
- (2) Every licensed practical nurse member shall meet the following criteria:
  - a. Hold a current, unencumbered license to practice as a licensed practical nurse in North Carolina.
  - a1. Be a resident of North Carolina.
  - c. Have a minimum of five years of experience as a licensed practical nurse.
  - d. Have been engaged continuously in the position of a licensed practical nurse for at least three years immediately preceding election.
  - e. Show evidence that the employer of the licensed practical nurse is aware that the nurse intends to serve on the Board.
- (3) A public member appointed by the Governor shall not be a provider of health services or employed in the health services field. No public member appointed by the Governor or person in the public member's immediate family as defined by G.S. 90-405(8) shall be currently employed as a licensed nurse or been previously employed as a licensed nurse.
- (4) The nurse practitioner, nurse anesthetist, nurse midwife, or clinical nurse specialist member shall be recognized by the Board as a registered nurse who meets the following criteria:
  - a. Has graduated from or completed a graduate level advanced practice nursing education program accredited by a national accrediting body.
  - b. Maintains current certification or recertification from a national credentialing body approved by the Board or meets other requirements established by rules adopted by the Board.
  - c. Practices in a manner consistent with rules adopted by the Board and other applicable law.



(e) Term. — Members of the Board shall serve four-year staggered terms. No member shall serve more than two consecutive four-year terms or eight consecutive years after January 1, 2005.

(f) Removal. — The Board may remove any of its members for neglect of duty, incompetence, or unprofessional conduct. A member subject to disciplinary proceedings shall be disqualified from Board business until the charges are resolved.

(g) Reimbursement. — Board members are entitled to receive compensation and reimbursement as authorized by G.S. 93B-5. (1981, c. 360, s. 1; c. 852, s. 1; 1987, c. 651, s. 2; 1991, c. 643, s. 1; 1991 (Reg. Sess., 1992), c. 1011, s. 3; 1997-456, s. 27; 2001-98, s. 2; 2003-146, s. 1; 2004-199, s. 26(a); 2006-264, s. 47.)

**Effect of Amendments. —**

Session Laws 2006-264, s. 47, effective August 27, 2006, in subdivision (d)(3), rewrote the

first sentence, and inserted “appointed by the Governor” following “No public member” near the beginning of the second sentence.

**CASE NOTES**

**Board of Nursing Entitled to Sovereign Immunity Defense.** — Trial court properly dismissed an employee's wrongful termination complaint for failure to state a claim as the North Carolina Board of Nursing was a state agency that was entitled to a defense of sovereign immunity as the Board was enacted by

G.S. 90-171.21, three members of the Board were appointed by the North Carolina Governor and the North Carolina legislature under G.S. 90-171.21(b), and its duties, as set forth in G.S. 90-171.23(b), served a public purpose. *Abbott v. N.C. Bd. of Nursing*, — N.C. App. —, 627 S.E.2d 482, 2006 N.C. App. LEXIS 714 (2006).

**§ 90-171.23. Duties, powers, and meetings.**

**CASE NOTES**

**Board of Nursing Entitled to Sovereign Immunity Defense.** — Trial court properly dismissed an employee's wrongful termination complaint for failure to state a claim as the North Carolina Board of Nursing was a state agency that was entitled to a defense of sovereign immunity as the Board was enacted by

G.S. 90-171.21, three members of the Board were appointed by the North Carolina Governor and the North Carolina legislature under G.S. 90-171.21(b), and its duties, as set forth in G.S. 90-171.23(b), served a public purpose. *Abbott v. N.C. Bd. of Nursing*, — N.C. App. —, 627 S.E.2d 482, 2006 N.C. App. LEXIS 714 (2006).

**ARTICLE 9D.**

*Nursing Scholars Program.*

**§ 90-171.61. Nursing Scholars Program established; administration.**

(a) There is established the Nursing Scholars Program. The North Carolina Nursing Scholars Commission shall determine selection criteria, methods of selection, and shall select recipients of scholarship loans made under the Nursing Scholars Program.

(b) The Nursing Scholars Program shall be used to provide the following:

- (1) Scholarship loans in amounts of up to six thousand five hundred dollars (\$6,500) per year, for each scholarship of no more than four years per recipient, to North Carolina residents interested in preparing to become registered nurses through associate or baccalaureate degree programs or through diploma programs.

- (2) through (4) Repealed by Session Laws 2006-66, s. 9.9(a), effective July 1, 2006, and applicable to all scholarship loans awarded or renewed on or after that date.
- (5) Scholarship loans of six thousand five hundred dollars (\$6,500) per year, per recipient, for two years of study leading to a master of science in nursing degree for residents already holding a baccalaureate degree in nursing.

In awarding scholarship loans pursuant to subdivisions (1) and (5) of this subsection, the Commission may award pro rata scholarship loans to recipients enrolled at least half-time in study to become registered nurses or to attain a master of science in nursing degree. In awarding all scholarship loans, the Commission shall give priority to full-time students over part-time students. The State Education Assistance Authority shall adopt specific rules to regulate scholarship loans to part-time nursing students.

Within current funds available or with any additional funds provided by the General Assembly for this purpose, the Commission may set aside slots for scholarship loans prescribed by subdivision (1) of this subsection to enable licensed practical nurses to become registered nurses. The State Education Assistance Authority shall adopt specific rules to regulate these scholarship loans.

(b1) If a recipient is awarded a scholarship loan under this program and is enrolled, or accepted for enrollment, in a baccalaureate nursing program, but is unable to pursue the course of study in nursing for a semester due to limited faculty resources at the institution for that semester, then the recipient shall continue to receive the scholarship loan for that semester and shall not be required to forfeit or repay the scholarship loan for that semester provided that the recipient remains otherwise eligible for the program. This waiver shall be valid for only one semester of study and may extend a recipient's eligibility for funding under the program by no more than one semester.

(c) The Commission shall adopt stringent standards, which may include minimum grade point average, scholastic aptitude test scores, and other standards deemed appropriate by the Commission, to ensure that only the best potential students receive and retain loans under the Nursing Scholars Program. Standards adopted by the Commission shall include provisions for ensuring that the qualifications of applicants who are or would be nontraditional students are considered fairly in providing them with opportunities to compete for the loans. Loans under the Nursing Scholars Program shall be awarded only to applicants who meet the standards set by the Commission and who agree to practice nursing in North Carolina upon completion of the nursing education program supported by the loan.

(d) The Commission shall develop and administer the Nursing Scholars Program in cooperation with nursing schools at institutions approved by the Commission and the North Carolina Board of Nursing. The Nursing Scholars Program shall provide for participants to be exposed to a range of extracurricular activities while in school, which activities shall be aimed at instilling in students a strong motivation to remain in the practice of nursing and to provide leadership for the nursing profession.

(e) The Commission may form regional review committees within North Carolina to assist it in identifying the best high school seniors and other applicants for the program. The Commission and the review committees shall make an effort to identify and encourage minority students and students who may not otherwise consider a career in nursing to apply for the Nursing Scholars Program.

(f) Upon the naming of recipients of loans from the Nursing Scholars Program, the Commission shall inform the State Education Assistance Authority (SEAA) of its decisions. The SEAA shall perform all of the administrative



functions necessary to implement this Article, which functions shall include: rule-making, dissemination of information to the public, distribution and receipt of applications for scholarship loans, and the functions necessary for the execution, payment, and enforcement of promissory notes required under this Article. (1989, c. 594, s. 1; 1991, c. 550, s. 1; 1993 (Reg. Sess., 1994), c. 769, s. 17.11(a); 1997-214, s. 1; 2005-276, s. 9.33; 2006-66, s. 9.9(a).)

**Editor's Note. —**

Session Laws 2006-66, s. 1.2, provides: "This act shall be known as 'The Current Operations and Capital Improvements Appropriations Act of 2006'."

Session Laws 2006-66, s. 28.6 is a severability clause.

**Effect of Amendments. —**

Session Laws 2006-66, s. 9.9(a), effective

July 1, 2006, rewrote subsection (b); inserted "and retain" preceding "loans under the Nursing Scholars Program" in the first sentence of subsection (c); and inserted "within North Carolina" following "regional review committees" in the first sentence of subsection (e).

## ARTICLE 9H.

### *Graduate Nurse Scholarship Program for Faculty Production.*

#### **§ 90-171.100. Graduate Nurse Scholarship Program for Faculty Production established; administration.**

(a) There is established the Graduate Nurse Scholarship Program for Faculty Production. The North Carolina Nursing Scholars Commission shall determine selection criteria, methods of selection, and shall select recipients of scholarship loans made under the Graduate Nurse Scholarship Program for Faculty Production.

(b) The Graduate Nurse Scholarship Program for Faculty Production shall be used to provide the following:

- (1) A scholarship loan for up to two years in the amount of fifteen thousand dollars (\$15,000) per year, per recipient, to students enrolled in a masters degree program in nursing education or any other area of the nursing field that would permit them to become a nursing instructor at a North Carolina community college or university.
- (2) A scholarship loan for up to three years in the amount of fifteen thousand dollars (\$15,000) per year, per recipient, to students enrolled in a doctoral degree program in nursing education or any other area of the nursing field that would permit them to become a nursing instructor at a North Carolina community college or university.

The State Education Assistance Authority shall adopt specific rules to regulate these scholarship loans.

(c) If a recipient is awarded a scholarship loan under this program and is enrolled, or accepted for enrollment, in an eligible program, but is unable to pursue the course of study in nursing for a semester due to limited faculty resources at the institution for that semester, then the recipient shall continue to receive the scholarship loan for that semester and shall not be required to forfeit or repay the scholarship loan for that semester, provided that the recipient remains otherwise eligible for the program. This waiver shall be valid for only one semester of study and may extend a recipient's eligibility for funding under the program by no more than one semester.

(d) The Commission shall adopt stringent standards, which may include minimum grade point average, scholastic aptitude test scores, and other standards deemed appropriate by the Commission, to ensure that only the best potential students receive loans under the Graduate Nurse Scholarship



Program for Faculty Production. Standards adopted by the Commission shall include provisions for ensuring that the qualifications of applicants who are or would be nontraditional students are considered fairly in providing them with opportunities to compete for the loans. Loans under the Graduate Nurse Scholarship Program for Faculty Production shall be awarded only to applicants who meet the standards set by the Commission and who agree to teach in a North Carolina public or private nursing program upon completion of the nursing education program supported by the loan.

(e) The Commission shall develop and administer the Graduate Nurse Scholarship Program for Faculty Production in cooperation with nursing schools at institutions approved by the Commission and the North Carolina Board of Nursing. The Graduate Nurse Scholarship Program for Faculty Production shall provide for participants to be exposed to a range of extracurricular activities while in school, which activities shall be aimed at instilling in students a strong motivation to remain in the practice of nursing education and to provide leadership for the nursing profession.

(f) The Commission shall make an effort to identify and encourage minority students and students who may not otherwise consider a career in nursing to apply for the Graduate Nurse Scholarship Program for Faculty Production.

(g) Upon the naming of recipients of loans from the Graduate Nurse Scholarship Program for Faculty Production, the Commission shall inform the State Education Assistance Authority (SEAA) of its decisions. The SEAA shall perform all of the administrative functions necessary to implement this Article, which functions shall include: rulemaking, dissemination of information to the public, distribution and receipt of applications for scholarship loans, and the functions necessary for the execution, payment, and enforcement of promissory notes required under this Article. (2006-66, s. 9.6.)

**Editor’s Note.** — Session Laws 2006-66, s. 28.7, made this Article effective July 1, 2006.

Session Laws 2006-66, s. 1.2, provides: “This act shall be known as ‘The Current Operations and Capital Improvements Appropriations Act of 2006’.”

Session Laws 2006-66, s. 9.6, enacted this section as G.S. 90-171.95; it was recodified as G.S. 90-171.100 at the direction of the Revisor of Statutes.

Session Laws 2006-66, s. 28.6 is a severability clause.

**§ 90-171.101. Terms of loans; receipt and disbursement of funds.**

(a) All scholarship loans shall be evidenced by notes made payable to the State Education Assistance Authority that bear interest at the rate of ten percent (10%) per year beginning 90 days after completion of the nursing education program, or 90 days after termination of the scholarship loan, whichever is earlier. The scholarship loan may be terminated upon the recipient’s withdrawal from school or by the recipient’s failure to meet the standards set by the Commission.

(b) The State Education Assistance Authority shall forgive the loan if, within seven years after graduation from a nursing education program, the recipient teaches in a public or private nursing education program in a public or private educational institution in North Carolina for one year for every year a scholarship loan was provided. If the recipient repays the scholarship loan by cash payments, all indebtedness shall be repaid within 10 years. The Authority may provide for accelerated repayment and for less than full-time employment options to encourage the practice of nursing education in either geographic or nursing specialty shortage areas. The Authority shall adopt specific rules to designate these geographic areas and these nursing specialty shortage areas, upon recommendations of the North Carolina Center for Nursing. The North Carolina Center for Nursing shall base its recommendations on objective

information provided by interested groups or agencies and upon objective information collected by the Center. The Authority may forgive the scholarship loan if it determines that it is impossible for the recipient to teach in a public or private nursing program in North Carolina for a sufficient time to repay the loan because of the death or permanent disability of the recipient within 10 years following graduation or termination of enrollment in a nursing education program.

(c) All funds appropriated to or otherwise received by the Graduate Nurse Scholarship Program for Faculty Production for scholarships, all funds received as repayment of scholarship loans, and all interest earned on these funds shall be placed in a revolving fund. This revolving fund may be used only for scholarship loans granted under the Graduate Nurse Scholarship Program for Faculty Production. (2006-66, s. 9.6.)

**Editor's Note.** — Session Laws 2006-66, s. 9.6, enacted this section as G.S. 90-171.96; it was recodified as G.S. 90-171.101 at the direction of the Revisor of Statutes.

## ARTICLE 16.

### *Dental Hygiene Act.*

#### **§ 90-223. Powers and duties of Board.**

- (a) The Board is authorized and empowered to:
  - (1) Conduct examinations for licensure,
  - (2) Issue licenses and provisional licenses,
  - (3) Issue annual renewal certificates,
  - (4) Renew expired licenses, and
  - (5) Contract with a regional or national testing agency to conduct clinical examinations. Prior to entering a contract with a regional or national testing agency, the Board shall evaluate the agency based on the following criteria:
    - a. The number of states that recognize the results of the testing agency's examination.
    - b. The cost to the applicant of the examination.
    - c. How long the testing agency has been conducting examinations.
    - d. Whether the examination includes procedures performed on human subjects as part of the assessment of clinical competencies.
- (b) The Board shall have the authority to make or amend rules and regulations not inconsistent with this Article governing the practice of dental hygiene and the granting, revocation and suspension of licenses and provisional licenses of dental hygienists.
  - (1) Any rule adopted under this Article shall be distributed to all licensed dentists and all licensed dental hygienists within 30 days of final approval by the Board.
  - (2) The Board shall issue every two years a compilation or supplement of the Dental Hygiene Act and the Board rules and regulations, and, upon written request therefor, a directory of dental hygienists to each licensed dentist and dental hygienist.
- (c) The Board shall keep on file in its office at all times a complete record of the names, addresses, license numbers and renewal certificate numbers of all persons entitled to practice dental hygiene in this State.
- (d) The Board shall, in addition to any other requirements for Board approval of a school or program of dental hygiene for purposes of this Article, require that any school or program in North Carolina develop and implement



a procedure for advanced placement of potentially qualified persons. This procedure shall be designed to encourage and allow credit for any person who has attained special capabilities in dental work through military service, on-the-job training or working experience, or other means not otherwise qualifying the person to be immediately eligible for licensure. The procedure shall include these elements: public announcement of the procedure, a method for persons who have special capabilities through training or experience to make application to the school or program for advanced placement, personal counseling on obtaining advanced placement, administration of specially prepared written and clinical examinations for all parts of the curriculum otherwise required for graduation, exemption from course requirements when results of the examinations so indicate, and appropriate modification of curriculum requirements, when necessary, to facilitate individual advancement in education programs. The procedure for advanced placement shall not be approved by the Board unless it is fairly designed to facilitate the substitution of military or civilian training and experience for regular curricula, taking into account that the special nature of military and certain civilian training and experience may be equivalent without necessarily being identical to the courses of the school or program.

(e) The Board shall have the authority to provide for programs for impaired dental hygienists as authorized in G.S. 90-48.3. (1945, c. 639, s. 3; 1971, c. 756, s. 2; 1973, c. 871, s. 2; 1979, 2nd Sess., c. 1195, s. 14; 1987, c. 827, s. 1; 1999-382, s. 2; 2000-189, s. 7; 2006-235, s. 1.)

**Editor's Note.** — Session Laws 2006-235, ss. 4, 5, provide: "The North Carolina State Board of Dental Examiners shall continue to conduct clinical examinations for applicants seeking a license to practice dental hygiene until at least September 30, 2007. No applicant for a dental hygiene license shall be required to take a Board-approved regional or national independent third-party clinical examination prior to September 30, 2007."

"Notwithstanding any provision to the contrary, the North Carolina State Board of Dental Examiners may accept any application for the dental hygiene clinical examination to be conducted on June 8, 2006, if the application was received on or before March 31, 2006."

**Effect of Amendments.** — Session Laws 2006-235, s. 1, effective July 1, 2006, added paragraph (a)(5) and made related minor stylistic and punctuation changes.

## § 90-224. Examination.

(a) The applicant for licensure must be of good moral character, have graduated from an accredited high school or hold a high school equivalency certificate duly issued by a governmental agency or unit authorized to issue the same, and be a graduate of a program of dental hygiene in a school or college approved by the Board.

(b) The Board shall have the authority to establish in its rules and regulations:

- (1) The form of application;
- (2) The time and place of examination;
- (3) The type of examination;
- (4) The qualifications for passing the examination.

(b1) The Board also may grant a license to an applicant who is found to have passed an examination given by a Board-approved regional or national dental hygiene testing agency, provided that the Board deems the regional or national examination to be substantially equivalent to or an improvement upon the examination given by the Board, and the applicant meets the other qualifications set forth in this Article.

(c) The Department of Justice may provide a criminal record check to the Board for a person who has applied for a new or renewal license through the Board. The Board shall provide to the Department of Justice, along with the



request, the fingerprints of the applicant, any additional information required by the Department of Justice, and a form signed by the applicant consenting to the check of the criminal record and to the use of the fingerprints and other identifying information required by the State or national repositories. The applicant's fingerprints shall be forwarded to the State Bureau of Investigation for a search of the State's criminal history record file, and the State Bureau of Investigation shall forward a set of the fingerprints to the Federal Bureau of Investigation for a national criminal history check. The Board shall keep all information pursuant to this subsection privileged, in accordance with applicable State law and federal guidelines, and the information shall be confidential and shall not be a public record under Chapter 132 of the General Statutes.

The Department of Justice may charge each applicant a fee for conducting the checks of criminal history records authorized by this subsection. (1945, c. 639, s. 4; 1971, c. 756, s. 3; 2002-147, s. 10; 2006-235, s. 2.)

**Editor's Note. —**

Session Laws 2006-235, ss. 4, 5, provide: "The North Carolina State Board of Dental Examiners shall continue to conduct clinical examinations for applicants seeking a license to practice dental hygiene until at least September 30, 2007. No applicant for a dental hygiene license shall be required to take a Board-approved regional or national independent third-party clinical examination prior to September 30, 2007.

"Notwithstanding any provision to the contrary, the North Carolina State Board of Dental Examiners may accept any application for the dental hygiene clinical examination to be conducted on June 8, 2006, if the application was received on or before March 31, 2006."

**Effect of Amendments.** — Session Laws 2006-235, s. 2, effective July 1, 2006, added subsection (b1).

**§ 90-232. Fees.**

(a) In order to provide the means of carrying out and enforcing the provisions of this Article and the duties devolving upon the North Carolina State Board of Dental Examiners, it is authorized to charge and collect fees established by its rules not exceeding the following:

- (1) Each applicant for examination..... \$350.00
- (2) Each renewal certificate, which fee shall be annually fixed by the Board and not later than November 30 of each year it shall give written notice of the amount of the renewal fee to each dental hygienist licensed to practice in this State by mailing such notice to the last address of record with the Board of each such dental hygienist..... 250.00
- (3) Each restoration of license..... 150.00
- (4) Each provisional license..... 150.00
- (5) Each certificate of license to a resident dental hygienist desiring to change to another state or territory..... 50.00
- (6) Annual fee to be paid upon license renewal to assist in funding programs for impaired dental hygienists..... 80.00
- (7) Each license by credentials..... 1,500.

(b) In all instances where the Board uses the services of a regional or national testing agency for preparation, administration, or grading of examinations, the Board may require applicants to pay the actual cost of the testing agency in lieu of the fee authorized in subdivision (a)(1) of this section.

(c) In no event may the annual fee imposed on dental hygienists to fund the impaired dental hygienists program exceed the annual fee imposed on dentists to fund the impaired dentist program. All fees shall be payable in advance to the Board and shall be disposed of by the Board in the discharge of its duties under this Article. (1945, c. 639, s. 11; 1965, c. 163, s. 7; 1967, c. 489, s. 2; 1971, c. 756, s. 12; 1987, c. 555, s. 2; 1999-382, s. 3; 2002-37, s. 6; 2003-348, s. 2; 2006-235, s. 3.)

**Editor's Note.** — Session Laws 2006-235, ss. 4, 5, provide: "The North Carolina State Board of Dental Examiners shall continue to conduct clinical examinations for applicants seeking a license to practice dental hygiene until at least September 30, 2007. No applicant for a dental hygiene license shall be required to take a Board-approved regional or national independent third-party clinical examination prior to September 30, 2007.

"Notwithstanding any provision to the con-

trary, the North Carolina State Board of Dental Examiners may accept any application for the dental hygiene clinical examination to be conducted on June 8, 2006, if the application was received on or before March 31, 2006."

**Effect of Amendments.** — Session Laws 2006-235, s. 3, effective July 1, 2006, designated the formerly undesignated first paragraph as subsection (a), added subsection (b), and designated the formerly undesignated second paragraph as subsection (c).

## ARTICLE 18A.

### *Psychology Practice Act.*

#### § 90-270.1. Title; purpose.

##### CASE NOTES

**Psychology Board's Authority Over a Professional Counseling Practice.** — North Carolina Psychology Board could not place a psychological associate's license on probation under G.S. 90-270.4(g) because the psychological assistant, who maintained both a psychological associate's practice and a licensed professional counselor's practice, could continue his licensed professional counselor's practice with-

out interference from the Psychology Board, pursuant to G.S. 90-332.1(c), as long as he remained a qualified licensed professional counselor and did not promote that practice by holding himself out as a licensed psychological associate. *Trayford v. N.C. Psychology Bd.*, 174 N.C. App. 118, 619 S.E.2d 862, 2005 N.C. App. LEXIS 2286 (2005).

#### § 90-270.4. Exemptions to this Article.

(a) Nothing in this Article shall be construed to prevent the teaching of psychology, the conduct of psychological research, or the provision of psychological services or consultation to organizations or institutions, provided that such teaching, research, service, or consultation does not involve the delivery or supervision of direct psychological services to individuals or groups of individuals who are themselves, rather than a third party, the intended beneficiaries of such services, without regard to the source or extent of payment for services rendered. Nothing in this Article shall prevent the provision of expert testimony by psychologists who are otherwise exempted by this act. Persons holding an earned master's, specialist, or doctoral degree in psychology from an institution of higher education may use the title "psychologist" in activities permitted by this subsection.

(b) Nothing in this Article shall be construed as limiting the activities, services, and use of official titles on the part of any person in the regular employ of the State of North Carolina or whose employment is included under the State Personnel Act who has served in a position of employment involving the practice of psychology as defined in this Article, provided that the person was serving in this capacity on December 31, 1979.

(c) Persons certified by the State Board of Education as school psychologists and serving as regular salaried employees of the Department of Public Instruction or local boards of education are not required to be licensed under this Article in order to perform the duties for which they serve the Department of Public Instruction or local boards of education, and nothing in this Article shall be construed as limiting their activities, services, or titles while performing those duties for which they serve the Department of Public Instruction or



local boards of education. If a person certified by the State Board of Education as a school psychologist and serving as a regular salaried employee of the Department of Public Instruction or a local board of education is or becomes a licensed psychologist under this Article, he or she shall be required to comply with all conditions, requirements, and obligations imposed by statute or by Board rules upon all other licensed psychologists as a condition to retaining that license. Other provisions of this Article notwithstanding, if a person certified by the State Board of Education as a school psychologist and serving as a regular salaried employee of the Department of Public Instruction or a local board of education is or becomes a licensed psychological associate under this Article, he or she shall not be required to comply with the supervision requirements otherwise applicable to licensed psychological associates by Board rules or by this Article in the course of his or her regular salaried employment with the Department of Public Instruction or a local board of education, but he or she shall be required to comply with all other conditions, requirements, and obligations imposed by statute or a local board of education or by Board rules upon all other licensed psychological associates as a condition to retaining that license.

(d) Nothing in this Article shall be construed as limiting the activities, services, and use of title designating training status of a student, intern, fellow, or other trainee preparing for the practice of psychology under the supervision and responsibility of a qualified psychologist in an institution of higher education or service facility, provided that such activities and services constitute a part of his or her course of study as a matriculated graduate student in psychology. For individuals pursuing postdoctoral training or experience in psychology, nothing shall limit the use of a title designating training status, but the Board may develop rules defining qualified supervision, disclosure of supervisory relationships, frequency of supervision, settings to which trainees may be assigned, activities in which trainees may engage, qualifications for trainee status, nature of responsibility assumed by the supervisor, and the structure, content, and organization of postdoctoral experience.

(e) Nothing in this Article shall be construed to prevent qualified members of other professional groups licensed or certified under the laws of this State from rendering services within the scope of practice, as defined in the statutes regulating those professional practices, provided they do not hold themselves out to the public by any title or description stating or implying that they are psychologists or are licensed, certified, or registered to practice psychology.

(f) Nothing in this Article is to be construed as prohibiting a psychologist who is not a resident of North Carolina who holds an earned doctoral, master's, or specialist degree in psychology from an institution of higher education, and who is licensed or certified only in another jurisdiction, from engaging in the practice of psychology, including the provision of health services, in this State for up to five days in any calendar year. All such psychologists shall comply with supervision requirements established by the Board, and shall notify the Board in writing of their intent to practice in North Carolina, prior to the provision of any services in this State. The Board shall adopt rules implementing and defining this provision.

(g) Except as otherwise provided in this Article, if a person exempt from the provisions of this Article and not required to be licensed under this Article is or becomes licensed under this Article, he or she shall be required to comply with all conditions, requirements, and obligations imposed by Board rules or by statute upon all other psychologists licensed under this Article.

(h) A licensee whose license is suspended or revoked pursuant to the provisions of G.S. 90-270.15, or an applicant who is notified that he or she has failed an examination for the second time, as specified in G.S. 90-270.5(b), or an applicant who is notified that licensure is denied pursuant to G.S. 90-270.11



or G.S. 90-270.15, or an applicant who discontinues the application process at any point must terminate the practice of psychology, in accordance with the duly adopted rules of the Board. (1967, c. 910, s. 4; 1977, c. 670, s. 3; 1979, c. 670, ss. 3, 4; c. 1005, s. 1; 1981, c. 654, ss. 1, 2; 1983, c. 82, s. 5; 1985, c. 734, ss. 1-3; 1993, c. 375, s. 1; 1995, c. 509, s. 44; 2006-175, s. 1.)

**Effect of Amendments.** — Session Laws 2006-175, s. 1, effective August 1, 2006, substituted “licensed or certified under the laws of this State from rendering services within the scope of practice, as defined in the statutes

regulating those professional practices” for “from rendering services consistent with their professional training and code of ethics” in the middle of subsection (e).

#### CASE NOTES

**Psychology Board’s Authority Over a Professional Counseling Practice.** — North Carolina Psychology Board could not place a psychological associate’s license on probation under G.S. 90-270.4(g) because the psychological assistant, who maintained both a psychological associate’s practice and a licensed professional counselor’s practice, could continue his licensed professional counselor’s practice with-

out interference from the Psychology Board, pursuant to G.S. 90-332.1(c), as long as he remained a qualified licensed professional counselor and did not promote that practice by holding himself out as a licensed psychological associate. *Trayford v. N.C. Psychology Bd.*, 174 N.C. App. 118, 619 S.E.2d 862, 2005 N.C. App. LEXIS 2286 (2005).

### § 90-270.6. Psychology Board; appointment; term of office; composition.

#### CASE NOTES

**Psychology Board’s Authority Over a Professional Counseling Practice.** — North Carolina Psychology Board could not place a psychological associate’s license on probation under G.S. 90-270.4(g) because the psychological assistant, who maintained both a psychological associate’s practice and a licensed professional counselor’s practice, could continue his licensed professional counselor’s practice with-

out interference from the Psychology Board, pursuant to G.S. 90-332.1(c), as long as he remained a qualified licensed professional counselor and did not promote that practice by holding himself out as a licensed psychological associate. *Trayford v. N.C. Psychology Bd.*, 174 N.C. App. 118, 619 S.E.2d 862, 2005 N.C. App. LEXIS 2286 (2005).

### § 90-270.22. Criminal history record checks of applicants for licensure and licensees.

(a) The Board may request that an applicant for licensure or reinstatement of a license or that a licensed psychologist or psychological associate currently under investigation by the Board for allegedly violating this Article consent to a criminal history record check. Refusal to consent to a criminal history record check may constitute grounds for the Board to deny licensure or reinstatement of a license to an applicant or take disciplinary action against a licensee, including revocation of a license. The Board shall be responsible for providing to the North Carolina Department of Justice the fingerprints of the applicant or licensee to be checked, a form signed by the applicant or licensee consenting to the criminal record check and the use of fingerprints and other identifying information required by the State or National Repositories, and any additional information required by the Department of Justice. The Board shall keep all information obtained pursuant to this section confidential.

The Board shall collect any fees required by the Department of Justice and shall remit the fees to the Department of Justice for the cost of conducting the criminal history record check.

(b) Limited Immunity. — The Board, its officers and employees, acting reasonably and in compliance with this section, shall be immune from civil liability for denying licensure or reinstatement of a license to an applicant or the revocation of a license or other discipline of a licensee based on information provided in the applicant's or licensee's criminal history record check. (2006-175, s. 2.)

**Editor's Note.** — Session Laws 2006-175, s. 4, made this section effective August 1, 2006.

## ARTICLE 18B.

### *Physical Therapy.*

#### § 90-270.26. Powers of the Board.

The Board shall have the following general powers and duties:

- (1) Examine and determine the qualifications and fitness of applicants for a license to practice physical therapy in this State;
- (2) Issue, renew, deny, suspend, or revoke licenses to practice physical therapy in this State, or reprimand or otherwise discipline licensed physical therapists and physical therapist assistants;
- (3) Conduct investigations for the purpose of determining whether violations of this Article or grounds for disciplining licensed physical therapists or physical therapist assistants exist;
- (3a) Establish mechanisms for assessing the continuing competence of licensed physical therapists or physical therapist assistants to engage in the practice of physical therapy, including approving rules requiring licensees to periodically, or in response to complaints or incident reports, submit to the Board: (i) evidence of continuing education experiences; (ii) evidence of minimum standard accomplishments; or (iii) evidence of compliance with other Board-approved measures, audits, or evaluations; and specify remedial actions if necessary or desirable to obtain license renewal or reinstatement;
- (4) Employ such professional, clerical or special personnel necessary to carry out the provisions of this Article, and may purchase or rent necessary office space, equipment and supplies;
- (5) Conduct administrative hearings in accordance with Chapter 150B of the General Statutes when a "contested case" as defined in G.S. 150B-2(2) arises under this Article;
- (6) Appoint from its own membership one or more members to act as representatives of the Board at any meeting where such representation is deemed desirable;
- (7) Establish reasonable fees for applications for examination, certificates of licensure and renewal, and other services provided by the Board;
- (8) Adopt, amend, or repeal any rules or regulations necessary to carry out the purposes of this Article and the duties and responsibilities of the Board.

The powers and duties enumerated above are granted for the purpose of enabling the Board to safeguard the public health, safety and welfare against unqualified or incompetent practitioners of physical therapy, and are to be liberally construed to accomplish this objective. In instances where the Board makes a decision to discipline physical therapists or physical therapist



assistants under powers set out by any of subsections (2) through (5) of this section, it may as part of its decision charge the reasonable costs of investigation and hearing to the person disciplined. (1979, c. 487; 1985, c. 701, s. 1; 1987, c. 827, ss. 1, 77; 2006-144, s. 1.)

**Effect of Amendments.** — Session Laws 2006-144, s. 1, effective July 19, 2006, added subdivision (3a).

## § 90-270.32. Renewal of license; lapse; revival.

(a) Every licensed physical therapist or physical therapist assistant shall, during the month of January of every year, apply to the Board for a renewal of licensure and pay to the secretary-treasurer the prescribed fee. Licenses that are not so renewed shall automatically lapse. The Board may decline to renew licenses of physical therapists or physical therapist assistants for failure to comply with any required continuing competency measures.

(b) The manner in which lapsed licenses shall be revived, reinstated, or extended shall be established by the Board in its discretion. (1951, c. 1131, s. 7; 1959, c. 630; 1969, c. 556; 1979, c. 487; 1985, c. 701, s. 1; 2006-144, s. 2.)

**Effect of Amendments.** — Session Laws 2006-144, s. 2, effective July 19, 2006, added the last sentence in subsection (a); and substi-

tuted “revived, reinstated, or extended” for “revived or extended” in subsection (b).

## ARTICLE 18D.

### *Occupational Therapy.*

## § 90-270.67. Definitions.

As used in this Article, unless the context clearly requires a different meaning:

- (1) Accrediting body. — The Accrediting Council for Occupational Therapy Education.
- (1a) Board. — The North Carolina Board of Occupational Therapy.
- (1b) Examining body. — The National Board for Certification in Occupational Therapy.
- (2) Occupational therapist. — An individual licensed in good standing to practice occupational therapy as defined in this Article.
- (3) Occupational therapy assistant. — An individual licensed in good standing to assist in the practice of occupational therapy under this Article, who performs activities commensurate with his or her education and training under the supervision of a licensed occupational therapist.
- (4) Occupational therapy. — A health care profession providing evaluation, treatment and consultation to help individuals achieve a maximum level of independence by developing skills and abilities interfered with by disease, emotional disorder, physical injury, the aging process, or impaired development. Occupational therapists use purposeful activities and specially designed orthotic and prosthetic devices to reduce specific impairments and to help individuals achieve independence at home and in the work place.
- (5) Person. — Any individual, partnership, unincorporated organization, or corporate body, except that only an individual may be licensed under this Article. (1983 Reg. Sess., 1984), c. 1073, s. 1; 1989, c. 256, s. 1; c. 770, s. 46; 2005-432, s. 2; 2006-226, s. 18.)



**Effect of Amendments. —**

Session Laws 2006-226, s. 18, effective August 10, 2006, substituted “Occupational ther-

apy. —” for “Occupational therapy means a”, and made a punctuation change at the beginning of subdivision (4).

## ARTICLE 19.

*Sterilization Operations.*

**§ 90-275. Article does not affect duty of guardian to obtain order permitting guardian to consent to sterilization of a mentally ill or mentally retarded ward.**

## CASE NOTES

**Cited** in Trayford v. N.C. Psychology Bd., 174 N.C. App. 118, 619 S.E.2d 862, 2005 N.C. App. LEXIS 2286 (2005).

## ARTICLE 24.

*Licensed Professional Counselors Act.*

**§ 90-330. Definitions; practice of marriage and family therapy.**

## CASE NOTES

**Cited** in Trayford v. N.C. Psychology Bd., 174 N.C. App. 118, 619 S.E.2d 862, 2005 N.C. App. LEXIS 2286 (2005).

**§ 90-332.1. Exemptions from licensure.**

## CASE NOTES

**Psychology Board's Authority Over a Professional Counseling Practice.** — North Carolina Psychology Board could not place a psychological associate's license on probation under G.S. 90-270.4(g) because the psychological assistant, who maintained both a psychological associate's practice and a licensed professional counselor's practice, could continue his licensed professional counselor's practice with-

out interference from the Psychology Board, pursuant to G.S. 90-332.1(c), as long as he remained a qualified licensed professional counselor and did not promote that practice by holding himself out as a licensed psychological associate. Trayford v. N.C. Psychology Bd., 174 N.C. App. 118, 619 S.E.2d 862, 2005 N.C. App. LEXIS 2286 (2005).

**§ 90-333. North Carolina Board of Licensed Professional Counselors; appointments; terms; composition.**

## CASE NOTES

**Cited** in Trayford v. N.C. Psychology Bd., 174 N.C. App. 118, 619 S.E.2d 862, 2005 N.C. App. LEXIS 2286 (2005).

ARTICLE 28.

*Self-Referrals by Health Care Providers.*

§ 90-405. Definitions.

CASE NOTES

**Cited** in Jacobs v. Physicians Weight Loss Ctr. of Am., Inc., 173 N.C. App. 663, 620 S.E.2d 232, 2005 N.C. App. LEXIS 2280 (2005).

§ 90-406. Self-referrals prohibited.

CASE NOTES

**Private Right of Action.** — There is no private right of action for violations of G.S. 90-406. Jacobs v. Physicians Weight Loss Ctr. of Am., Inc., 173 N.C. App. 663, 620 S.E.2d 232, 2005 N.C. App. LEXIS 2280 (2005).

§ 90-407. Disciplinary action and penalties.

CASE NOTES

**Cited** in Jacobs v. Physicians Weight Loss Ctr. of Am., Inc., 173 N.C. App. 663, 620 S.E.2d 232, 2005 N.C. App. LEXIS 2280 (2005).

## Chapter 90A.

### Sanitarians and Water and Wastewater Treatment Facility Operators.

#### Article 5.

##### Certification of On-Site Wastewater Contractors and Inspectors.

Sec.

90A-70. Purpose.

90A-71. Definitions.

90A-72. (Effective January 1, 2008) Certification required; applicability.

90A-73. Creation and membership of the Board.

Sec.

90A-74. Powers and duties of the Board.

90A-75. Expenses and fees.

90A-76. On-Site Wastewater Certification Fund.

90A-77. Certification requirements.

90A-78. Certification renewal.

90A-79. (Effective January 1, 2008) Continuing education.

90A-80. Investigation of complaints.

90A-81. (Effective January 1, 2008) Remedies.

#### ARTICLE 5.

##### *Certification of On-Site Wastewater Contractors and Inspectors.*

#### § 90A-70. Purpose.

It is the purpose of this Article to protect the environment and public health, safety, and welfare by ensuring the integrity and competence of on-site wastewater contractors and inspectors; to require the examination of on-site wastewater contractors and inspectors and the certification of their competency to supervise or conduct the construction, installation, repair, or inspection of on-site wastewater systems; to establish minimum standards for ethical conduct, responsibility, training, experience, and continuing education for on-site wastewater system contractors and inspectors; and to provide appropriate enforcement procedures for rules adopted by the North Carolina On-Site Wastewater Contractors and Inspectors Certification Board. (2006-82, s. 1.)

**Editor's Note.** — Session Laws 2006-82, s. 3, made this Article effective July 10, 2006, except that G.S. 90A-72, 90A-79, and 90A-81 become effective January 1, 2008.

#### § 90A-71. Definitions.

The following definitions apply in this Article:

- (1) "Board" means the North Carolina On-Site Wastewater Contractors and Inspectors Certification Board.
- (2) "Contractor" means a person who constructs, installs, or repairs, or offers to construct, install, or repair an on-site wastewater system in the State.
- (3) "Conventional wastewater system" has the same meaning as in G.S. 130A-343(a)(3).
- (4) "Department" means the Department of Environment and Natural Resources.
- (5) "Inspector" means a person who conducts an inspection of an on-site wastewater system at any time after the local health department has issued an operation permit pursuant to G.S. 130A-337.
- (6) "On-site wastewater system" means any wastewater system permitted under the provisions of Article 11 of Chapter 130A of the General Statutes that does not discharge to a treatment facility or the surface waters of the State.



- (7) “Person” means all persons, including individuals, firms, partnerships, associations, public or private institutions, municipalities, or political subdivisions, governmental agencies, or private or public corporations organized and existing under the laws of this State or any other state or country. (2006-82, s. 1.)

### **§ 90A-72. (Effective January 1, 2008) Certification required; applicability.**

(a) **Certification Required.** — No person shall construct, install, or repair or offer to construct, install, or repair an on-site wastewater system in the State without being certified as a contractor at the required level of certification for the specified system. No person shall conduct an inspection or offer to conduct an inspection of an on-site wastewater system without being certified as an inspector at the required level of certification for the specified system.

(b) **Applicability.** — This Article does not apply to the following:

- (1) A person who is employed by, or performs labor and services for, a certified contractor or inspector in connection with the construction, installation, repair, or inspection of an on-site wastewater system performed under the direct and personal supervision of the certified contractor or inspector.
- (2) A person who constructs, installs, or repairs an on-site wastewater system described as a single septic tank with a gravity-fed distribution system when located on land owned by that person and that is intended solely for use by that person and members of that person’s immediate family.
- (3) A person licensed under Article 1 of Chapter 87 of the General Statutes who constructs or installs an on-site wastewater system ancillary to the building being constructed.
- (4) A person who is certified by the Water Pollution Control System Operators Certification Commission and contracted to provide necessary operation and maintenance on the permitted on-site wastewater system.
- (5) A person permitted under Article 21 of Chapter 143 of the General Statutes who is constructing a water pollution control facility necessary to comply with the terms and conditions of a National Pollutant Discharge Elimination System (NPDES) permit.
- (6) A person licensed under Article 1 of Chapter 87 of the General Statutes as a licensed public utilities contractor who is installing or expanding a wastewater treatment facility, including a collection system, designed by a registered professional engineer.
- (7) A plumbing contractor licensed under Article 2 of Chapter 87 of the General Statutes, so long as the plumber is not performing plumbing work that includes the installation or repair of a septic tank or similar depository, or lines or appurtenances downstream from the point where the house or building sewer lines from the plumbing system meet the septic tank or similar depository. (2006-82, s. 1.)

**Editor’s Note.** — As to delayed effective date, see the editor’s note at G.S. 90A-70.

### **§ 90A-73. Creation and membership of the Board.**

(a) **Creation and Appointments.** — There is created the North Carolina On-Site Wastewater Contractors and Inspectors Certification Board. The Board shall consist of nine members appointed to three-year terms as follows:

- (1) One member appointed by the Governor who, at the time of appointment, is engaged in the construction, installation, repair, or inspection of on-site wastewater systems, to a term that expires on 1 July of years that precede by one year those years that are evenly divisible by three.
- (2) One member appointed by the Governor who, at the time of appointment, is a certified water treatment facility operator pursuant to Article 2 of Chapter 90A of the General Statutes, to a term that expires on 1 July of years evenly divisible by three.
- (3) One member appointed by the Governor who is an employee of the Division of Environmental Health of the Department to a term that expires on 1 July of years that follow by one year those years that are evenly divisible by three.
- (4) One member appointed by the General Assembly upon recommendation of the President Pro Tempore of the Senate who, at the time of appointment, is engaged in the construction, installation, repair, or inspection of on-site wastewater systems, to a term that expires on 1 July of years that follow by one year those years that are evenly divisible by three.
- (5) One member appointed by the General Assembly upon recommendation of the President Pro Tempore of the Senate who, at the time of appointment, is engaged in the business of inspecting on-site wastewater systems, to a term that expires on 1 July of years that precede by one year those years that are evenly divisible by three.
- (6) One member appointed by the General Assembly upon recommendation of the President Pro Tempore of the Senate upon the recommendation of the North Carolina Home Builders Association, to a term that expires on 1 July of years evenly divisible by three.
- (7) One member appointed by the General Assembly upon recommendation of the Speaker of the House of Representatives who, at the time of appointment, is engaged in the construction, installation, repair, or inspection of on-site wastewater systems, to a term that expires on 1 July of years evenly divisible by three.
- (8) One member appointed by the General Assembly upon recommendation of the Speaker of the House of Representatives who, at the time of appointment, is (i) employed as an environmental health specialist, and (ii) engaged primarily in the inspection and permitting of on-site wastewater systems, to a term that expires on 1 July of years that follow by one year those years that are evenly divisible by three.
- (9) One member appointed by the General Assembly upon recommendation of the Speaker of the House of Representatives who, at the time of appointment, is (i) employed by the North Carolina Cooperative Extension Service, and (ii) is knowledgeable in the area of on-site wastewater systems, to a term that expires on 1 July of years that precede by one year those years that are evenly divisible by three.

(b) Vacancies. — An appointment to fill a vacancy on the Commission created by the resignation, dismissal, disability, or death of a member shall be for the balance of the unexpired term. Vacancies in appointments made by the General Assembly shall be filled as provided in G.S. 120-122.

(c) Oath. — Each member of the Board, before entering upon the discharge of the duties of the Board, shall take and file with the Secretary of State an oath in writing to perform properly the duties as a member of the Board and to uphold the Constitution of North Carolina and the Constitution of the United States.

(d) Dual Office Holding. — Service on the Board may be in addition to any other office a person is entitled to hold.



(e) Officers. — The Board shall elect a Chair from among its members. The Chair shall serve from the time of election until 30 June of the following year, or until a successor is elected.

(f) Compensation. — Board members who are State employees shall receive no per diem compensation for serving on the Board but shall be reimbursed for their expenses in accordance with G.S. 138-6. All other Board members shall receive per diem compensation and reimbursement in accordance with the compensation rate established in G.S. 93B-5.

(g) Quorum. — A majority of the members of the Board constitutes a quorum for the transaction of business.

(h) Meetings. — The Board shall meet at least twice each year and may hold special meetings at the call of the Chair or a majority of the members of the Board.

(i) Staff. — The Board may employ staff to carry out the duties of the Board and the provisions of this Article. The Board shall determine the compensation, duties, and other terms and conditions of employment of the staff. (2006-82, s. 1.)

**Editor's Note.** — Session Laws 2006-82, s. 2(a), (b), provides: 'In order to provide for a system of staggered three-year terms for the members of the On-Site Wastewater Contractors and Inspectors Certification Board established by G.S. 90A-73(a), as enacted by Section 1 of this act, the following provisions shall apply:

"(1) The term of the member initially appointed to serve in the position established by G.S. 90A-73(a)(1) shall be three years and shall expire on 1 July 2009.

"(2) The term of the member initially appointed to serve in the position established by G.S. 90A-73(a)(2) shall be four years and shall expire on 1 July 2010.

"(3) The term of the member initially appointed to serve in the position established by G.S. 90A-73(a)(3) shall be five years and shall expire on 1 July 2011.

"(4) The term of the member initially appointed to serve in the position established by G.S. 90A-73(a)(4) shall be five years and shall expire on 1 July 2011.

"(5) The term of the member initially appointed to serve in the position established by

G.S. 90A-73(a)(5) shall be three years and shall expire on 1 July 2009.

"(6) The term of the member initially appointed to serve in the position established by G.S. 90A-73(a)(6) shall be four years and shall expire on 1 July 2010.

"(7) The term of the member initially appointed to serve in the position established by G.S. 90A-73(a)(7) shall be four years and shall expire on 1 July 2010.

"(8) The term of the member initially appointed to serve in the position established by G.S. 90A-73(a)(8) shall be five years and shall expire on 1 July 2011.

"(9) The term of the member initially appointed to serve in the position established by G.S. 90A-73(a)(9) shall be three years and shall expire on 1 July 2009.

"In the event that the General Assembly fails to appoint one or more initial members to the On-Site Wastewater Contractors and Inspectors Certification Board during the 2006 Regular Session, the failure to make an initial appointment shall be treated as though a vacancy had occurred, and the vacancy may be filled by appointment as provided in G.S. 120-122."

## § 90A-74. Powers and duties of the Board.

The Board shall have the following general powers and duties:

- (1) To adopt rules in the manner prescribed by Chapter 150B of the General Statutes to govern its actions and to implement the provisions of this Article.
- (2) To determine the eligibility requirements for persons seeking certification pursuant to this Article.
- (3) To establish grade levels of certifications based on design capacity, complexity, projected costs, and other features of approved on-site wastewater systems.
- (4) To develop and administer examinations for each grade level of certification. The Board may approve applications by recognized associations for certification of its members after a review of the



requirements of the association to ensure that they are equivalent to the requirements of the Board.

- (5) To issue, renew, deny, restrict, suspend, or revoke certifications and to carry out any of the other actions authorized by this Article.
- (6) To establish, publish, and enforce rules of professional conduct of persons who are certified pursuant to this Article.
- (7) To maintain a record of all proceedings and make available to persons certified under this Article, and to other concerned parties, an annual report of all Board action.
- (8) To establish reasonable fees for application, certification, and renewal, and other services provided by the Board.
- (9) To conduct investigations to determine whether violations of this Article or grounds for disciplining persons certified under this Article exist.
- (10) To adopt a common seal containing the name of the Board for use on all certificates and official reports issued by the Board.
- (11) To conduct other services necessary to carry out the purposes of this Article. (2006-82, s. 1.)

### § 90A-75. Expenses and fees.

(a) Expenses. — All salaries, compensation, and expenses incurred or allowed for the purposes of carrying out this Article shall be paid by the Board exclusively out of the funds received by the Board as authorized by this Article. No salary, expense, or other obligations of the Board may be charged against the General Fund of the State. Neither the Board nor any of its members or employees may incur any expense, debt, or financial obligation binding upon the State.

(b) Contributions. — The Board may accept grants, contributions, bequests, and gifts that shall be kept in the same account as the funds deposited in accordance with this Article and other provisions of the law.

(c) Fees. — All fees shall be established in rules adopted by the Board. The Board shall establish fees sufficient to pay the costs of administering this Article, but in no event shall the Board charge a fee at an annual rate in excess of the following:

- |   |           |
|---|-----------|
| (1) Application for basic certification                 | \$150.00  |
| (2) Application for each grade level                    | \$50.00   |
| (3) Certification renewal                               | \$100.00  |
| (4) Reinstatement of revoked or suspended certification | \$500.00  |
| (5) Application for on-site wastewater system inspector | \$200.00. |

(d) Audit. — The Board is subject to the oversight of the State Auditor under Article 5A of Chapter 147 of the General Statutes. (2006-82, s. 1.)

### § 90A-76. On-Site Wastewater Certification Fund.

The On-Site Wastewater Certification Fund is created as a nonreverting account within the Department. All fees collected pursuant to this Article shall be credited to the Fund. The Fund shall be used solely for the costs of administering this Article. (2006-82, s. 1.)

### § 90A-77. Certification requirements.

(a) Certification. — The Board shall issue a certificate of the appropriate grade level to an applicant who satisfies all of the following conditions:

- (1) Is at least 18 years of age.
  - (2) Submits a properly completed application to the Board.
  - (3) If the applicant has prior experience providing on-site wastewater system services, submits affidavits of three persons not related to the applicant for whom the applicant provided on-site wastewater services.
  - (4) If the applicant has no prior experience, completes the basic on-site wastewater education program approved by the Board.
  - (5) Completes any additional training program designed by the Board specific to the grade level for which the applicant is applying.
  - (6) Pays the applicable fees set by the Board for the particular application and grade level.
  - (7) For grade levels greater than conventional systems, passes a written or oral examination that tests the applicant's proficiency in all of the following areas:
    - a. Principles of public and environmental health associated with on-site wastewater systems.
    - b. Principles of construction and safety.
    - c. Technical and practical knowledge of on-site wastewater systems typical to the specified grade level.
    - d. Laws and rules related to the installation, construction, repair, or inspection of the specified on-site wastewater system.
- (b) Location of Examinations. — The Board shall provide a minimum of three examinations each year; one each in the eastern, central, and western regions of the State.
- (c) Approval of Certification Programs. — The Board may issue a certificate at the appropriate grade level to an applicant who has completed an approved training or continuing education program.
- (d) No Degree Required. — An applicant shall not be required to hold or obtain an educational diploma or degree to obtain a certificate. An applicant that meets all the conditions for certification except for passage of the Board examination may take the examination on three successive occasions without having to file for a new application, pay an additional application fee, or repeat any applicable training program. If the applicant fails to pass the Board examination on three successive occasions, the applicant must reapply to the Board, pay an additional application fee, and repeat the training program.
- (e) Certificate. — The certification shall show the full name of the certificate holder. The certificate shall provide a unique identification number and shall be signed by the Chair. Issuance of the certificate by the Board shall be prima facie evidence that the person named therein is entitled to all the rights and privileges of a certified contractor or inspector, at the grade level specified on the certificate, while the certificate remains in effect.
- (f) Replacement Certificate. — A new certificate to replace one lost, destroyed, or mutilated shall be issued subject to rules adopted by the Board and with the payment of a fee set by the Board. The fee for a duplicate or replacement certificate shall not exceed twenty-five dollars (\$25.00). (2006-82, s. 1.)

## § 90A-78. Certification renewal.

(a) Renewal. — All certifications shall expire at intervals determined by the Board unless they are renewed. In no event may the interval determined by the Board be less than one year. To renew a certification, a contractor or inspector must meet all of the following conditions:

- (1) Submit an application for renewal on the form prescribed by the Board.



(2) Meet the continuing education requirements prescribed by the Board.

(3) Pay the certification renewal fee.

(b) Late Fee. — A contractor or inspector with an expired certificate may renew the certification within 90 days of its expiration upon payment of a late fee set by the Board. The late fee shall not exceed twenty-five dollars (\$25.00). If a certification is not renewed within 90 days of its expiration, the certification shall not be renewed, and the holder must apply for a new certificate. (2006-82, s. 1.)

### **§ 90A-79. (Effective January 1, 2008) Continuing education.**

(a) Requirements. — The Board shall require continuing education as a condition of certification and renewal. The Board shall determine the number of hours, based on grade levels applied for, up to a maximum of 12 hours per year, and the subject material for the specified grade level. The Board shall maintain records of continuing education coursework successfully completed by each certified contractor or inspector.

(b) Approval of Continuing Education Programs. — The Board may approve a continuing education program or course if the Board finds that the program or course provides useful educational information or experience that will enhance the construction, installation, repair, or inspection of on-site wastewater systems. The Board may develop and offer continuing education programs. (2006-82, s. 1.)

**Editor's Note.** — As to delayed effective date, see the editor's note at G.S. 90A-70.

### **§ 90A-80. Investigation of complaints.**

(a) Misconduct. — A person may refer to the Board charges of fraud, deceit, negligence, incompetence, or misconduct against any certified contractor or inspector. The charges shall be in writing and sworn to by the complainant and submitted to the Board. These charges, unless dismissed without a hearing by the Board as unfounded or trivial, shall be heard and determined by the Board in accordance with the provisions of Chapter 150B of the General Statutes. An association that receives professional recognition of its own certification process by the Board shall be responsible for the conduct and competency of its members.

(b) Records. — The Board shall establish and maintain detailed records regarding complaints concerning each certified contractor or inspector. The records shall include those certified by recognized associations. The records shall also detail the levels of certification held by each contractor or inspector.

(c) Notification. — The Board shall provide local health departments with notification of changes in certifications, complaints, suspensions, or reinstatements under this Article. (2006-82, s. 1.)

### **§ 90A-81. (Effective January 1, 2008) Remedies.**

(a) Denial, Suspension, and Revocation of Certification. — The Board may deny, suspend, or revoke a certificate under this Article for:

(1) A violation of this Article or a rule of the Board.

(2) The use of fraud or deceit in obtaining or renewing a certificate.

(3) Any act of gross negligence, incompetence, or misconduct in the construction, installation, repair, or inspection of an on-site wastewater system.



(4) Failure to satisfactorily complete continuing education requirements prescribed by the Board.

(b) Arbitration. — The Board may establish a voluntary arbitration procedure to resolve complaints concerning a certified contractor or inspector or any work performed by a certified contractor or inspector, or conflicts involving any certified contractor or inspector and the Division of Environmental Health of the Department or a local health department.

(c) Injunction. — The Board may ask the Attorney General to seek an injunction to restrain any person, firm, partnership, or corporation from violating the provisions of this Article or rules adopted by the Board. The Attorney General may bring an action for an injunction in the name of the State in the superior court of any county in which the violator resides or the violator's principal place of business is located. In any proceedings for an injunction, it shall not be necessary to allege or prove either that an adequate remedy at law does not exist, or that substantial or irreparable damage would result from the continued violation. Members of the Board shall not be personally or professionally liable for any act or omission pursuant to this subsection. The Board shall not be required to post a bond in connection with any action to obtain an injunction.

(d) Offenses. — A person who commits any one or more of the following offenses is guilty of a Class 2 misdemeanor:

- (1) Engages in or offers to engage in the construction, installation, repair, or inspection of an on-site wastewater system without the appropriate certificate for the grade level of on-site wastewater system.
- (2) Gives false or forged evidence of any kind in obtaining a certificate.
- (3) Falsely impersonates a certified contractor or inspector. (2006-82, s. 1.)

**Editor's Note.** — As to delayed effective date, see the editor's note at G.S. 90A-70.

## Chapter 90B.

### Social Worker Certification and Licensure Act.

Sec.

90B-9. Renewal of certificates and licenses.

#### § 90B-9. Renewal of certificates and licenses.

(a) All certificates and licenses shall be effective upon date of issuance by the Board, and shall be renewed on or before the second June 30 thereafter.

(b) All certificates and licenses issued hereunder shall be renewed at the times and in the manner provided by this section. At least 45 days prior to expiration of each certificate or license, the Board shall mail a notice and application for renewal to the certificate holder or licensee. Prior to the expiration date, the application shall be returned properly completed, together with a renewal fee established by the Board pursuant to G.S. 90B-6.2(a)(4) and evidence of completion of the continuing education requirements established by the Board pursuant to G.S. 90B-6(g), upon receipt of which the Board shall renew the certificate or license. If a certificate or license is not renewed on or before the expiration date, an additional fee shall be charged for late renewal as provided in G.S. 90B-6.2(a)(5).

(c) A certificate or license issued under this Chapter shall be automatically suspended for failure to renew for a period of more than 60 days after the renewal date. The Board may reinstate a certificate or license suspended under this subsection upon payment of a reinstatement fee as provided in G.S. 90B-6.2(a)(6) and may require that the applicant file a new application, furnish new supervisory reports or references or otherwise update his or her credentials, or submit to examination for reinstatement. The Board shall have exclusive jurisdiction to investigate alleged violations of this Chapter by any person whose certificate or license has been suspended under this subsection and, upon proof of any violation of this Chapter, the Board may take disciplinary action as provided in G.S. 90B-11.

(d) Any person certified or licensed and desiring to retire temporarily from the practice of social work shall send written notice thereof to the Board. Upon receipt of such notice, his or her name shall be placed upon the nonpracticing list and he or she shall not be subject to payment of renewal fees while temporarily retired. In order to reinstate certification or licensure, the person shall apply to the Board by making a request for reinstatement and paying the appropriate fee as provided in G.S. 90B-6.2. (1983, c. 495, s. 1; 1999-313, s. 1; 2006-226, s. 19.)

**Effect of Amendments.** — Session Laws 2006-226, s. 19, effective August 10, 2006, in subsection (b), substituted “G.S. 90B-6.2(a)(4)” for “G.S. 90B-6.2(a)(5)” in the third sentence,

and “G.S. 90B-6.2(a)(5)” for “G.S. 90B-6.2(a)(6)” in the last sentence; and in subsection (c), substituted “G.S. 90B-6.2(a)(6)” for “G.S. 90B-6.2(a)(7)” in the second sentence.

**Chapter 93.**  
**Certified Public Accountants.**

**§ 93-12. Board of Certified Public Accountant Examiners.**

**CASE NOTES**

**Approval of CPA Firm Name Change.** — Certified public accounting firm failed to show that the North Carolina State Board of Certified Public Accountant Examiners erred by denying the accounting firm's proposed name change as the Board had authority under G.S. 93-12 to regulate name changes, and the Board's decision that the proposed name

change had a capacity or tendency to deceive, in violation of N.C. Admin. Code. Tit. 21, r. 8N.0307, was supported by substantial evidence. *McGladrey & Pullen, LLP v. N.C. State Bd. of CPA Exam'rs*, 171 N.C. App. 610, 615 S.E.2d 339, 2005 N.C. App. LEXIS 1274 (2005), cert. denied, notice of appeal dismissed, 360 N.C. 65, 621 S.E.2d 627 (2005).



## Chapter 93B.

### Occupational Licensing Boards.

Sec.

93B-2. Annual reports required; contents;  
open to inspection.

#### § 93B-2. Annual reports required; contents; open to inspection.

(a) Each occupational licensing board shall file with the Secretary of State, the Attorney General, and the Joint Legislative Administrative Procedure Oversight Committee an annual report containing all of the following information:

- (1) The address of the board, and the names of its members and officers.
- (2) The number of persons who applied to the board for examination.
- (3) The number who were refused examination.
- (4) The number who took the examination.
- (5) The number to whom initial licenses were issued.
- (6) The number who applied for license by reciprocity or comity.
- (7) The number who were granted licenses by reciprocity or comity.
- (8) The number of licenses suspended or revoked.
- (9) The number of licenses terminated for any reason other than failure to pay the required renewal fee.
- (10) The substance of any anticipated request by the occupational licensing board to the General Assembly to amend statutes related to the occupational licensing board.
- (11) The substance of any anticipated change in rules adopted by the occupational licensing board or the substance of any anticipated adoption of new rules by the occupational licensing board.

(b) Each occupational licensing board shall file with the Secretary of State, the Attorney General, and the Joint Legislative Administrative Procedure Oversight Committee a financial report that includes the source and amount of all funds credited to the occupational licensing board and the purpose and amount of all funds disbursed by the occupational licensing board during the previous 12-month period.

(c) The reports required by this section shall be open to public inspection. (1957, c. 1377, s. 2; 1969, c. 42; 2006-70, s. 1.)

**Editor's Note.** — Session Laws 2006-70, s. 2, provides, in part, that the first reports required by G.S. 93B-2 are due no later than July 1, 2007.

**Effect of Amendments.** — Session Laws 2006-70, s. 1, effective July 1, 2006, designated

the formerly undesignated paragraphs as present subsections (a) and (c); in subsection (a), rewrote the introductory language, added subdivisions (10) and (11), and made stylistic changes throughout; and added subsection (b).

**Chapter 93E.**  
**North Carolina Appraisers Act.**

**Article 1.**

**Real Estate Appraiser.**

Sec.  
§93E-1-7. Registration, license and certificate  
renewal; renewal fees; continuing

education; reinstatement; replace-  
ment registrations, licenses and  
certificates; registration, licen-  
sure, and certification history; ad-  
dress changes.

**ARTICLE 1.**

*Real Estate Appraiser.*

**§ 93E-1-7. Registration, license and certificate renewal;  
renewal fees; continuing education; reinstatement;  
replacement registrations, licenses and  
certificates; registration, licensure, and certi-  
fication history; address changes.**

(a) Trainee registrations, licenses, and certificates issued under this Chapter shall expire on the 30th day of June of every year and shall become invalid after that date unless renewed prior to the expiration date by filing an application with and paying to the Executive Director of the Board the fee of two hundred dollars (\$200.00). As a prerequisite to the renewal of a trainee registration or a real estate appraiser license or certificate, the trainee registration holder, the licensee, or the certificate holder must satisfy any continuing education requirements that may be prescribed by the Board under subsection (b) of this section. The members of the General Assembly are exempt from this requirement and any education program regarding trainee supervision during their term of office. The Board may adopt rules establishing a system of trainee registration, license, and certificate renewal in which trainee registrations, licenses, and certificates expire annually with varying expiration dates.

(b) The Board may by rule require, as a prerequisite to trainee registration, license, or certificate renewal, the completion of Board-approved education courses in subject matters determined by the Board, or courses determined by the Board to be equivalent to the instruction, not inconsistent with any requirements of federal authorities.

(c) All trainee registrations, licenses, and certificates reinstated after the expiration dates shall be subject to a late filing fee of five dollars (\$5.00) per month for each month or part thereof that the trainee registration, license, or certificate is lapsed, not to exceed sixty dollars (\$60.00). The late filing fee shall be in addition to the required renewal fee. In the event a trainee, licensee, or certificate holder fails to reinstate the trainee registration, license, or certificate within 12 months after the expiration date thereof, the Board may, in its discretion, consider the person as not having been previously registered, licensed, or certified, and thereby subject to the provisions of this Chapter relating to the issuance of an original trainee registration, license, or certificate, including the examination requirements set forth herein. Applications to reinstate trainee registrations, licenses, or certificates expired for 12 or more months shall be accompanied by the fee required for an original trainee registration, license, or certificate.

(d) Replacement trainee registrations, licenses, and certificates may be issued by the Board upon payment of five dollars (\$5.00) by the trainee, licensee, or certificate holder. Certification by the Board of the trainee registration history or the licensure or certification history of a person registered, licensed, or certified under this Chapter shall be made only after the payment of a fee of ten dollars (\$10.00) to the Board. (1993, c. 419, s. 6; 1995, c. 482, s. 7; 2001-399, s. 1; 2006-259, s. 17.)

**Effect of Amendments.** — Session Laws 2006-259, s. 17, effective August 23, 2006, near the end of subsection (a), substituted “section.

The members” for “section; provided, however, that members” and inserted “and any education program regarding trainee supervision”.

## § 93E-1-12. Disciplinary action by Board.

### CASE NOTES

**Revocation of Certification.** — Trial court judgment affirming the North Carolina Appraisal Board’s decision to revoke a real estate appraiser’s certification was upheld on appeal where sufficient evidence existed to show that the appraiser knowingly made omissions and false statements concerning the identification

of the property owner and the marketing and sales history of four properties, all of which made the property appear more favorable and provided artificial support for the inflated value placed on the subject. *In re Nantz*, — N.C. App. —, 627 S.E.2d 665, 2006 N.C. App. LEXIS 718 (2006).



**Chapter 95.**  
**Department of Labor and Labor Regulations.**

**Article 2A.**  
**Wage and Hour Act.**  
  
Sec.  
95-25.3. Minimum wage.  
  
**Article 12.**  
  
**Units of Government and Labor Unions,  
Trade Unions, and Labor Organizations,  
and Public Employee Strikes.**  
  
**Article 16.**  
  
**Occupational Safety and Health Act of  
North Carolina.**  
  
95-135. North Carolina Occupational Safety  
and Health Review Commission.  
95-138. Civil penalties.

**Article 20.**  
**Controlled Substance Examination  
Regulation.**  
  
Sec.  
95-232. Procedural requirements for the ad-  
ministration of controlled sub-  
stance examinations.  
  
**Article 22.**  
**Safety and Health Programs and  
Committees.**  
  
95-256. Penalties.  
  
**Article 23.**  
**Workplace Violence Prevention.**  
  
95-265. Temporary civil no-contact order; court  
holidays and evenings.

**ARTICLE 1.**  
*Department of Labor.*

**§ 95-4. Authority, powers and duties of Commissioner.**

**CASE NOTES**

**Cited** in *Multiple Claimants v. N.C. HHS, Div. of Facility and Detention Servs., — N.C. App. —, 626 S.E.2d 666, 2006 N.C. App. LEXIS 530 (2006).*

**ARTICLE 2A.**  
*Wage and Hour Act.*

**§ 95-25.1. Short title and legislative purpose.**

**CASE NOTES**

**Preemption by ERISA. —**  
Where employee sued under the North Carolina Wage and Hour Act, G.S. 95-25.1 et seq. to recover severance pay, which was also provided for by 29 U.S.C.S. § 1132(a), the civil enforcement provision of the Employee Retirement Income Security Act (ERISA), 29 U.S.C.S. § 1001 et seq., 29 U.S.C.S. § 1132(a), preempted the state law claim; however, the state law claim was not dismissed but was treated as an ERISA claim, subject to amendment of the complaint to assert the ERISA claim, since the requested relief was not allowed under ERISA and a finding that the employer's severance

plan was an ERISA plan could give rise to claims other than that for benefits. *Mullaly v. Ins. Servs. Office, Inc., 395 F. Supp. 2d 290, 2005 U.S. Dist. LEXIS 25556 (M.D.N.C. 2005).*  
Where former employee sought severance pay under the North Carolina Wage and Hour Act, G.S. 95-25.1 et seq., the employer's severance plan was an employee welfare benefit plan subject to the Employee Retirement Income Security Act (ERISA), 29 U.S.C.S. § 1001 et seq. and preempted the state law claim; the federal district court had federal question subject matter jurisdiction, and it denied the employee's post-removal motion to remand to state

court. *Mullaly v. Ins. Servs. Office, Inc.*, 395 F. Supp. 2d 290, 2005 U.S. Dist. LEXIS 25556 (M.D.N.C. 2005).

**Pharmacy Board Lacked Authority to Regulate Pharmacist Hours.** — Pharmacy board's authority to regulate pharmacies did not extend to regulating pharmacist working hours as set out in its proposed rule; the North Carolina Department of Labor was the only entity with authority to regulate working hours of pharmacists in pharmacies, and such regu-

lation was solely through the Wage and Hour Act, G.S. 95-25.1. *N.C. Bd. of Pharm. v. Rules Review Comm'n*, 174 N.C. App. 301, 620 S.E.2d 893, 2005 N.C. App. LEXIS 2362 (2005).

**Cited in** *Arndt v. First Union Nat'l Bank*, 170 N.C. App. 518, 613 S.E.2d 274, 2005 N.C. App. LEXIS 1080 (2005); *Youse v. Duke Energy Corp.*, 171 N.C. App. 187, 614 S.E.2d 396, 2005 N.C. App. LEXIS 1209 (2005); *Abreo v. N.C. Growers' Ass'n*, — F. Supp. 2d —, 2005 U.S. Dist. LEXIS 30535 (M.D.N.C. Nov. 25, 2005).

## § 95-25.2. Definitions.

### CASE NOTES

**Amendment of Annual Bonus Without Notice.** — Employee was entitled to an award under the North Carolina Wage and Hour Act, G.S. 95-25.1 et seq., because: (1) the employers' representative orally agreed to pay the employee an annual bonus as part of a contract; (2)

the employers modified the employee's bonus formula without his consent; and (3) the employers also failed to give the employee notice of the change in the bonus formula. *Arndt v. First Union Nat'l Bank*, 170 N.C. App. 518, 613 S.E.2d 274, 2005 N.C. App. LEXIS 1080 (2005).

## § 95-25.3. Minimum wage.

(a) Every employer shall pay to each employee who in any workweek performs any work, wages of at least six dollars and fifteen cents (\$6.15) per hour or the minimum wage set forth in paragraph 1 of section 6(a) of the Fair Labor Standards Act, 29 U.S.C. 206(a)(1), as that wage may change from time to time, whichever is higher, except as otherwise provided in this section.

(b) In order to prevent curtailment of opportunities for employment, the wage rate for full-time students, learners, apprentices, and messengers, as defined under the Fair Labor Standards Act, shall be ninety percent (90%) of the rate in effect under subsection (a) above, rounded to the lowest nickel.

(c) The Commissioner, in order to prevent curtailment of opportunities for employment, may, by regulation, establish a wage rate less than the wage rate in effect under section (a) which may apply to persons whose earning or productive capacity is impaired by age or physical or mental deficiency or injury, as such persons are defined under the Fair Labor Standards Act.

(d) The Commissioner, in order to prevent curtailment of opportunities for employment of the economically disadvantaged and the unemployed, may, by regulation, establish a wage rate not less than eighty-five percent (85%) of the otherwise applicable wage rate in effect under subsection (a) which shall apply to all persons (i) who have been unemployed for at least 15 weeks and who are economically disadvantaged, or (ii) who are, or whose families are, receiving Work First Family Assistance or who are receiving supplemental security benefits under Title XVI of the Social Security Act.

Pursuant to regulations issued by the Commissioner, certificates establishing eligibility for such subminimum wage shall be issued by the Employment Security Commission.

The regulation issued by the Commissioner shall not permit employment at the subminimum rate for a period in excess of 52 weeks.

(e) The Commissioner, in order to prevent curtailment of opportunities for employment, and to not adversely affect the viability of seasonal establishments, may, by regulation, establish a wage rate not less than eighty-five percent (85%) of the otherwise applicable wage rate in effect under subsection (a) which shall apply to any employee employed by an establishment which is

a seasonal amusement or recreational establishment, or a seasonal food service establishment.

(f) Tips earned by a tipped employee may be counted as wages only up to the amount permitted in section 3(m) of the Fair Labor Standards Act, 29 U.S.C. 203(m), if the tipped employee is notified in advance, is permitted to retain all tips and the employer maintains accurate and complete records of tips received by each employee as such tips are certified by the employee monthly or for each pay period. Even if the employee refuses to certify tips accurately, tips may still be counted as wages when the employer complies with the other requirements of this section and can demonstrate by monitoring tips that the employee regularly receives tips in the amount for which the credit is taken. Tip pooling shall also be permissible among employees who customarily and regularly receive tips; however, no employee's tips may be reduced by more than fifteen percent (15%) under a tip pooling arrangement.

(g) Repealed by Session Laws 2006-259, s. 18, effective August 23, 2006. (1959, c. 475; 1963, c. 816; 1965, c. 229; 1969, c. 34, s. 1; 1971, c. 138; 1973, c. 802; 1975, c. 256, s. 1; 1977, c. 519; 1979, c. 839, s. 1; 1981, c. 493, s. 1; c. 663, s. 13; 1983, c. 708, s. 1; 1985, c. 97; 1987, c. 79; 1991, c. 270, ss. 1, 2; c. 330, s. 5; 1997-146, s. 1; 1997-443, s. 12.25; 2006-114, s. 1; 2006-259, s. 18.)

**Effect of Amendments.** — Session Laws 2006-114, s. 1, effective January 1, 2007, in subsection (a), inserted “six dollars and fifteen cents (\$6.15) per hour or” following “wages of at least” and inserted “whichever is higher” following “from time to time.”

Session Laws 2006-259, s. 18, effective Au-

gust 23, 2006, repealed subsection (g) which read: “In order to prevent curtailment of opportunities for employment, an employer may, in lieu of the minimum wage prescribed by this section, pay a training wage to eligible persons in accordance with G.S.95-25.3A.”

## § 95-25.6. Wage payment.

### CASE NOTES

**Cited in** *Arndt v. First Union Nat'l Bank*, 170 N.C. App. 518, 613 S.E.2d 274, 2005 N.C. App. LEXIS 1080 (2005).

## § 95-25.7. Payment to separated employees.

### CASE NOTES

**Cited in** *Buchanan v. Fairfield Resorts, Inc.*, — F. Supp. 2d —, 2005 U.S. Dist. LEXIS 30532 (M.D.N.C. Nov. 25, 2005).

## § 95-25.8. Withholding of wages.

### CASE NOTES

**Preempted By ERISA.** — Because plaintiff's claim under G.S. 95-25.8 sought benefits allegedly due under a severance pay plan, the claim was exclusively governed by the Employee Retirement Income Security Act of 1974

(ERISA), 29 U.S.C.S. § 1001 et seq., and ERISA completely preempted the claim. *Buchanan v. Fairfield Resorts, Inc.*, — F. Supp. 2d —, 2005 U.S. Dist. LEXIS 30532 (M.D.N.C. Nov. 25, 2005).



# § 95-25.13. Notification, posting, and records.

## CASE NOTES

**Amendment of Annual Bonus Without Notice.** — Employee was entitled to an award under the North Carolina Wage and Hour Act, G.S. 95-25.1 et seq., because: (1) the employers' representative orally agreed to pay the employee an annual bonus as part of a contract; (2)

the employers modified the employee's bonus formula without his consent; and (3) the employers also failed to give the employee notice of the change in the bonus formula. *Arndt v. First Union Nat'l Bank*, 170 N.C. App. 518, 613 S.E.2d 274, 2005 N.C. App. LEXIS 1080 (2005).

# § 95-25.22. Recovery of unpaid wages.

## CASE NOTES

**Class Action not Appropriate.** — Wage and Hour Act claims would require individual determinations, including which putative class members were subject to the alleged violations and why those putative class members who worked off-the-clock did so, i.e., whether they, for example, missed breaks in order to leave work early; thus, it was not a proper claim for a class action suit. *Harrison v. Wal-Mart Stores, Inc.*, 170 N.C. App. 545, 613 S.E.2d 322, 2005 N.C. App. LEXIS 1082 (2005).

**Trial court did not abuse its discretion in awarding an employee liquidated dam-**

**ages** under G.S. 95-25.22, when the employers unilaterally modified the employee's agreed to bonus formula without notice, because the employers neither offered evidence showing nor argued how the trial court's decision to award liquidated damages was so arbitrary that it could not have been the result of a reasoned decision. Further, review of the record did not indicate the trial court's decision to impose liquidated damages on the employers was manifestly unsupported by reason. *Arndt v. First Union Nat'l Bank*, 170 N.C. App. 518, 613 S.E.2d 274, 2005 N.C. App. LEXIS 1080 (2005).

# § 95-25.25. Construction of Article and severability.

## CASE NOTES

**Cited** in *Youse v. Duke Energy Corp.*, 171 N.C. App. 187, 614 S.E.2d 396, 2005 N.C. App. LEXIS 1209 (2005).

## ARTICLE 12.

### *Units of Government and Labor Unions, Trade Unions, and Labor Organizations, and Public Employee Strikes.*

**Editor's Note.** — Session Laws 2006-264, s. 50, effective August 27, 2006, rewrote the Article heading by substituting "Units of Government and Labor Unions, Trade Unions, and

Labor Organizations, and Public Employee Strikes" for "Public Employees Prohibited from Becoming Members of Trade Unions or Labor."

## ARTICLE 14B.

### *Amusement Device Safety Act of North Carolina.*

# § 95-111.1. Short title and legislative purpose.

## CASE NOTES

**Cited** in *Multiple Claimants v. N.C. HHS, Div. of Facility and Detention Servs.*, — N.C.

App. —, 626 S.E.2d 666, 2006 N.C. App. LEXIS 530 (2006).

## ARTICLE 16.

*Occupational Safety and Health Act of North Carolina.***§ 95-126. Short title and legislative purpose.**

**Editor's Note.** — Session Laws 2005-133, s. 1, effective June 29, 2005, as amended by Session Laws 2006-226, s. 30, provides: "Under the Occupational Safety and Health Act of North Carolina, the name of the Safety and Health Review Board is changed to the North Carolina Occupational Safety and Health Review Commission. The Revisor of Statutes is authorized to substitute the term 'Commission'

for the term 'Board' wherever that term appears in the General Statutes in relation to the Act. The Revisor of Statutes is also authorized to insert the words 'North Carolina Occupational' in front of the phrase 'Safety and Health Review Commission' wherever that phrase appears in the General Statutes in relation to the Act."

**§ 95-127. Definitions.**

**Editor's Note.** — Session Laws 2005-133, s. 1, effective June 29, 2005, as amended by Session Laws 2006-226, s. 30, provides: "Under the Occupational Safety and Health Act of North Carolina, the name of the Safety and Health Review Board is changed to the North Carolina Occupational Safety and Health Review Commission. The Revisor of Statutes is authorized to substitute the term 'Commission'

for the term 'Board' wherever that term appears in the General Statutes in relation to the Act. The Revisor of Statutes is also authorized to insert the words 'North Carolina Occupational' in front of the phrase 'Safety and Health Review Commission' wherever that phrase appears in the General Statutes in relation to the Act."

**§ 95-129. Rights and duties of employers.**

## CASE NOTES

**Applied** in *Brown v. Kroger Co.*, 169 N.C. App. 312, 610 S.E.2d 447, 2005 N.C. App. LEXIS 611 (2005).

**§ 95-131. Development and promulgation of standards; adoption of federal standards and regulations.**

**Editor's Note.** — Session Laws 2006-264, s. 102(a), (b), provide: "The Department of Labor shall adopt rules in connection with its requirements regarding fall protection for tower climbers as follows:

"(1) With regard to employer-provided rescue procedures, employers must ensure that at least two trained and designated rescue employees are on-site when employees are working at heights over six feet on the tower, except that where only two employees are on-site, then an employer may comply with this requirement if one employee is a trained and designated rescue employee and one employee has been employed for less than nine months and has received documented orientation from the employer outlining steps to take in an emergency.

"(2) With regard to third-party-provided rescue procedures, the employer must obtain ver-

ification from the third-party rescue service that the service is able to respond to a rescue summons in a timely manner and that the service is proficient in rescue-related tasks and equipment needed to rescue climbers from elevated heights on communication structures. The employer must also provide the selected third-party rescue service with contact information regarding the tower site and allow the service to conduct whatever preparation for rescue it deems necessary

"Notwithstanding G.S. 150B-21.1(a), the Department of Labor may adopt the rules provided for by this section as temporary rules within 270 days after the effective date of this act."

## CASE NOTES

**OSHA Regulations Are Admissible to Establish Standard of Care. —**

By virtue of G.S. 95-131(a), the requirements of 29 C.F.R. § 1910.22(b)(1) are a statutory requirement that brings an employee's injury

and an employer's subsequent citation within the scope of G.S. 97-12. *Brown v. Kroger Co.*, 169 N.C. App. 312, 610 S.E.2d 447, 2005 N.C. App. LEXIS 611 (2005).

**§ 95-133. Office of Director of Occupational Safety and Health; powers and duties of the Director.**

**Editor's Note.** — Session Laws 2005-133, s. 1, effective June 29, 2005, as amended by Session Laws 2006-226, s. 30, provides: "Under the Occupational Safety and Health Act of North Carolina, the name of the Safety and Health Review Board is changed to the North Carolina Occupational Safety and Health Review Commission. The Revisor of Statutes is authorized to substitute the term 'Commission'

for the term 'Board' wherever that term appears in the General Statutes in relation to the Act. The Revisor of Statutes is also authorized to insert the words 'North Carolina Occupational' in front of the phrase 'Safety and Health Review Commission' wherever that phrase appears in the General Statutes in relation to the Act."

**§ 95-135. North Carolina Occupational Safety and Health Review Commission.**

(a) The North Carolina Occupational Safety and Health Review Commission is hereby established. The Commission shall be composed of three members from among persons who, by reason of training, education or experience, are qualified to carry out the functions of the Commission under this Article. The Governor shall appoint the members of the Commission and name one of the members as chairman of the Commission. The terms of the members of the Commission shall be six years except that the members of the Commission first taking office shall serve, as designated by the Governor at the time of appointment, one for a term of two years, one for a term of four years, and the member of the Commission designated as chairman shall serve for a term of six years. Any vacancy caused by the death, resignation, or removal of a member prior to the expiration of the term for which he was appointed shall be filled by the Governor for the remainder of the unexpired term. The Governor shall fill all vacancies occurring by reason of the expiration of the term of any members of the Commission.

(b) The Commission shall hear and issue decisions on appeals entered from citations and abatement periods and from all types of penalties. Appeals from orders of the Director dealing with conditions or practices that constitute imminent danger shall not be stayed by the Commission until after full and adequate hearing. The Commission in the discharge of its duties under this Article is authorized and empowered to administer oaths and affirmations and institute motions, cause the taking of depositions, interrogatories, certify to official acts, and issue subpoenas to compel the attendance of witnesses and the production of books, papers, correspondence, memoranda, and other records deemed necessary as evidence in connection with any appeal or proceeding for review before the Commission.

(c) **(Effective until July 1, 2007)** The Commission shall meet at least once each calendar quarter but it may hold call meetings or hearings upon at least three days' notice to each member by the chairman and at such time and place as the chairman may fix. The chairman shall be responsible on behalf of the Commission for the administrative operations of the Commission and shall appoint such hearing examiners and other employees as he deems necessary to assist in the performance of the Commission's functions and fix the compen-



**G.S. 95-135(c) is set out twice. See note.**

sation of such employees with the approval of the Governor. The assignment and removal of hearing examiners shall be made by the Commission, and any hearing examiner may be removed for misfeasance, malfeasance, misconduct, immoral conduct, incompetency, the commission of any crime, or for any other good and adequate reason as found by the Commission. The Commission shall give notice to such hearing examiner, along with written allegations as to the charges against him, and the same shall be heard by the Commission, and its decision shall be final. The compensation of the members of the Commission shall be on a per diem basis and shall be fixed by the Governor. The chairman of the Commission may be paid a higher rate of compensation than the other two members of the Commission. For the purpose of carrying out its duties and functions under this Article, two members of the Commission shall constitute a quorum and official action can be taken only on the affirmative vote of at least two members of the Commission. On matters properly before the Commission the chairman may issue temporary orders, subpoenas, and other temporary types of orders subject to the subsequent review of the Commission. The issuance of subpoenas, orders to take depositions, orders requiring interrogatories and other procedural matters of evidence issued by the chairman shall not be subject to review. Prior to taking any action under this subsection to set compensation, the Governor may consult with the Advisory Budget Commission.

(c) **(Effective July 1, 2007)** The Commission shall meet at least once each calendar quarter but it may hold call meetings or hearings upon at least three days' notice to each member by the chairman and at such time and place as the chairman may fix. The chairman shall be responsible on behalf of the Commission for the administrative operations of the Commission and shall appoint such hearing examiners and other employees as he deems necessary to assist in the performance of the Commission's functions and fix the compensation of such employees with the approval of the Governor. The assignment and removal of hearing examiners shall be made by the Commission, and any hearing examiner may be removed for misfeasance, malfeasance, misconduct, immoral conduct, incompetency, the commission of any crime, or for any other good and adequate reason as found by the Commission. The Commission shall give notice to such hearing examiner, along with written allegations as to the charges against him, and the same shall be heard by the Commission, and its decision shall be final. The compensation of the members of the Commission shall be on a per diem basis and shall be fixed by the Governor. The chairman of the Commission may be paid a higher rate of compensation than the other two members of the Commission. For the purpose of carrying out its duties and functions under this Article, two members of the Commission shall constitute a quorum and official action can be taken only on the affirmative vote of at least two members of the Commission. On matters properly before the Commission the chairman may issue temporary orders, subpoenas, and other temporary types of orders subject to the subsequent review of the Commission. The issuance of subpoenas, orders to take depositions, orders requiring interrogatories and other procedural matters of evidence issued by the chairman shall not be subject to review.

(d) Every official act of the Commission shall be entered of record and its hearings and records shall be open to the public. The Commission is authorized and empowered to make such procedural rules as are necessary for the orderly transaction of its proceedings. Unless the Commission adopts a different rule, the proceedings, as nearly as possible, shall be in accordance with the Rules of Civil Procedure, G.S. 1A-1. The Commission may order testimony to be taken by deposition in any proceeding pending before it at any stage of such

proceeding. Any person, firm or corporation, and its agents or officials, may be compelled to appear and testify and produce like documentary evidence before the Commission. Witnesses whose depositions are taken under this section, and the persons taking such depositions, shall be entitled to the same fees as are paid for like services in the courts of the State.

(e) The rules of procedure prescribed or adopted by the Commission shall provide affected employees or representatives of affected employees an opportunity to participate as parties to hearings under this section.

(f) Any member of the Commission may be removed by the Governor for inefficiency, neglect of duty, or any misfeasance or malfeasance in office. Before such removal the Governor shall give notice of hearing and state the allegations against the member of the Commission, and the same shall be heard by the Governor, and his decision shall be final. The principal office of the Commission shall be in Raleigh, North Carolina, but whenever it deems that the convenience of the public or of the parties may be promoted, or delay or expense may be minimized, the Commission may hold hearings or conduct other proceedings at any place in the State.

(g) In case of a contumacy, failure or refusal of any person to testify before the Commission, give any type of evidence, or to produce any books, records, papers, correspondence, memoranda or other records, such person upon such failure to obey the orders of the Commission may be punished for contempt or any other matter involving contempt as set forth and described by the general laws of the State. The Commission shall issue no order for contempt without first finding the facts involved in the proceeding. Witnesses appearing before the Commission shall be entitled to the same fees as those paid for the services of said witnesses in the courts of the State, and all such fees shall be taxed against the interested parties according to the judgment and discretion of the Commission.

(h) The Director shall consult with the chairman of the Commission with respect to the preparation and presentation to the Commission for adoption of all necessary forms or citations, notices of all kinds, forms of stop orders, all forms and orders imposing penalties and all forms of notices or applications for review by the Commission, and any and all other procedural papers and documents necessary for the administration of the Article as applied to employers and employees and for all procedures and proceedings brought before the Commission for review.

(i) A hearing examiner appointed by the chairman of the Commission shall hear, and make a determination upon, any proceeding instituted before the Commission and may hear any motion in connection therewith, assigned to the hearing examiner, and shall make a report of the determination which constitutes the hearing examiner's final disposition of the proceedings. A copy of the report of the hearing examiner shall be furnished to the Director and all interested parties involved in any appeal or any proceeding before the hearing examiner for the hearing examiner's determination. The report of the hearing examiner shall become the final order of the Commission 30 days from the date of the report as determined by the hearing examiner, unless within the 30-day period any member of the Commission had directed that the report shall be reviewed by the entire Commission as a whole. Upon application for review of any report or determination of a hearing examiner, before the 30-day period expires, the Commission shall schedule the matter for hearing, on the record, except the Commission may allow the introduction of newly discovered evidence, or in its discretion the taking of further evidence upon any question or issue. All interested parties to the original hearing shall be notified of the date, time and place of the hearing and shall be allowed to appear in person or by attorney at the hearing. Upon review of the report and determination by the hearing examiner the Commission may adopt, modify or vacate the report of



the hearing examiner and notify the interested parties. The report of the hearing examiner, and the report, decision, or determination of the Commission upon review shall be in writing and shall include findings of fact, conclusions of law, and the reasons or bases for them, on all the material issues of fact, law, or discretion presented on the record. The report, decision or determination of the Commission upon review shall be final unless further appeal is made to the courts under the provisions of Chapter 150B of the General Statutes, as amended, entitled: "Judicial Review of Decisions of Certain Administrative Agencies."

(j) Repealed by Session Laws 1993, c. 300, s. 1. (1973, c. 295, s. 10; c. 1331, s. 3; 1985, c. 746, s. 1; 1985 (Reg. Sess., 1986), c. 955, ss. 6, 7; 1987, c. 827, s. 1; 1987 (Reg. Sess., 1988), c. 1111, s. 10; 1993, c. 300, s. 1; c. 474, s. 1; 2005-133, ss. 1, 5; 2006-203, s. 21.)

**Subsection (c) Set Out Twice.** — The first version of subsection (c) set out above is effective until July 1, 2007. The second version of subsection (c) set out above is effective July 1, 2007.

**Editor's Note.** —

Session Laws 2005-133, s. 1, as amended by Session Laws 2006-226, s. 30, effective June 29, 2005, provides: "Under the Occupational Safety and Health Act of North Carolina, the name of the Safety and Health Review Board is changed to the North Carolina Occupational Safety and Health Review Commission. The Revisor of Statutes is authorized to substitute the term 'Commission' for the term 'Board' wherever that term appears in the General Statutes in relation to the Act. The Revisor of Statutes is also authorized to insert the words 'North Carolina Occupational' in front of the phrase 'Safety and

Health Review Commission' wherever that phrase appears in the General Statutes in relation to the Act."

Session Laws 2006-203, s. 126, provides, in part: "Prosecutions for offenses committed before the effective date of this act are not abated or affected by this act, and the statutes that would be applicable but for this act remain applicable to those prosecutions."

**Effect of Amendments.** —

Session Laws 2006-203, s. 21, effective July 1, 2007, and applicable to the budget for the 2007-2009 biennium and each subsequent biennium thereafter, deleted the last sentence in subsection (c), which reads "Prior to taking any action under this subsection to set compensation, the Governor may consult with the Advisory Budget Commission."

## § 95-137. Issuance of citations.

**Editor's Note.** — Session Laws 2005-133, s. 1, as amended by Session Laws 2006-226, s. 30, effective June 29, 2005, provides: "Under the Occupational Safety and Health Act of North Carolina, the name of the Safety and Health Review Board is changed to the North Carolina Occupational Safety and Health Review Commission. The Revisor of Statutes is authorized

to substitute the term 'Commission' for the term 'Board' wherever that term appears in the General Statutes in relation to the Act. The Revisor of Statutes is also authorized to insert the words 'North Carolina Occupational' in front of the phrase 'Safety and Health Review Commission' wherever that phrase appears in the General Statutes in relation to the Act."

## § 95-138. Civil penalties.

(a) The Commissioner, upon recommendation of the Director, or the North Carolina Occupational Safety and Health Review Commission in the case of an appeal, shall have the authority to assess penalties against any employer who violates the requirements of this Article, or any standard, rule, or order adopted under this Article, as follows:

- (1) A minimum penalty of five thousand dollars (\$5,000) to a maximum penalty of seventy thousand dollars (\$70,000) may be assessed for each willful or repeat violation.
- (2) A penalty of up to seven thousand dollars (\$7,000) shall be assessed for each serious violation.
- (2a) A penalty of up to seven thousand dollars (\$7,000) may be assessed for each violation that is adjudged not to be of a serious nature.



- (3) A penalty of up to seven thousand dollars (\$7,000) may be assessed against an employer who fails to correct and abate a violation, within the period allowed for its correction and abatement, which period shall not begin to run until the date of the final Order of the Commission in the case of any appeal proceedings in this Article initiated by the employer in good faith and not solely for the delay of avoidance of penalties. The assessment shall be made to apply to each day during which the failure or violation continues.
- (4) A penalty of up to seven thousand dollars (\$7,000) shall be assessed for violating the posting requirements, as required under the provisions of this Article.

(b) The Commissioner shall adopt uniform standards that the Commissioner, the Commission, and the hearing examiner shall apply when determining appropriateness of the penalty. The following factors shall be used in determining whether a penalty is appropriate:

- (1) Size of the business of the employer being charged.
- (2) The gravity of the violation.
- (3) The good faith of the employer.
- (4) The record of previous violations; provided that for purposes of determining repeat violations, only the record within the previous three years is applicable.

The report of the hearing examiner and the report, decision, or determination of the Commission on appeal shall specify the standards applied in determining the reduction or affirmation of the penalty assessed by the Commissioner.

(c) The clear proceeds of all civil penalties and interest recovered by the Commissioner, together with the costs thereof, shall be remitted to the Civil Penalty and Forfeiture Fund in accordance with G.S. 115C-457.2. (1973, c. 295, s. 13; 1987 (Reg. Sess., 1988), c. 1111, s. 12; 1989 (Reg. Sess., 1990), c. 844; 1991, c. 329, s. 1; c. 761, s. 17; 1993, c. 474, s. 2; 1998-215, s. 111; 2004-203, s. 39(a); 2005-133, s. 8; 2006-39, s. 3.)

**Editor's Note.** — Session Laws 2005-133, s. 1, as amended by Session Laws 2006-226, s. 30, effective June 29, 2005, provides: "Under the Occupational Safety and Health Act of North Carolina, the name of the Safety and Health Review Board is changed to the North Carolina Occupational Safety and Health Review Commission. The Revisor of Statutes is authorized to substitute the term 'Commission' for the term 'Board' wherever that term appears in the General Statutes in relation to the Act. The Revisor of Statutes is also authorized to insert the words 'North Carolina Occupational' in front of the phrase 'Safety and Health Review Commission' wherever that phrase appears in

the General Statutes in relation to the Act."

**Effect of Amendments.** —

Session Laws 2006-39, s. 3, effective June 30, 2006, in the introductory paragraph of subsection (a), substituted "shall have the authority to assess" for "may assess" preceding "penalties against any" and substituted "adopted under" for "promulgated pursuant to" following "or any standard, rule, or order"; added "may be assessed" following "seventy thousand dollars (\$70,000)" in subdivision (a)(1); rewrote subdivision (a)(2); added subdivision (a)(2a); in subdivision (a)(3), rewrote the first sentence and added the last sentence; and rewrote subdivision (a)(4).

## § 95-152. Confidentiality of trade secrets.

**Editor's Note.** — Session Laws 2005-133, s. 1, as amended by Session Laws 2006-226, s. 30, effective June 29, 2005, provides: "Under the Occupational Safety and Health Act of North Carolina, the name of the Safety and Health Review Board is changed to the North Carolina Occupational Safety and Health Review Commission. The Revisor of Statutes is authorized

to substitute the term 'Commission' for the term 'Board' wherever that term appears in the General Statutes in relation to the Act. The Revisor of Statutes is also authorized to insert the words 'North Carolina Occupational' in front of the phrase 'Safety and Health Review Commission' wherever that phrase appears in the General Statutes in relation to the Act."

## ARTICLE 20.

*Controlled Substance Examination Regulation.***§ 95-232. Procedural requirements for the administration of controlled substance examinations.**

(a) An examiner who requests or requires an examinee to submit to a controlled substance examination shall comply with the procedural requirements set forth in this section.

(b) Collection of samples: the collection of samples for examination or screening shall be performed under reasonable and sanitary conditions. Individual dignity shall be preserved to the extent practicable. Samples shall be collected in a manner reasonably calculated to prevent substitution of samples and interference with the collection, examination, or screening of samples. Samples for prospective or current employees may be collected on-site or at an approved laboratory.

(c) Screening test of samples:

(1) Prospective employees: a preliminary screening procedure that utilizes a single-use test device may be used for prospective employees.

(2) Current employees: the screening test of samples for current employees shall only be performed by an approved laboratory.

(c1) Confirmation test of samples: if a preliminary screening procedure or other screening test produces a positive result, an approved laboratory shall confirm that result by a second examination of the sample utilizing gas chromatography with mass spectrometry or an equivalent scientifically accepted method.

(d) Retention of samples: a portion of every sample that produces a confirmed positive examination result shall be preserved by the laboratory that conducts the confirmatory examination for a period of at least 90 days from the time the results of the confirmed positive examination are mailed or otherwise delivered to the examiner.

(e) Chain of custody: the examiner or his agent shall establish procedures regarding chain of custody for sample collection and examination to ensure proper record keeping, handling, labeling, and identification of examination samples.

(f) Retesting of positive samples: the examinee shall have the right to retest a confirmed positive sample at the same or another approved laboratory. The examiner, through the approved laboratory, shall make confirmed positive samples available to the affected examinee, or a designated agent, during the time which the sample is required to be retained. The examinee must request release of the sample in writing specifying to which approved laboratory the sample is to be sent. The examinee incurs all reasonable expenses for chain of custody procedures, shipping, and retesting of positive samples related to this request. (1991, c. 687, s. 1; 1993, c. 213, s. 2; 1995, c. 383, s. 1; 2006-264, s. 52(a).)

**Editor's Note.** — Session Laws 2006-264, s. 52(b), provides: "This section constitutes a recent act of the General Assembly within the meaning of G.S. 150B-21.1(a). The Department of Labor shall adopt within 30 days of the effective date of this section temporary rules to clarify when employees who are subject to Article 20 of Chapter 95 of the General Statutes may utilize a preliminary screening procedure

involving a single-use test device consistent with this section."

**Effect of Amendments.** — Session Laws 2006-264, s. 52(a), effective August 27, 2006, added the last sentence in subsection (b); rewrote subsection (c); and in subsection (c1), inserted "if a preliminary screening procedure or other screening test produces a positive result," near the beginning, and substituted

“that result” for “any sample that produces a positive result.”

## ARTICLE 21.

### *Retaliatory Employment Discrimination.*

## § 95-240. Definitions.

### CASE NOTES

**Former Employees Not Protected.** — “Former employees” are not within the class of persons protected by the Retaliatory Employment Discrimination Act, G.S. 95-240 et seq. *Ciancia v. Mission Hosps., Inc.*, — F. Supp. 2d —, 2005 U.S. Dist. LEXIS 38354 (W.D.N.C. Dec. 28, 2005).

Because plaintiff was not an “employee” at the time the employer committed the acts of which plaintiff complained, plaintiff was not

protected by the Retaliatory Employment Discrimination Act (REDA), G.S. 95-240 et seq., and the employer’s motion to dismiss plaintiff’s REDA claim was granted. *Ciancia v. Mission Hosps., Inc.*, — F. Supp. 2d —, 2005 U.S. Dist. LEXIS 38354 (W.D.N.C. Dec. 28, 2005).

**Cited in** *Whitings v. Wolfson Casing Corp.*, 173 N.C. App. 218, 618 S.E.2d 750, 2005 N.C. App. LEXIS 1916 (2005).

## § 95-241. Discrimination prohibited.

### CASE NOTES

#### **Workers’ Compensation Claim.** —

Decision of the North Carolina Industrial Commission, finding that a claimant was terminated from his employment due to his disability, was upheld on appeal because the employer failed to show that the claimant made threats at work to have justified his termina-

tion. *Workman v. Rutherford Elec. Mbrshp. Corp.*, 170 N.C. App. 481, 613 S.E.2d 243, 2005 N.C. App. LEXIS 1077 (2005).

**Applied in** *Ciancia v. Mission Hosps., Inc.*, — F. Supp. 2d —, 2005 U.S. Dist. LEXIS 38354 (W.D.N.C. Dec. 28, 2005).

## § 95-242. Complaint; investigation; conciliation.

### CASE NOTES

**Cited in** *Badgett v. Fed. Express Corp.*, 378 F. Supp. 2d 613, 2005 U.S. Dist. LEXIS 19307 (M.D.N.C. Apr. 7, 2005).

## § 95-243. Civil action.

### CASE NOTES

**Cited in** *Whitings v. Wolfson Casing Corp.*, 173 N.C. App. 218, 618 S.E.2d 750, 2005 N.C. App. LEXIS 1916 (2005).

## § 95-245. Rules.

### CASE NOTES

**Deference to Commissioner’s Interpretation.** — Based upon the plain language of the

Retaliatory Employment Discrimination Act, G.S. 95-240 et seq., the state and federal court



decisions construing the Act, and the purpose of the Act as expressed by the North Carolina Court of Appeals, the Commissioner of Labor impermissibly defined “employee” to include “former employees,” and the court declined to

follow the Commissioner’s definition. *Ciancia v. Mission Hosps., Inc.*, — F. Supp. 2d —, 2005 U.S. Dist. LEXIS 38354 (W.D.N.C. Dec. 28, 2005).

ARTICLE 22.

*Safety and Health Programs and Committees.*

§ 95-256. Penalties.

(a) The Commissioner may levy a civil penalty, not to exceed the amounts listed as follows, for a violation of this Article:

Employers with 10 or less employees .....	\$ 2,000
Employers with 11-50 employees .....	\$ 5,000
Employers with 51-100 employees .....	\$10,000
Employers with more than 100 employees .....	\$25,000.

(b) The Commissioner, in determining the amount of the penalty, shall consider the nature of the violation, whether it is a first or subsequent violation, and the steps taken by the employer to remedy the violation upon discovery of the violation.

(c) An employer may appeal a penalty levied by the Commissioner pursuant to this section to the North Carolina Occupational Safety and Health Review Commission subject to the procedures and requirements applicable to contested penalties under Article 16 of this Chapter. The determination of the Commission shall be final unless further appeal is made to the courts under the provisions of Chapter 150B of the General Statutes.

(d) All civil penalties and interest recovered by the Commissioner, together with any costs, shall be paid into the General Fund of the State. (1991 (Reg. Sess., 1992), c. 962, s. 1; 2005-133, s. 1; 2006-226, s. 30.)

**Editor’s Note.** — Session Laws 2005-133, s. 1, as amended by Session Laws 2006-226, s. 30, effective June 29, 2005, provides: “Under the Occupational Safety and Health Act of North Carolina, the name of the Safety and Health Review Board is changed to the North Carolina Occupational Safety and Health Review Commission. The Revisor of Statutes is authorized to substitute the term ‘Commission’ for the term ‘Board’ wherever that term appears in the General Statutes in relation to the Act. The

Revisor of Statutes is also authorized to insert the words ‘North Carolina Occupational’ in front of the phrase ‘Safety and Health Review Commission’ wherever that phrase appears in the General Statutes in relation to the Act.”

**Effect of Amendments.** — Session Laws 2005-133, s. 1, as amended by Session Laws 2006-226, s. 30, effective June 29, 2005, inserted “North Carolina Occupational” preceding “Safety and Health Review Commission” in subsection (c).

ARTICLE 23.

*Workplace Violence Prevention.*

§ 95-265. Temporary civil no-contact order; court holidays and evenings.

(a) A temporary civil no-contact order may be granted ex parte, without written or oral notice to the respondent, only if both of the following are shown:

- (1) It clearly appears from specific facts shown by a verified complaint or affidavit that immediate injury, loss, or damage will result to the complainant, or the complainant’s employee before the respondent can be heard in opposition.

## (2) Either one of the following:

- a. The complainant certifies to the court in writing the efforts, if any, that have been made to give the notice and the reasons supporting the claim that notice should not be required.
- b. The complainant certified to the court that there is good cause to grant the remedy because the harm that the remedy is intended to prevent would likely occur if the respondent were given any prior notice of the complainant's efforts to obtain judicial relief.

## (b) Every temporary civil no-contact order granted without notice shall:

- (1) Be endorsed with the date and hour of issuance.
- (2) Be filed immediately in the clerk's office and entered of record.
- (3) Define the injury, state why it is irreparable and why the order was granted without notice.
- (4) Expire by its terms within such time after entry, not to exceed 10 days.
- (5) Give notice of the date of hearing on the temporary order as provided in G.S. 95-267(a).

(c) If the respondent appears in court for the hearing for a temporary order, the respondent may elect to file a general appearance and testify. Any resulting order may be a temporary order, governed by this section. Notwithstanding the requirements of this section, if all requirements of G.S. 95-266 have been met, the court may issue a permanent order.

(d) When the court is not in session, the complainant may file a complaint for a temporary order before any judge or magistrate designated to grant relief under this Article. If the judge or magistrate finds that there is an immediate and present danger of abuse against the complainant or employee of the complainant and that the complainant has satisfied the prerequisites set forth in subsection (a) of this section, the judge or magistrate may issue a temporary civil no-contact order. The chief district court judge may designate for each county at least one judge or magistrate to be reasonably available to issue temporary civil no-contact orders when the court is not in session. (2004-165, s. 1; 2006-264, s. 9.)

**Effect of Amendments.** — Session Laws 2006-264, s. 9, effective August 27, 2006, substituted “likely occur” for “like occur” near the middle of subdivision (a)(2)b.

**Chapter 96.**  
**Employment Security.**

<b>Article 1.</b>	<b>Sec.</b>	
<b>Employment Security Commission.</b>		after January 1, 2011) Training and reemployment contribution.
<b>Sec.</b>		<b>Article 2.</b>
96-5. Employment Security Administration Fund.		<b>Unemployment Insurance Division.</b>
96-6. Unemployment Insurance Fund.		96-9. Contributions.
96-6.1. (Repealed effective with respect to calendar quarters beginning on or	96-15. Claims for benefits.	

**ARTICLE 1.**  
*Employment Security Commission.*

**§ 96-1. Title.**

**CASE NOTES**

**Cited in** *Boylard v. Southern Structures, Inc.*, 172 N.C. App. 108, 615 S.E.2d 919, 2005 N.C. App. LEXIS 1434 (2005).

**§ 96-5. Employment Security Administration Fund.**

(a) **(Effective until July 1, 2007)** Special Fund. — There is hereby created in the State treasury a special fund to be known as the Employment Security Administration Fund. All moneys which are deposited or paid into this fund shall be continuously available to the Commission for expenditure in accordance with the provisions of this Chapter, and shall not lapse at any time or be transferred to any other fund. The Employment Security Administration Fund, except as otherwise provided in this Chapter, shall be subject to the provisions of the Executive Budget Act (G.S. 143-1 et seq.) and the Personnel Act (G.S. 126-1 et seq.). All moneys in this fund which are received from the federal government or any agency thereof or which are appropriated by this State for the purpose described in G.S. 96-20 shall be expended solely for the purposes and in the amounts found necessary by the Secretary of Labor for the proper and efficient administration of this Chapter. The fund shall consist of all moneys appropriated by this State, all moneys received from the United States of America, or any agency thereof, including the Secretary of Labor, and all moneys received from any other source for such purpose, and shall also include any moneys received from any agency of the United States or any other state as compensation for services or facilities supplied to such agency, any amounts received pursuant to any surety bond or insurance policy or from other sources for losses sustained by the Employment Security Administration Fund or by reason of damage to equipment or supplies purchased from moneys in such fund, and any proceeds realized from the sale or disposition of any such equipment or supplies which may no longer be necessary for the proper administration of this Chapter: Provided, any interest collected on contributions and/or penalties collected pursuant to this Chapter shall be paid into the Special Employment Security Administration Fund created by subsection (c) of this section. All moneys in this fund shall be deposited, administered, and disbursed in the same manner and under the same conditions and require-



**G.S. 96-5 (a), (c), and (f) are set out twice. See notes.**

ments as is provided by law for other special funds in the State treasury, and shall be maintained in a separate account on the books of the State treasury. The State Treasurer shall be liable on his official bond for the faithful performance of his duties in connection with the Employment Security Administration Fund provided for under this Chapter. Such liability on the official bond shall be effective immediately upon the enactment of this provision, and such liability shall exist in addition to any liability upon any separate bond existent on the effective date of this provision, or which may be given in the future. All sums recovered on any surety bond for losses sustained by the Employment Security Administration Fund shall be deposited in said fund.

(a) **(Effective July 1, 2007) Special Fund.** — There is hereby created in the State treasury a special fund to be known as the Employment Security Administration Fund. All moneys which are deposited or paid into this fund shall be continuously available to the Commission for expenditure in accordance with the provisions of this Chapter, and shall not lapse at any time or be transferred to any other fund. The Employment Security Administration Fund, except as otherwise provided in this Chapter, shall be subject to the provisions of the State Budget Act (Chapter 143C of the General Statutes) and the Personnel Act (G.S. 126-1 et seq.). All moneys in this fund which are received from the federal government or any agency thereof or which are appropriated by this State for the purpose described in G.S. 96-20 shall be expended solely for the purposes and in the amounts found necessary by the Secretary of Labor for the proper and efficient administration of this Chapter. The fund shall consist of all moneys appropriated by this State, all moneys received from the United States of America, or any agency thereof, including the Secretary of Labor, and all moneys received from any other source for such purpose, and shall also include any moneys received from any agency of the United States or any other state as compensation for services or facilities supplied to such agency, any amounts received pursuant to any surety bond or insurance policy or from other sources for losses sustained by the Employment Security Administration Fund or by reason of damage to equipment or supplies purchased from moneys in such fund, and any proceeds realized from the sale or disposition of any such equipment or supplies which may no longer be necessary for the proper administration of this Chapter: Provided, any interest collected on contributions and/or penalties collected pursuant to this Chapter shall be paid into the Special Employment Security Administration Fund created by subsection (c) of this section. All moneys in this fund shall be deposited, administered, and disbursed in the same manner and under the same conditions and requirements as is provided by law for other special funds in the State treasury, and shall be maintained in a separate account on the books of the State treasury. The State Treasurer shall be liable on his official bond for the faithful performance of his duties in connection with the Employment Security Administration Fund provided for under this Chapter. Such liability on the official bond shall be effective immediately upon the enactment of this provision, and such liability shall exist in addition to any liability upon any separate bond existent on the effective date of this provision, or which may be given in the future. All sums recovered on any surety bond for losses sustained by the Employment Security Administration Fund shall be deposited in said fund.

(b) **Replacement of Funds Lost or Improperly Expended.** — If any moneys received from the Secretary of Labor under Title III of the Social Security Act, or any unencumbered balances in the Employment Security Administration Fund or any moneys granted to this State pursuant to the provisions of the

**G.S. 96-5 (a), (c), and (f) are set out twice. See notes.**

Wagner-Peyser Act, or any moneys made available by this State or its political subdivisions and matched by such moneys granted to this State pursuant to the provisions of the Wagner-Peyser Act, are found by the Secretary of Labor, because of any action or contingency, to have been lost or expended for purposes other than, or in amounts in excess of those found necessary by the Secretary of Labor for the proper administration of this Chapter, it is the policy of this State that such moneys, not available from the Special Employment Security Administration Fund established by subsection (c) of this section, shall be replaced by moneys appropriated for such purpose from the general funds of this State to the Employment Security Administration Fund for expenditure as provided in subsection (a) of this section. Upon receipt of notice of such a finding by the Secretary of Labor, the Commission shall promptly pay from the Special Employment Security Administration Fund such sum if available in such fund; if not available, it shall promptly report the amount required for such replacement to the Governor and the Governor shall, at the earliest opportunity, submit to the legislature a request for the appropriation of such amount.

(c) **(Effective until July 1, 2007)** There is hereby created in the State treasury a special fund to be known as the Special Employment Security Administration Fund. All interest, regardless of when the same became payable, collected from employers under the provisions of this Chapter subsequent to June 30, 1947 as well as any appropriations of funds by the General Assembly, shall be paid into this fund. No part of said fund shall be expended or available for expenditure in lieu of federal funds made available to the Commission for the administration of this Chapter. Said fund shall be used by the Commission for the payment of costs and charges of administration which are found by the Secretary of Labor not to be proper and valid charges payable out of any funds in the Employment Security Administration Fund received from any source and shall also be used by the Commission for: (i) extensions, repairs, enlargements and improvements to buildings, and the enhancement of the work environment in buildings used for Commission business; (ii) the acquisition of real estate, buildings and equipment required for the expeditious handling of Commission business; and (iii) the temporary stabilization of federal funds cash flow. The Employment Security Commission may use funds either from the Special Employment Security Commission Administration Fund created by this subsection or from federal funds, or from a combination of the two, to offset the costs of compliance with Article 7A of Chapter 163 of the General Statutes of North Carolina or compliance with P.L. 103-31. Refunds of interest allowable under G.S. 96-10, subsection (e) shall be made from this special fund: Provided, such interest was deposited in said fund: Provided further, that in those cases where an employer takes credit for a previous overpayment of interest on contributions due by such employer pursuant to G.S. 96-10, subsection (e), that the amount of such credit taken for such overpayment of interest shall be reimbursed to the Unemployment Insurance Fund from the Special Employment Security Administration Fund. The Special Employment Security Administration Fund, except as otherwise provided in this Chapter, shall be subject to the provisions of the Executive Budget Act (G.S. 143-1 et seq.) and the Personnel Act (G.S. 126-1 et seq.). All moneys in this fund shall be deposited, administered, and disbursed in the same manner and under the same conditions and requirements as is provided by law for other special funds in the State treasury, and shall be maintained in a separate account on the books of the State treasury. The State Treasurer shall be liable on his official bond for the faithful performance of his duties in connection with the Special Employment Security Administration Fund pro-



**G.S. 96-5 (a), (c), and (f) are set out twice. See notes.**

vided for under this Chapter. Such liability on the official bond shall be effective immediately upon the enactment of this provision, and such liability shall exist in addition to any liability upon any separate bond existent on the effective date of this provision, or which may be given in the future. All sums recovered on any surety bond for losses sustained by the Special Employment Security Administration Fund shall be deposited in said fund. The moneys in the Special Employment Security Administration Fund shall be continuously available to the Commission for expenditure in accordance with the provisions of this section.

(c) **(Effective July 1, 2007)** There is hereby created in the State treasury a special fund to be known as the Special Employment Security Administration Fund. All interest and penalties, regardless of when the same became payable, collected from employers under the provisions of this Chapter subsequent to June 30, 1947 as well as any appropriations of funds by the General Assembly, shall be paid into this fund. No part of said fund shall be expended or available for expenditure in lieu of federal funds made available to the Commission for the administration of this Chapter. Said fund shall be used by the Commission for the payment of costs and charges of administration which are found by the Secretary of Labor not to be proper and valid charges payable out of any funds in the Employment Security Administration Fund received from any source and shall also be used by the Commission for: (i) extensions, repairs, enlargements and improvements to buildings, and the enhancement of the work environment in buildings used for Commission business; (ii) the acquisition of real estate, buildings and equipment required for the expeditious handling of Commission business; and (iii) the temporary stabilization of federal funds cash flow. The Employment Security Commission may use funds either from the Special Employment Security Commission Administration Fund created by this subsection or from federal funds, or from a combination of the two, to offset the costs of compliance with Article 7A [of Chapter 163] of the General Statutes of North Carolina or compliance with P.L. 103-31. Refunds of interest allowable under G.S. 96-10, subsection (e) shall be made from this special fund: Provided, such interest was deposited in said fund: Provided further, that in those cases where an employer takes credit for a previous overpayment of interest on contributions due by such employer pursuant to G.S. 96-10, subsection (e), that the amount of such credit taken for such overpayment of interest shall be reimbursed to the Unemployment Insurance Fund from the Special Employment Security Administration Fund. The Special Employment Security Administration Fund, except as otherwise provided in this Chapter, shall be subject to the provisions of the State Budget Act (Chapter 143C of the General Statutes) and the Personnel Act (G.S. 126-1 et seq.). All moneys in this fund shall be deposited, administered, and disbursed in the same manner and under the same conditions and requirements as is provided by law for other special funds in the State treasury, and shall be maintained in a separate account on the books of the State treasury. The State Treasurer shall be liable on his official bond for the faithful performance of his duties in connection with the Special Employment Security Administration Fund provided for under this Chapter. Such liability on the official bond shall be effective immediately upon the enactment of this provision, and such liability shall exist in addition to any liability upon any separate bond existent on the effective date of this provision, or which may be given in the future. All sums recovered on any surety bond for losses sustained by the Special Employment Security Administration Fund shall be deposited in said fund. The moneys in the Special Employment Security Administration Fund shall be continuously available to the Commission for expenditure in accordance with the provisions of this section.



**G.S. 96-5 (a), (c), and (f) are set out twice. See notes.**

(c1) Repealed by Session Laws 2004-124, s. 13.7B(b), effective July 20, 2004.

(d) The other provisions of this section and G.S. 96-6, to the contrary notwithstanding, the Commission is authorized to requisition and receive from its account in the unemployment trust fund in the treasury of the United States of America, in the manner permitted by federal law, such moneys standing to its credit in such fund, as are permitted by federal law to be used for expense of administering this Chapter and to expend such moneys for such purpose, without regard to a determination of necessity by a federal agency. The State Treasurer shall be treasurer and custodian of the amounts of money so requisitioned. Such moneys shall be deposited, administered, and disbursed in the same manner and under the same conditions and requirements as are provided by law for other special funds in the State treasury.

(e) Reed Bill Fund Authorization. — Subject to a specific appropriation by the General Assembly of North Carolina to the Employment Security Commission out of funds credited to and held in this State's account in the Unemployment Trust Fund by the Secretary of the Treasury of the United States pursuant to and in accordance with section 903 of the Social Security Act, the Commission is authorized to utilize such funds for the administration of the Employment Security Law, including personal services, operating and other expenses incurred in the administration of said law, as well as for the purchase or rental, either or both, of offices, lands, buildings or parts of buildings, fixtures, furnishings, equipment, supplies and the construction of buildings or parts of buildings, suitable for use in this State by the Employment Security Commission, and for the payment of expenses incurred for the construction, maintenance, improvements or repair of, or alterations to, such real or personal property. Provided, that any such funds appropriated by the General Assembly shall not exceed the amount in the Unemployment Trust Fund which may be obligated for expenditure for such purposes; and provided that said funds shall not be obligated for expenditure, as herein provided, after the close of the two-year period which begins on the effective date of the appropriation.

(f) **(Effective until July 1, 2007)** Employment Security Commission Reserve Fund. — There is created in the State treasury a special trust fund, separate and apart from all other public moneys or funds of this State, to be known as the Employment Security Commission Reserve Fund, hereinafter "Reserve Fund". Part of the proceeds from the tax on contributions imposed in G.S. 96-9(b)(3)j shall be credited to the Reserve Fund, as specified in that statute. The moneys in the Reserve Fund may be used by the Commission for loans to the Unemployment Insurance Fund, as security for loans from the federal Unemployment Insurance Trust Fund, and to pay any interest required on advances under Title XII of the Social Security Act, and shall be continuously available to the Commission for expenditure in accordance with the provisions of this section. The State Treasurer shall be ex officio the treasurer and custodian and shall invest said moneys in accordance with existing law as well as rules and regulations promulgated pursuant thereto. Furthermore, the State Treasurer shall disburse the moneys in accordance with the directions of the Commission and in accordance with such regulations as the Commission may prescribe.

Administrative costs for the collection of the tax and interest payable to the Reserve Fund shall be borne by the Special Employment Security Administration Fund.

The interest earned from investment of the Reserve Fund moneys shall be deposited in a fund hereby established in the State Treasurer's Office, to be known as the "Worker Training Trust Fund". These moneys shall be used to:

**G.S. 96-5 (a), (c), and (f) are set out twice. See notes.**

- (1) Fund programs, specifically for the benefit of unemployed workers or workers who have received notice of long-term layoff or permanent unemployment, which will enhance the employability of workers, including, but not limited to, adult basic education, adult high school or equivalency programs, occupational skills training programs, assessment, job counseling and placement programs;
- (2) Continue operation of local Employment Security Commission offices throughout the State; or
- (3) Provide refunds to employers.

The use of funds from the Worker Training Trust Fund, for the purposes set out in the above paragraph, shall be pursuant to appropriations in the Current Operations Appropriations Act. Funds appropriated from the Worker Training Trust Fund that are unexpended and unencumbered at the end of the fiscal year for which they are appropriated shall revert to the State treasury to the credit of the Worker Training Trust Fund in accordance with G.S. 143-18.

(f) **(Effective July 1, 2007)** Employment Security Commission Reserve Fund. — There is created in the State treasury a special trust fund, separate and apart from all other public moneys or funds of this State, to be known as the Employment Security Commission Reserve Fund, hereinafter “Reserve Fund”. Part of the proceeds from the tax on contributions imposed in G.S. 96-9(b)(3)j shall be credited to the Reserve Fund, as specified in that statute. The moneys in the Reserve Fund may be used by the Commission for loans to the Unemployment Insurance Fund, as security for loans from the federal Unemployment Insurance Trust Fund, and to pay any interest required on advances under Title XII of the Social Security Act, and shall be continuously available to the Commission for expenditure in accordance with the provisions of this section. The State Treasurer shall be ex officio the treasurer and custodian and shall invest said moneys in accordance with existing law as well as rules and regulations promulgated pursuant thereto. Furthermore, the State Treasurer shall disburse the moneys in accordance with the directions of the Commission and in accordance with such regulations as the Commission may prescribe.

Administrative costs for the collection of the tax and interest payable to the Reserve Fund shall be borne by the Special Employment Security Administration Fund.

The interest earned from investment of the Reserve Fund moneys shall be deposited in a fund hereby established in the State Treasurer’s Office, to be known as the “Worker Training Trust Fund”. These moneys shall be used to:

- (1) Fund programs, specifically for the benefit of unemployed workers or workers who have received notice of long-term layoff or permanent unemployment, which will enhance the employability of workers, including, but not limited to, adult basic education, adult high school or equivalency programs, occupational skills training programs, assessment, job counseling and placement programs;
- (2) Continue operation of local Employment Security Commission offices throughout the State; or
- (3) Provide refunds to employers.

The use of funds from the Worker Training Trust Fund, for the purposes set out in the above paragraph, shall be pursuant to appropriations in the Current Operations Appropriations Act. Funds appropriated from the Worker Training Trust Fund that are unexpended and unencumbered at the end of the fiscal year for which they are appropriated shall revert to the State treasury to the credit of the Worker Training Trust Fund in accordance with G.S. 143C-1-2.

(g) Notwithstanding subsection (f) of this section, the State Treasurer may invest not more than a total of twenty-five million dollars (\$25,000,000) of



funds in the Employment Security Commission Reserve Fund established under subsection (f) of this section in securities issued by the North Carolina Technological Development Authority, Inc., the proceeds for which are directed to support investment in venture capital funds. The State Treasurer shall report to the Joint Legislative Commission on Governmental Operations and the Fiscal Research Division on October 1 and March 1 of each fiscal year on investments made pursuant to this subsection. (Ex. Sess. 1936, c. 1, s. 13; 1941, c. 108, ss. 12, 13; 1947, c. 326, s. 5; c. 598, s. 1; 1949, c. 424, s. 2; 1951, c. 332, s. 18; 1953, c. 401, ss. 1, 5; 1977, c. 727, ss. 11-13; 1981, c. 160, s. 2; 1987, c. 17, ss. 1, 2; 1991, c. 689, s. 142; 1991, Ex. Sess., c. 6, s. 1; 1995 (Reg. Sess., 1996), c. 608, s. 2; 1996, 2nd Ex. Sess., c. 18, s. 26.6; 2004-124, s. 13.7B(b); 2005-276, s. 6.37(h); 2006-203, s. 22.)

**Subsections (a), (c) and (f) Set Out Twice.** — The first versions of subsection (a), (c), and (f) set out above are in effect until July 1, 2007. The second versions of subsections (a), (c), and (f) set out above are effective July 1, 2007, and applicable to the budget for the 2007-2009 biennium and each subsequent biennium thereafter.

**Editor's Note.** —

Session Laws 2006-203, s. 126, provides, in part: "Prosecutions for offenses committed before July 1, 2007 are not abated or affected by this act, and the statutes that would be appli-

cable but for this act remain applicable to those prosecutions."

**Effect of Amendments.** —

Session Laws 2006-203, s. 22, effective July 1, 2007, and applicable to the budget for the 2007-2009 biennium and each subsequent biennium thereafter, substituted "State Budget Act (Chapter 143C of the General Statutes)" for "Executive Budget Act (G.S. 143-1 et seq.)" in subsections (a) and (c); and substituted "G.S. 143C-1-2" for "G.S. 143-18" at the end of the last paragraph in subsection (f).

## § 96-6. Unemployment Insurance Fund.

(a) **Establishment and Control.** — There is hereby established as a special fund, separate and apart from all public moneys or funds of this State, an Unemployment Insurance Fund, which shall be administered by the Commission exclusively for the purposes of this Chapter. This fund shall consist of:

- (1) All contributions collected under this Chapter, together with any interest earned upon any moneys in the fund;
- (2) Any property or securities acquired through the use of moneys belonging to the fund;
- (3) All earnings of such property or securities;
- (4) Any moneys received from the federal unemployment account in the unemployment trust fund in accordance with Title XII of the Social Security Act as amended;
- (5) All moneys credited to this State's account in the Unemployment Trust Fund pursuant to section 903 of Title IX of the Social Security Act, as amended, (U.S.C.A. Title 42, sec. 1103 (a));
- (6) All moneys paid to this State pursuant to section 204 of the Federal-State Extended Unemployment Compensation Act of 1970;
- (7) Reimbursement payments in lieu of contributions.

All moneys in the fund shall be commingled and undivided.

(b) **(Effective until July 1, 2007) Accounts and Deposit.** — The State Treasurer shall be ex officio the treasurer and custodian of the fund who shall disburse such fund in accordance with the directions of the Commission and in accordance with such regulations as the Commission shall prescribe. He shall maintain within the fund three separate accounts:

- (1) A clearing account,
- (2) An unemployment trust fund account, and
- (3) A benefit account.

All moneys payable to the fund, upon receipt thereof by the Commission, shall be forwarded immediately to the treasurer who shall immediately deposit



**G.S. 96-6(b) and (c) are set out twice. See note.**

them in the clearing account. Refunds payable pursuant to G.S. 96-10 may be paid from the clearing account upon warrants issued upon the treasurer as provided in G.S. 143-3.2 under the requisition of the Commission. After clearance thereof, all other moneys in the clearing account shall be immediately deposited with the secretary of the treasury of the United States of America to the credit of the account of this State in the unemployment trust fund, established and maintained pursuant to section 904 of the Social Security Act, as amended, any provision of law in this State relating to the deposit, administration, release, or disbursement of moneys in the possession or custody of this State to the contrary notwithstanding. The benefit account shall consist of all moneys requisitioned from this State's account in the unemployment trust fund. Moneys in the clearing and benefit accounts may be deposited by the treasurer, under the direction of the Commission, in any bank or public depository in which general funds of the State may be deposited, but no public deposit insurance charge or premium shall be paid out of the fund. The State Treasurer shall be liable on his official bond for the faithful performance of his duties in connection with the unemployment insurance fund provided for under this Chapter. Such liability on the official bond shall be effective immediately upon the enactment of this provision, and such liability shall exist in addition to any liability upon any separate bond existent on the effective date of this provision, or which may be given in the future. All sums recovered on any surety bond for losses sustained by the unemployment insurance fund shall be deposited in said fund.

(b) **(Effective July 1, 2007)** Accounts and Deposit. — The State Treasurer shall be ex officio the treasurer and custodian of the fund who shall disburse such fund in accordance with the directions of the Commission and in accordance with such regulations as the Commission shall prescribe. He shall maintain within the fund three separate accounts:

- (1) A clearing account,
- (2) An unemployment trust fund account, and
- (3) A benefit account.

All moneys payable to the fund, upon receipt thereof by the Commission, shall be forwarded immediately to the treasurer who shall immediately deposit them in the clearing account. Refunds payable pursuant to G.S. 96-10 may be paid from the clearing account upon warrants issued upon the treasurer as provided in G.S. 143B-426.40G under the requisition of the Commission. After clearance thereof, all other moneys in the clearing account shall be immediately deposited with the secretary of the treasury of the United States of America to the credit of the account of this State in the unemployment trust fund, established and maintained pursuant to section 904 of the Social Security Act, as amended, any provision of law in this State relating to the deposit, administration, release, or disbursement of moneys in the possession or custody of this State to the contrary notwithstanding. The benefit account shall consist of all moneys requisitioned from this State's account in the unemployment trust fund. Moneys in the clearing and benefit accounts may be deposited by the treasurer, under the direction of the Commission, in any bank or public depository in which general funds of the State may be deposited, but no public deposit insurance charge or premium shall be paid out of the fund. The State Treasurer shall be liable on his official bond for the faithful performance of his duties in connection with the unemployment insurance fund provided for under this Chapter. Such liability on the official bond shall be effective immediately upon the enactment of this provision, and such liability shall exist in addition to any liability upon any separate bond existent on the effective date of this provision, or which may be given in the future. All sums

**G.S. 96-6(b) and (c) are set out twice. See note.**

recovered on any surety bond for losses sustained by the unemployment insurance fund shall be deposited in said fund.

(c) **(Effective until July 1, 2007)** Withdrawals. — Moneys shall be requisitioned from this State's account in the unemployment trust fund solely for the payment of benefits (including extended benefits) and in accordance with regulations prescribed by the Commission. The Commission shall, from time to time, requisition from the unemployment trust fund such amounts, not exceeding the accounts standing to its account therein, as it deems necessary for the payment of benefits for a reasonable future period. Upon receipt thereof the treasurer shall deposit such moneys in the benefit account and shall pay all warrants drawn thereon as provided in G.S. 143-3.2 and requisitioned by the Commission for the payment of benefits solely from such benefit account. Expenditures of such moneys in the benefit account and refunds from the clearing account shall not be subject to approval of the Budget Bureau or any provisions of law requiring specific appropriations or other formal release by State officers of money in their custody. All warrants issued upon the treasurer for the payment of benefits and refunds shall be issued as provided in G.S. 143-3.2 as requisitioned by the chairman of the Commission or a duly authorized agent of the Commission for that purpose. Any balance of moneys requisitioned from the unemployment trust fund which remains unclaimed or unpaid in the benefit account after the expiration of the period for which such sums were requisitioned shall either be deducted from estimates for, and may be utilized for the payment of, benefits during succeeding periods, or, in the discretion of the Commission, shall be redeposited with the Secretary of the Treasury of the United States of America, to the credit of this State's account in the unemployment trust fund, as provided in subsection (b) of this section.

(c) **(Effective July 1, 2007)** Moneys shall be requisitioned from this State's account in the unemployment trust fund solely for the payment of benefits (including extended benefits) and in accordance with regulations prescribed by the Commission. The Commission shall, from time to time, requisition from the unemployment trust fund such amounts, not exceeding the accounts standing to its account therein, as it deems necessary for the payment of benefits for a reasonable future period. Upon receipt thereof the treasurer shall deposit such moneys in the benefit account and shall pay all warrants drawn thereon as provided in G.S. 143B-426.40G and requisitioned by the Commission for the payment of benefits solely from such benefit account. Expenditures of such moneys in the benefit account and refunds from the clearing account shall not be subject to approval of the Budget Bureau or any provisions of law requiring specific appropriations or other formal release by State officers of money in their custody. All warrants issued upon the treasurer for the payment of benefits and refunds shall be issued as provided in G.S. 143B-426.40G as requisitioned by the chairman of the Commission or a duly authorized agent of the Commission for that purpose. Any balance of moneys requisitioned from the unemployment trust fund which remains unclaimed or unpaid in the benefit account after the expiration of the period for which such sums were requisitioned shall either be deducted from estimates for, and may be utilized for the payment of, benefits during succeeding periods, or, in the discretion of the Commission, shall be redeposited with the Secretary of the Treasury of the United States of America, to the credit of this State's account in the unemployment trust fund, as provided in subsection (b) of this section.

(d) Management of Funds upon Discontinuance of Unemployment Trust Fund. — The provisions of subsections (a), (b), and (c), to the extent that they relate to the unemployment trust fund, shall be operative only so long as such unemployment trust fund continues to exist, and so long as the Secretary of the



Treasury of the United States of America continues to maintain for this State a separate book account of all funds deposited therein by this State for benefit purposes, together with this State's proportionate share of the earnings of such unemployment trust fund, from which no other state is permitted to make withdrawals. If and when such unemployment trust fund ceases to exist, or such separate book account is no longer maintained, all moneys, properties, or securities therein belonging to the Unemployment Insurance Fund of this State shall be transferred to the treasurer of the Unemployment Insurance Fund, who shall hold, invest, transfer, sell, deposit, and release such moneys, properties, or securities in a manner approved by the Commission, in accordance with the provisions of this Chapter: Provided, that such moneys shall be invested in the following readily marketable classes of securities: Bonds or other interest-bearing obligations of the United States of America or such investments as are now permitted by law for sinking funds of the State of North Carolina; and provided further, that such investment shall at all times be so made that all the assets of the fund shall always be readily convertible into cash when needed for the payment of benefits. The treasurer shall dispose of securities or other properties belonging to the Unemployment Insurance Fund only under the direction of the Commission.

(e) Benefits shall be deemed to be due and payable under this Chapter only to the extent provided in this Chapter and to the extent that moneys are available therefor to the credit of the Unemployment Insurance Fund, and neither the State nor the Commission shall be liable for any amount in excess of such sums.

(f) Any interest required to be paid on advances under Title XII of the Social Security Act shall be paid in a timely manner and shall not be paid, directly or indirectly, from amounts in the Unemployment Insurance Fund. (Ex. Sess. 1936, c. 1, ss. 9, 18; 1939, c. 27, s. 7; c. 52, s. 4; c. 208; 1941, c. 108; 1945, c. 522, s. 4; 1947, c. 326, s. 6; 1953, c. 401, ss. 1, 6; 1959, c. 362, s. 1; 1961, c. 454, ss. 1-3; 1969, c. 575, s. 3; 1971, c. 673, ss. 3, 4; 1985, c. 197, s. 2; 2006-66, s. 6.19(a); 2006-203, s. 23; 2006-221, s. 3A; 2006-259, s. 40(a).)

**Subsections (b) and (c) Set Out Twice.** — The first versions of subsections (b) and (c) set out above are effective until July 1, 2007. The second versions of subsections (b) and (c) set out above are effective July 1, 2007, and applicable to the budget for the 2007-2009 biennium and each subsequent biennium thereafter.

**Editor's Note.** — Session Laws 2006-66, s. 6.19(a), as added by Session Laws 2006-221, s. 3A, substituted G.S. 143B-426.39E for G.S. 143B-426.39B, which had been substituted for "G.S. 143-3.2" by Session Laws 2006-203, s. 23. The reference to G.S. 143B-426.39E has been changed to G.S. 143B-426.40G at the direction of the Revisor of Statutes.

Session Laws 2006-66, s. 1.2, provides: "This act shall be known as 'The Current Operations and Capital Improvements Appropriations Act of 2006'."

Session Laws 2006-66, s. 28.3, provides: "Except for statutory changes or other provisions that clearly indicate an intention to have effects beyond the 2006 2007 fiscal year, the textual provisions of this act apply only to funds appropriated for, and activities occurring during, the 2006 2007 fiscal year."

Session Laws 2006-66, s. 28.6 is a severability clause.

Session Laws 2006-203, s. 126, provides, in part: "Prosecutions for offenses committed before July 1, 2007 are not abated or affected by this act, and the statutes that would be applicable but for this act remain applicable to those prosecutions."

Session Laws 2006-259, s. 40(a), which made identical changes to those made by Session Laws 2006-66, s. 6.19(a) as added by Session Laws 2006-221, s. 3A, was repealed, pursuant to the terms of Session Laws 2006-259, s. 40(i) upon Session Laws 2006-221 becoming law.

**Effect of Amendments.** — Session Laws 2006-66, s. 6.19(a), as added by Session Laws 2006-221, s. 3A, effective July 1, 2007, in subsections (b) and (c), substituted "G.S. 143B-426.39E" for "G.S. 143B-426.39B," which had been substituted for "G.S. 143-3.2" by Session Laws 2006-203, s. 23. See Editor's note.

Session Laws 2006-203, s. 23, effective July 1, 2007, and applicable to the budget for the 2007-2009 biennium and each subsequent biennium thereafter, substituted "G.S. 143B-426.39B" for "G.S. 143-3.2" in the last paragraph of subsection (b) and twice in subsection (c).



**§ 96-6.1. (Repealed effective with respect to calendar quarters beginning on or after January 1, 2011) Training and reemployment contribution.**

(a) Contribution. — A mandatory training and reemployment contribution is levied upon employers at a percentage rate of the amount of the employer's unemployment insurance contributions due under G.S. 96-9. The rate is the lesser of (i) twenty percent (20%) or (ii) a percentage of the unemployment insurance contributions that yields an amount that, when added to the amount of the employer's unemployment insurance contributions due for the taxable period, is no greater than five and seven-tenths percent (5.7%) of wages for employment for the taxable period. The purpose of the training and reemployment contribution is to provide funds for Department of Community College training programs, Employment Security Commission reemployment services, administration and collection of the new contribution, and other needs of the State. The training and reemployment contribution is due and payable at the time and in the same manner as the unemployment insurance contributions under G.S. 96-9. The training and reemployment contribution does not apply in a calendar year if, as of August 1 of the preceding year, the amount in the Unemployment Insurance Fund equals or is less than nine hundred million dollars (\$900,000,000) or if at any time during the 12 months preceding August 1, the State unemployment rate rises above four and three-tenths percent (4.3%). The collection of the training and reemployment contribution, the assessment of interest and penalties on unpaid contributions under this section, the filing of judgment liens, and the enforcement of the liens for unpaid contributions under this section are governed by the provisions of G.S. 96-10 where applicable.

Training and reemployment contributions collected under this section shall be credited to the Employment Security Commission Training and Employment Account created in this section, and refunds of these contributions shall be paid from the same account. The clear proceeds of any civil penalties levied pursuant to this section shall be remitted to the Civil Penalty and Forfeiture Fund in accordance with G.S. 115C-457.2. Any interest collected on unpaid contributions under this section shall be credited to the Special Employment Security Administration Fund, and any interest refunded on contributions imposed by this section shall be paid from the same Fund.

(b) **(Effective until July 1, 2007.)** Training and Employment Account. — There is created in the State treasury a special account separate and apart from all other public moneys or funds of this State, to be known as the Employment Security Commission Training and Employment Account. The State Treasurer is ex officio the treasurer and custodian of the Account and shall invest its funds in accordance with law. Any interest or other income derived from the Account shall be credited to the Account. Funds in the Account may be spent only pursuant to appropriation by the General Assembly and in accordance with the line item budget enacted by the General Assembly. The Account is subject to the provisions of the Executive Budget Act, except that no unexpended surplus of the Account shall revert to the General Fund. Funds appropriated from the Account that are unexpended and unencumbered at the end of the fiscal year for which they were appropriated shall revert to the credit of the Account in the State treasury in accordance with G.S. 143-18.

It is the intent of the General Assembly that eighty percent (80%) of the funds in the Account shall be appropriated annually to the Department of Community Colleges to be used for nonrecurring expenditures to provide worker training through improved continuing education, acquisition of modern training equipment, operation of specialized training centers, enhancement of

**G.S. 96-6.1 has a delayed repeal date. See notes.**

small business center training, expansion of training for new and expanding industries, incentive grants for incumbent worker training, programs funded by the Worker Training Trust Fund, and other programs of the Department of Community Colleges. It is the intent of the General Assembly that twenty percent (20%) of the funds in the Account shall be appropriated annually to the Employment Security Commission for administration and collection of the training and reemployment contribution and for nonrecurring expenditures for reemployment services.

(b) **(Effective July 1, 2007.)** Training and Employment Account. — There is created in the State treasury a special account separate and apart from all other public moneys or funds of this State, to be known as the Employment Security Commission Training and Employment Account. The State Treasurer is ex officio the treasurer and custodian of the Account and shall invest its funds in accordance with law. Any interest or other income derived from the Account shall be credited to the Account. Funds in the Account may be spent only pursuant to appropriation by the General Assembly and in accordance with the line item budget enacted by the General Assembly. The Account is subject to the provisions of the State Budget Act, except that no unexpended surplus of the Account shall revert to the General Fund. Funds appropriated from the Account that are unexpended and unencumbered at the end of the fiscal year for which they were appropriated shall revert to the credit of the Account in the State treasury in accordance with G.S. 143C-1-2.

It is the intent of the General Assembly that eighty percent (80%) of the funds in the Account shall be appropriated annually to the Department of Community Colleges to be used for nonrecurring expenditures to provide worker training through improved continuing education, acquisition of modern training equipment, operation of specialized training centers, enhancement of small business center training, expansion of training for new and expanding industries, incentive grants for incumbent worker training, programs funded by the Worker Training Trust Fund, and other programs of the Department of Community Colleges. It is the intent of the General Assembly that twenty percent (20%) of the funds in the Account shall be appropriated annually to the Employment Security Commission for administration and collection of the training and reemployment contribution and for nonrecurring expenditures for reemployment services.

(c) **Sunset.** — This section is repealed effective with respect to calendar quarters beginning on or after January 1, 2011. (1999-321, s. 2; 2001-424, ss. 30.5(e), 30.5(f); 2005-276, ss. 8.8(a), 8.8(b), 6.37(i); 2006-203, s. 24.)

**Subsection (b) Set Out Twice.** — The first version of subsection (b) set out above is effective until July 1, 2007. The second version of subsection (b) set out above is effective July 1, 2007.

**Editor's Note.** —

Session Laws 2006-203, s. 126, provides, in part: "Prosecutions for offenses committed before the effective date of this act are not abated or affected by this act, and the statutes that would be applicable but for this act remain

applicable to those prosecutions."

**Effect of Amendments.** —

Session Laws 2006-203, s. 24, effective July 1, 2007, and applicable to the budget for the 2007-2009 biennium and each subsequent biennium thereafter, in the first paragraph of subsection (b), substituted "State Budget Act," for "Executive Budget Act," in the next-to-last sentence, and substituted "G.S. 143C-1-2" for "G.S. 143-18" at the end of the last sentence.



## ARTICLE 2.

*Unemployment Insurance Division.***§ 96-9. Contributions.**

## (a) Payment. —

- (1) Except as provided in subsection (d) hereof, contributions shall accrue and become payable by each employer for each calendar year in which he is subject to this Chapter, with respect to wages for employment (as defined in G.S. 96-8(6)). Such contributions shall become due and be paid by each employer to the Commission for the fund in accordance with such regulations as the Commission may prescribe, and shall not be deducted in whole or in part from the remuneration of individuals in his employ. Contributions shall become due on and shall be paid on or before the last day of the month following the close of the calendar quarter in which such wages are paid and such contributions shall be paid by each employer to the Commission for the fund in accordance with such regulations as the Commission may prescribe, and shall not be deducted in whole or in part from the remuneration of individuals in his employ, provided, further, that if the Commission shall be advised by its duly authorized officers or agents that the collection of any contribution under any provision of this Chapter will be jeopardized by delay, the Commission may, whether or not the time otherwise prescribed by law for making returns and paying such tax has expired, immediately assess such contributions (together with all interest and penalties, the assessment of which is provided for by law). Such contributions, penalties and interest shall thereupon become immediately due and payable, and immediate notice and demand shall be made by the Commission for the payment thereof. Upon failure or refusal to pay such contributions, penalties, and interest, it shall be lawful to make collection thereof as provided by G.S. 96-10 and subsections thereunder and such collection shall be lawful without regard to the due date of contributions herein prescribed, provided, further, that nothing in this paragraph shall be construed as permitting any refund of contributions heretofore paid under the law and regulations in effect at the time such contributions were paid.
- (2) In the payment of any contributions a fractional part of a cent shall be disregarded unless it amounts to one-half cent or more, in which case it shall be increased to one cent.
- (3) Benefits paid employees of this State shall be financed and administered in accordance with the provisions and conditions of G.S. 96-9(d) required for nonprofit organizations; except as provided by suitable regulations which may be adopted by the Commission. The Department of Administration shall make an election with respect to financing all such benefits.
- (4) Political subdivisions of this State may finance benefits paid to employees either by coming under the experience rating program provided in G.S. 96-9(b) or by coming into the program on a reimbursement basis in accordance with the provisions and conditions of G.S. 96-9(f). Any election made shall be binding upon the political subdivision so electing for a period of four years.
- (4a) Indian tribes may finance benefits paid to employees either by coming under the experience rating program provided in G.S. 96-9(b) or by coming into the program on a reimbursement basis in accor-



dance with the provisions and conditions of G.S. 96-9(i). Any election made is binding on the tribe so electing for a period of three years.

- (5) An employer is not required to pay contributions on wages the employer pays to an individual in a calendar year in excess of the taxable wage base for that calendar year. The taxable wage base is the greater of (i) the federally required taxable wage base or (ii) the product resulting from multiplying the average yearly insured wage by fifty percent (50%), rounded to the nearest multiple of one hundred dollars (\$100.00). The average yearly insured wage is the average weekly insured wage on the applicable computation date multiplied by 52. The following wages are included in determining whether the amount of wages paid to an individual in a single calendar year exceeds the taxable wage base:
  - a. Wages paid to an individual in this State by an employer that made contributions in another state upon the wages paid to the individual because the work was performed in the other state.
  - b. Wages paid by a successor employer to an individual that meets both of the following conditions: (i) the individual was an employee of the predecessor and was taken over as an employee by the successor as a part of the organization acquired and (ii) the predecessor employer has paid contributions on the wages paid to the individual while in the predecessor's employ during the year of acquisition and the account of the predecessor is transferred to the successor in accordance with G.S. 96-9(c)(4)a.
- (6) If the amount of the contributions shown to be due after all credits is less than five dollars (\$5.00), no payment need be made. If an employer has paid contributions, penalties, and/or interest in excess of the amount due, this shall be considered an overpayment and refunded provided no other debts are owed to the Commission by the employer. Overpayments of less than five dollars (\$5.00) shall be refunded only upon receipt by the Chairman of a written demand for such refund from the employer. Nothing herein shall be construed to change or extend the limitation set forth in G.S. 96-10(e), (f), and (i).
- (7) Effective with the quarter ending September 30, 1999, every employer with 100 or more employees, and every person or organization that, as agent, reports wages on a total of 100 or more employees on behalf of one or more subject employers, shall file that portion of the "Employer's Quarterly Tax and Wage Report" that contains the name, social security number, and gross wages of each individual in employment on magnetic tapes or diskettes in a format prescribed by the Commission.

For failure of an employer to comply with this subdivision, there shall be added to the amount required to be shown as tax in the reports a penalty of twenty-five dollars (\$25.00). For failure of an agent to comply with this subdivision, the Commission may deny the agent the right to report wages and file reports for the employer for whom the agent filed an improper report for a period of one year following the calendar quarter in which that agent filed the improper report. The Commission may reduce or waive a penalty for good cause shown.

- (8) An employer of domestic service employees as defined by the Internal Revenue Code may be given permission by the Chair of the Commission to file reports once a year on or before the last day of the month following the close of the calendar year in which the wages are paid. Permission to file a report annually may be revoked if the employer is found liable to the Commission for quarterly contributions under subdivision (6) of this subsection.

- (9) Employers who are granted permission under subdivision (8) of this subsection to file annual reports may be given permission to file reports by telephone. Employers who report by telephone must contact either the Field Tax Auditor who is assigned to the employer's account or the Unemployment Insurance Division in Raleigh and report the required information to that Auditor or to the Division by the date the report is due under subdivision (8) of this subsection.
- (10) Employers electing to do so may pay their quarterly tax contributions by electronic funds transfer. When an electronic funds transfer cannot be completed due to insufficient funds or the nonexistence of an account of the transferor, the Commission shall assess a penalty equal to ten percent (10%) of the amount of the transfer, subject to a minimum of one dollar (\$1.00) and a maximum of one thousand dollars (\$1,000). The Commission may waive this penalty for good cause shown. As used in this section, the term "electronic funds transfer" means a transfer of funds initiated by using an electronic terminal, a telephone, a computer, or magnetic tape to instruct or authorize a financial institution or its agent to credit or debit an account.
- (11) The Commission may establish policies to allow taxes to be payable under certain conditions by credit card. A condition of payment by credit card is receipt by the Commission of the full amount of taxes, penalties, and interest due. The Commission shall require an employer who pays by credit card to include an amount equal to any fee charged the Commission for the use of the card. A payment of taxes that is made by credit card and is not honored by the card issuer does not relieve the employer of the obligation to pay the taxes.
- (b) Rate of Contributions. —

- (1) Beginning Rate. — The standard beginning rate of contributions for an employer is a percentage of wages paid by the employer during a calendar year for employment occurring during that year. For any calendar year that the training and reemployment contribution in G.S. 96-6.1 applies, the rate is determined in accordance with the following table:

<u>Percentage</u>	<u>Date After Which Employment Occurs</u>
2.25%	December 31, 1986
1.8	December 31, 1993
1.2	December 31, 1995
1.0	December 31, 1999

For any calendar year that the training and reemployment contribution in G.S. 96-6.1 does not apply, the rate is determined in accordance with the following table:

<u>Percentage</u>	<u>Date After Which Employment Occurs</u>
2.25%	December 31, 1986
1.8	December 31, 1993
1.2	December 31, 1995

- (2) Experience Rating. —
- a. Waiting Period for Rate Reduction. — No employer's contribution rate shall be reduced below the standard rate for any calendar year until its account has been chargeable with benefits for at least 12 calendar months ending July 31 immediately preceding the computation date. An employer's account has been chargeable with benefits for at least 12 calendar months if the employer has reported wages paid in four completed calendar quarters pursuant to G.S. 96-9(a).



- b. Credit Ratio. — The Commission shall, for each year, compute a credit reserve ratio for each employer whose account has a credit balance. An employer's credit reserve ratio shall be the quotient obtained by dividing the credit balance of the employer's account as of July 31 of each year by the total taxable payroll of the employer for the 36 calendar-month period ending June 30 preceding the computation date. Credit balance as used in this section means the total of all contributions paid and credited for all past periods in accordance with the provisions of G.S. 96-9(c)(1) together with all other lawful credits to the account of the employer less the total benefits charged to the account of the employer for all past periods.
- c. Debit Ratio. — The Commission shall for each year compute a debit ratio for each employer whose account shows that the total of all its contributions paid and credited for all past periods in accordance with G.S. 96-9(c)(1) together with all other lawful credits is less than the total benefits charged to its account for all past periods. An employer's debit ratio shall be the quotient obtained by dividing the debit balance of the employer's account as of July 31 of each year by the total taxable payroll of the employer for the 36 calendar-month period ending June 30 preceding the computation date. The amount arrived at by subtracting the total amount of all contributions paid and credited for all past periods in accordance with the provisions of G.S. 96-9(c)(1) together with all other lawful credits of the employer from the total amount of all benefits charged to the account of the employer for such periods is the employer's debit balance.
- d. Other Provisions. — No employer's contribution rate shall be reduced below the standard rate for any calendar year unless its liability extends over a period of all or part of two consecutive calendar years and, as of August 1 of the second year, its credit reserve ratio meets the requirements of that schedule used in computing rates for the following calendar year, unless the employer's liability was established under G.S. 96-8(5)b and its predecessor's account was transferred as provided by G.S. 96-9(c)(4)a.

Whenever contributions are erroneously paid into one account which should have been paid into another account or which should have been paid into a new account, that erroneous payment can be adjusted only by refunding the erroneously paid amounts to the paying entity. No pro rata adjustment to an existing account may be made, nor can a new account be created by transferring any portion of the erroneously paid amount, notwithstanding that the entities involved may be owned, operated, or controlled by the same person or organization. No adjustment of a contribution rate can be made reducing the rate below the standard rate for any period in which the account was not in actual existence and in which it was not actually chargeable for benefits. Whenever payments are found to have been made to the wrong account, refunds can be made to the entity making the wrongful payment for a period not exceeding five years from the last day of the calendar year in which it is determined that wrongful payments were made. Notwithstanding payment into the wrong account, if an entity is determined to have met the requirements to be a covered employer, whether or not the entity has had paid on the account of its employees any



sum into another account, the Commission shall collect contributions at the standard rate or the assigned rate, whichever is higher, for the five years preceding the determination of erroneous payments, which five years shall run from the last day of the calendar year in which the determination of liability for contributions or additional contributions is made. This requirement applies regardless of whether the employer acted in good faith.

- (3)a through c. Repealed by Session Laws 1977, c. 727, s. 39.
- d. Rate schedule A, B, C, D, E, F, G, H, or I appearing on the line opposite the fund ratio in the following Fund Ratio Schedules table shall be applicable in determining and assigning each eligible employer's contribution rate for the calendar year immediately following the computation date. The fund ratio is the total amount available for benefits in the Unemployment Insurance Fund on the computation date divided by the total amount of the taxable payroll of all subject employers for the 12-month period ending June 30 preceding the computation date.

FUND RATIO SCHEDULES

When the Fund Ratio Is:		Applicable
As Much As	But Less Than	Schedule
_____	2.0%	A
2.0%	3.0%	B
3.0%	4.0%	C
4.0%	5.0%	D
5.0%	6.0%	E
6.0%	7.0%	F
7.0%	8.0%	G
8.0%	9.0%	H
9.0% and in excess thereof		I

- d1. Repealed by Session Laws 1994, Extra Session, c. 10, s. 3.
- d2. Repealed by Session Laws 1995, c. 4, s. 3, effective January 1, 1998.
- d3. The standard contribution rate set by subdivision (b)(1) of this section applies to an employer unless the employer's account has a credit balance. Beginning January 1, 1999, for any calendar year that the training and reemployment contribution in G.S. 96-6.1 does not apply, the contribution rate of an employer whose account has a credit balance is determined in accordance with the rate set in the following Experience Rating Formula table for the applicable rate schedule. The contribution rate of an employer whose contribution rate is determined by this Experience Rating Formula table shall be reduced by fifty percent (50%) for any year in which the balance in the Unemployment Insurance Fund on computation date equals or exceeds one and ninety-five hundredths percent (1.95%) of the gross taxable wages reported to the Commission in the previous calendar year, and the fund ratio determined on that date is less than five percent (5%) and shall be reduced by sixty percent (60%) for any year in which the balance in the Unemployment Insurance Fund on computation date

equals or exceeds one and ninety-five hundredths percent (1.95%) of the gross taxable wages as reported to the Commission in the previous calendar year, and the fund ratio determined on that date is five percent (5%) or more.

EXPERIENCE RATING FORMULA

When The Credit Ratio Is:

As Much As	But Less Than	Rate Schedules (%)								
		A	B	C	D	E	F	G	H	I
0.0%	0.2%	2.70%	2.70%	2.70%	2.70%	2.50%	2.30%	2.10%	1.90%	1.70%
0.2%	0.4%	2.70%	2.70%	2.70%	2.50%	2.30%	2.10%	1.90%	1.70%	1.50%
0.4%	0.6%	2.70%	2.70%	2.50%	2.30%	2.10%	1.90%	1.70%	1.50%	1.30%
0.6%	0.8%	2.70%	2.50%	2.30%	2.10%	1.90%	1.70%	1.50%	1.30%	1.10%
0.8%	1.0%	2.50%	2.30%	2.10%	1.90%	1.70%	1.50%	1.30%	1.10%	0.90%
1.0%	1.2%	2.30%	2.10%	1.90%	1.70%	1.50%	1.30%	1.10%	0.90%	0.80%
1.2%	1.4%	2.10%	1.90%	1.70%	1.50%	1.30%	1.10%	0.90%	0.80%	0.70%
1.4%	1.6%	1.90%	1.70%	1.50%	1.30%	1.10%	0.90%	0.80%	0.70%	0.60%
1.6%	1.8%	1.70%	1.50%	1.30%	1.10%	0.90%	0.80%	0.70%	0.60%	0.50%
1.8%	2.0%	1.50%	1.30%	1.10%	0.90%	0.80%	0.70%	0.60%	0.50%	0.40%
2.0%	2.2%	1.30%	1.10%	0.90%	0.80%	0.70%	0.60%	0.50%	0.40%	0.30%
2.2%	2.4%	1.10%	0.90%	0.80%	0.70%	0.60%	0.50%	0.40%	0.30%	0.20%
2.4%	2.6%	0.90%	0.80%	0.70%	0.60%	0.50%	0.40%	0.30%	0.20%	0.15%
2.6%	2.8%	0.80%	0.70%	0.60%	0.50%	0.40%	0.30%	0.20%	0.15%	0.10%
2.8%	3.0%	0.70%	0.60%	0.50%	0.40%	0.30%	0.20%	0.15%	0.10%	0.09%
3.0%	3.2%	0.60%	0.50%	0.40%	0.30%	0.20%	0.15%	0.10%	0.09%	0.08%
3.2%	3.4%	0.50%	0.40%	0.30%	0.20%	0.15%	0.10%	0.09%	0.08%	0.07%
3.4%	3.6%	0.40%	0.30%	0.20%	0.15%	0.10%	0.09%	0.08%	0.07%	0.06%
3.6%	3.8%	0.30%	0.20%	0.15%	0.10%	0.09%	0.08%	0.07%	0.06%	0.05%
3.8%	4.0%	0.20%	0.15%	0.10%	0.09%	0.08%	0.07%	0.06%	0.05%	0.04%
4.0%										
& OVER		0.00%	0.00%	0.00%	0.00%	0.00%	0.00%	0.00%	0.00%	0.00%

- d4. Expired.
- d5. The standard contribution rate set by subdivision (b)(1) of this section applies to an employer unless the employer’s account has a credit balance. Beginning January 1, 1999, for any calendar year that the training and reemployment contribution in G.S. 96-6.1 applies, the contribution rate of an employer whose account has a credit balance is determined in accordance with the rate set in the following Experience Rating Formula table for the applicable rate schedule. The contribution rate of an employer whose contribution rate is determined by this Experience Rating Formula table shall be reduced by fifty percent (50%) for any year in which the balance in the Unemployment Insurance Fund on computation date equals or exceeds one and ninety-five hundredths percent (1.95%) of the gross taxable wages reported to the Commission in the previous calendar year, and the fund ratio determined on that date is less than five percent (5%) and shall be reduced by sixty percent (60%) for any year in which the balance

in the Unemployment Insurance Fund on computation date equals or exceeds one and ninety-five hundredths percent (1.95%) of the gross taxable wages reported to the Commission in the previous calendar year, and the fund ratio determined on that date is five percent (5%) or more.

EXPERIENCE RATING FORMULA

When The Credit Ratio Is:

As Much As	But Less Than	Rate Schedules (%)								
		A	B	C	D	E	F	G	H	I
0.0%	0.2%	2.16%	2.16%	2.16%	2.16%	2.00%	1.84%	1.68%	1.52%	1.36%
0.2%	0.4%	2.16%	2.16%	2.16%	2.00%	1.84%	1.68%	1.52%	1.36%	1.20%
0.4%	0.6%	2.16%	2.16%	2.00%	1.84%	1.68%	1.52%	1.36%	1.20%	1.04%
0.6%	0.8%	2.16%	2.00%	1.84%	1.68%	1.52%	1.36%	1.20%	1.04%	0.88%
0.8%	1.0%	2.00%	1.84%	1.68%	1.52%	1.36%	1.20%	1.04%	0.88%	0.72%
1.0%	1.2%	1.84%	1.68%	1.52%	1.36%	1.20%	1.04%	0.88%	0.72%	0.64%
1.2%	1.4%	1.68%	1.52%	1.36%	1.20%	1.04%	0.88%	0.72%	0.64%	0.56%
1.4%	1.6%	1.52%	1.36%	1.20%	1.04%	0.88%	0.72%	0.64%	0.56%	0.48%
1.6%	1.8%	1.36%	1.20%	1.04%	0.88%	0.72%	0.64%	0.56%	0.48%	0.40%
1.8%	2.0%	1.20%	1.04%	0.88%	0.72%	0.64%	0.56%	0.48%	0.40%	0.32%
2.0%	2.2%	1.04%	0.88%	0.72%	0.64%	0.56%	0.48%	0.40%	0.32%	0.24%
2.2%	2.4%	0.88%	0.72%	0.64%	0.56%	0.48%	0.40%	0.32%	0.24%	0.16%
2.4%	2.6%	0.72%	0.64%	0.56%	0.48%	0.40%	0.32%	0.24%	0.16%	0.12%
2.6%	2.8%	0.64%	0.56%	0.48%	0.40%	0.32%	0.24%	0.16%	0.12%	0.08%
2.8%	3.0%	0.56%	0.48%	0.40%	0.32%	0.24%	0.16%	0.12%	0.08%	0.07%
3.0%	3.2%	0.48%	0.40%	0.32%	0.24%	0.16%	0.12%	0.08%	0.07%	0.06%
3.2%	3.4%	0.40%	0.32%	0.24%	0.16%	0.12%	0.08%	0.07%	0.06%	0.06%
3.4%	3.6%	0.32%	0.24%	0.16%	0.12%	0.08%	0.07%	0.06%	0.06%	0.05%
3.6%	3.8%	0.24%	0.15%	0.12%	0.08%	0.07%	0.06%	0.06%	0.05%	0.04%
3.8%	4.0%	0.16%	0.12%	0.08%	0.07%	0.06%	0.06%	0.05%	0.04%	0.03%
4.0%	&									
OVER		0.00%	0.00%	0.00%	0.00%	0.00%	0.00%	0.00%	0.00%	0.00%

e. For any calendar year that the training and reemployment contribution in G.S. 96-6.1 applies, each employer whose account as of any computation date occurring after August 1, 1964, shows a debit balance shall be assigned the rate of contributions appearing on the line opposite its debit ratio as set forth in the following Rate Schedule for Overdrawn Accounts:

RATE SCHEDULE FOR OVERDRAWN ACCOUNTS BEGINNING WITH THE CALENDAR YEAR 1978

When the Debit Ratio Is:		
As Much As	But Less Than	Assigned Rate
0.0%	0.3%	2.3%



When the Debit Ratio Is:		
As Much As	But Less Than	Assigned Rate
0.3	0.6	2.5
0.6	0.9	2.6
0.9	1.2	2.8
1.2	1.5	3.0
1.5	1.8	3.1
1.8	2.1	3.3
2.1	2.4	3.4
2.4	2.7	3.6
2.7	3.0	3.8
3.0	3.3	3.9
3.3	3.6	4.1
3.6	3.9	4.2
3.9	4.2	4.4
4.2	4.5	4.6
4.5	4.8	4.8
4.8	5.1	5.0
5.1	5.4	5.2
5.4 and over		5.4

For any calendar year that the training and reemployment contribution in G.S. 96-6.1 does not apply, each employer whose account as of any computation date occurring after August 1, 1964, shows a debit balance shall be assigned the rate of contributions appearing on the line opposite its debit ratio as set forth in the following Rate Schedule for Overdrawn Accounts:

RATE SCHEDULE FOR OVERDRAWN ACCOUNTS BEGINNING WITH  
THE CALENDAR YEAR 1978

When the Debit Ratio Is:		
As Much As	But Less Than	Assigned Rate
0.0%	0.3%	2.9%
0.3	0.6	3.1
0.6	0.9	3.3
0.9	1.2	3.5
1.2	1.5	3.7
1.5	1.8	3.9
1.8	2.1	4.1
2.1	2.4	4.3
2.4	2.7	4.5
2.7	3.0	4.7
3.0	3.3	4.9
3.3	3.6	5.1
3.6	3.9	5.3
3.9	4.2	5.5
4.2 and over		5.7

The Rate Schedule for Overdrawn Accounts Beginning with the Calendar Year 1966 in force in any particular calendar year shall apply to all accounts for that calendar year subsequent replacement enactments notwithstanding.

- f. The computation date for all contribution rates shall be August 1 of the calendar year preceding the calendar year with respect to which such rates are effective.
- g. Any employer may at any time make a voluntary contribution, additional to the contributions required under this Chapter, to the fund to be credited to its account, and such voluntary contributions when made shall for all intents and purposes be deemed "contributions required" as this term is used in G.S. 96-8(8). Any voluntary contributions so made by an employer within 30 days after the date of mailing by the Commission pursuant to G.S. 96-9(c)(3) of notification of contribution rate contained in cumulative account statement and computation of rate, shall be credited to its account as of the previous July 31. If, however, the voluntary contribution is made after July 31 of any year it shall not be considered a part of the balance of the unemployment insurance fund for the purposes of G.S. 96-9(b)(3) until the following July 31. The Commission in accepting a voluntary contribution shall not be bound by any condition stipulated in or made a part of the voluntary contribution by the employer.
- h. If, within the calendar month in which the computation date occurs, the Commission finds that any employing unit has failed to file any report required in connection therewith or has filed a report which the Commission finds incorrect or insufficient, the Commission shall make an estimate of the information required from such employing unit on the basis of the best evidence reasonably available to it at the time and shall notify the employing unit thereof by registered mail addressed to its last known address. Unless such employing unit shall file the report or a corrected or sufficient report, as the case may be, within 15 days after the mailing of such notice, the Commission shall compute such employing unit's rate of contributions on the basis of such estimates, and the rate as so determined shall be subject to increases but not to reduction, on the basis of subsequently ascertained information.
- i. Repealed by Session Laws 1987, c. 17, s. 5.
- j. A tax is imposed upon contributions at the rate of twenty percent (20%) of the amount of contributions due. The tax is due and payable at the time and in the same manner as the contributions. The tax does not apply in a calendar year if, as of August 1 of the preceding year, either of the following conditions was met; (i) the amount in the Reserve Fund equals or exceeds one hundred sixty-three million three hundred forty-nine thousand dollars (\$163,349,000), which is one percent (1%) of taxable wages for calendar year 1984; or (ii) the balance in the Unemployment Insurance Fund established by G.S. 96-6(a) is five hundred million (\$500,000,000) or less. The collection of this tax, the assessment of interest and penalties on unpaid taxes, the filing of judgment liens, and the enforcement of the liens for unpaid taxes is governed by the provisions of G.S. 96-10 where applicable. Taxes collected under this subpart shall be credited to the Employment Security Commission Reserve Fund, and refunds of

the taxes shall be paid from the same Fund. The clear proceeds of any civil penalties collected under this subpart shall be remitted to the Civil Penalty and Forfeiture Fund in accordance with G.S. 115C-457.2. Any interest collected on unpaid taxes shall be credited to the Special Employment Security Administration Fund, and any interest refunded on taxes imposed by this subpart shall be paid from the same Fund.

- (c)(1) Except as provided in subsection (d) of this section, the Commission shall maintain a separate account for each employer and shall credit his account with all voluntary contributions made by him and all other contributions which he has paid or is paid on his behalf, provided the Commission shall credit the account of each employer in an amount equal to eighty percent (80%) of all voluntary contributions paid with respect to periods prior to January 1, 1984, and of all other contributions paid with respect to periods between July 1, 1965, and December 31, 1983. On the computation date, beginning first with August 1, 1948, the ratio of the credit balance in each individual account to the total of all the credit balances in all employer accounts shall be computed as of such computation date, and an amount equal to the interest credited to this State's account in the unemployment trust fund in the treasury of the United States for the four most recently completed calendar quarters shall be credited prior to the next computation date on a pro rata basis to all employers' accounts having a credit balance on the computation date. Such amount shall be prorated to the individual accounts in the same ratio that the credit balance in each individual account bears to the total of the credit balances in all such accounts. In computing the amount to be credited to the account of an employer as a result of interest earned by funds on deposit in the unemployment trust fund in the treasury of the United States to the account of this State, any voluntary contributions made by an employer after July 31 of any year shall not be considered a part of the account balance of the employer until the next computation date occurring after such voluntary contribution was made. No provision in this section shall in any way be subject to or affected by any provisions of the Executive Budget Act, as amended. Nothing in this Act shall be construed to grant any employer or individual in his service prior claims or rights to the amount paid by him into the fund either on his own behalf or on behalf of such individuals.
- (2) Charging of benefit payments. —
- a. Benefits paid shall be allocated to the account of each base period employer in the proportion that the base period wages paid to an eligible individual in any calendar quarter by each such employer bears to the total wages paid by all base period employers during the base period, except as hereinafter provided in paragraphs b, c, and d of this subdivision, G.S. 96-9(d)(2)c, and 96-12.01G. The amount so allocated shall be multiplied by one hundred twenty percent (120%) and charged to that employer's account. Benefits paid shall be charged to employers' accounts upon the basis of benefits paid to claimants whose benefit years have expired.
  - b. Any benefits paid to any claimant under a claim filed for a period occurring after the date of such separations as are set forth in this paragraph and based on wages paid prior to the date of (i) the leaving of work by the claimant without good cause attributable to the employer; (ii) the discharge of claimant for misconduct in connection with his work; (iii) the discharge of the claimant for substantial fault as that term may be defined in G.S. 96-14; (iv)



the discharge of the claimant solely for a bona fide inability to do the work for which he was hired but only where the claimant's period of employment was 100 days or less; (v) separations made disqualifying under G.S. 96-14(2b) and (6a); (vi) separation due to leaving for disability or health condition; or (vii) separation of claimant solely as the result of an undue family hardship shall not be charged to the account of an employer by whom the claimant was employed at the time of such separation; provided, however, said employer promptly furnishes the Commission with such notices regarding any separation of the individual from work as are or may be required by the regulations of the Commission.

No benefit charges shall be made to the account of any employer who has furnished work to an individual who, because of the loss of employment with one or more other employers, becomes eligible for partial benefits while still being furnished work by such employer on substantially the same basis and substantially the same amount as had been made available to such individual during his base period whether the employments were simultaneous or successive; provided, that such employer makes a written request for noncharging of benefits in accordance with Commission regulations and procedures.

No benefit charges shall be made to the account of any employer for benefit years ending on or before June 30, 1992, where benefits were paid as a result of a discharge due directly to the reemployment of a veteran mandated by the Veteran's Reemployment Rights Law, 38 USCA § 2021, et seq.

No benefit charges shall be made to the account of any employer where benefits are paid as a result of a decision by an Adjudicator, Appeals Referee or the Commission if such decision to pay benefits is ultimately reversed; nor shall any such benefits paid be deemed to constitute an overpayment under G.S. 96-18(g)(2), the provisions thereof notwithstanding. Provided, an overpayment of benefits paid shall be established in order to provide for the waiting period required by G.S. 96-13(c).

- c. Any benefits paid to any claimant who is attending a vocational school or training program as provided in G.S. 96-13(a)(3) shall not be charged to the account of the base period employer(s).
- d. Any benefits paid to any claimant under the following conditions shall not be charged to the account of the base period employer(s):
  - 1. The benefits are paid for unemployment due directly to a major natural disaster, and
  - 2. The President has declared the disaster pursuant to the Disaster Relief Act of 1970, 42 USCA 4401, et seq., and
  - 3. The benefits are paid to claimants who would have been eligible for disaster unemployment assistance under this Act, if they had not received unemployment insurance benefits with respect to that unemployment.
- e.1. Any benefits paid to any claimant which are based on previously uncovered employment which are reimbursable by the federal government shall not be charged to the experience rating account of any employer.
- 2. For purposes of this paragraph previously uncovered employment for which benefits are reimbursable by the federal government means services performed before July 1, 1978, in the case of a week of unemployment beginning before July 1, 1978, or before January 1, 1978, in the case of a week of

unemployment beginning after July 1, 1978, and to the extent that assistance under Title II of the Emergency Jobs and Unemployment Assistance Act of 1974 (SUA) was not paid to such individuals on the basis of such service.

- (3) As of July 31 of each year, and prior to January 1 of the succeeding year, the Commission shall determine the balance of each employer's account and shall furnish him with a statement of all charges and credits thereto. At the same time the Commission shall notify each employer of his rate of contributions as determined for the succeeding calendar year pursuant to this section. Such determination shall become final unless the employer files an application for review or redetermination prior to May 1 following the effective date of such rates. The Commission may redetermine on its own motion within the same period of time.

- (4) Transfer of account. —

a. 1. Mandatory. — When an employer, as defined in G.S. 96-8(5)b., in any manner acquires all of the organization, trade, or business of another employing unit, the account of the predecessor shall be transferred as of the date of the acquisition to the successor employer for use in the determination of the successor's rate of contributions. This mandatory transfer does not apply when there is no common ownership between the predecessor and the successor and the successor acquired the assets of the predecessor in a sale in bankruptcy. In this circumstance, the successor's rate of contributions is determined without regard to the predecessor's rate of contributions.

2. Consent. — When an employer, as defined in G.S. 96-8(5)b., in any manner acquires a distinct and severable portion of the organization, trade, or business of another employing unit, the part of the account of the predecessor that relates to the acquired portion of the business shall, upon the mutual consent of the parties concerned and approval of the Commission in conformity with the regulations as prescribed therefor, be transferred as of the date of acquisition to the successor employer for use in the determination of the successor's rate of contributions, provided application for transfer is made within 60 days after the Commission notifies the successor of the right to request such transfer, otherwise the effective date of the transfer shall be the first day of the calendar quarter in which such application is filed, and that after the transfer the successor employing unit continues to operate the transferred portion of such organization, trade or business. On or after January 1, 2006, whenever part of an organization, trade, or business is transferred between entities subject to substantially common ownership, management, or control, the tax account shall be transferred in accordance with regulations. However, employing units transferring entities with any common ownership, management, or control are not entitled to separate and distinct employer status under this Chapter. Provided, however, that the transfer of an account for the purpose of computation of rates shall be deemed to have been made prior to the computation date falling within the calendar year within which the effective date of such transfer occurs and the account shall thereafter be used in the computation of the



rate of the successor employer for succeeding years, subject, however, to the provisions of paragraph b of this subdivision. No request for a transfer of the account will be accepted and no transfer of the account will be made if the request for the transfer of the account is not received within two years of the date of acquisition or notification by the Commission of the right to request such transfer, whichever occurs later. However, in no event will a request for a transfer be allowed if an account has been terminated because an employer ceases to be an employer pursuant to G.S. 96-9(c)(5) and G.S. 96-11(d) regardless of the date of notification.

- a1. A new employing unit shall not be assigned a discrete employer number when there is an acquisition or change in the form or organization of an existing business enterprise, or severable portion thereof, and there is a continuity of control of the business enterprise. That new employing unit shall continue to be the same employer for the purposes of this Chapter as before the acquisition or change in form. As used in this sub-subdivision:

1. "Control of the business enterprise" may occur by means of ownership of the organization conducting the business enterprise, ownership of assets necessary to conduct the business enterprise, security arrangements or lease arrangements covering assets necessary to conduct the business enterprise, or a contract when the ownership, stated arrangements, or contract provide for or allow direction of the internal affairs or conduct of the business enterprise.
2. A "continuity of control" will exist if one or more persons, entities, or other organizations controlling the business enterprise remain in control of the business enterprise after an acquisition or change in form. Evidence of continuity of control shall include, but not be limited to, changes of an individual proprietorship to a corporation, partnership, limited liability company, association, or estate; a partnership to an individual proprietorship, corporation, limited liability company, association, estate, or the addition, deletion, or change of partners; a limited liability company to an individual proprietorship, partnership, corporation, association, estate, or to another limited liability company; a corporation to an individual proprietorship, partnership, limited liability company, association, estate, or to another corporation or from any form to another form.

This sub-subdivision shall not modify the provisions of G.S. 96-10(d) — Collections of Contributions Upon Transfer or Cessation of Business.

- b. Notwithstanding any other provisions of this section, if the successor employer was an employer subject to this Chapter prior to the date of acquisition of the business, the successor's rate of contribution for the period from that date to the end of the then current contribution year shall be the same as the successor's rate in effect on the date of the acquisition. If the successor was not an employer prior to the date of the acquisition of the business, the successor shall be assigned a standard beginning rate of contribution set forth in G.S. 96-9(b)(1) for the remainder of the year in which the successor acquired the business of the predecessor; however, if the successor makes application for the transfer of the account within 60 days after notification by the Commission of



the right to do so and the account is transferred, or meets the requirements for mandatory transfer, the successor shall be assigned for the remainder of the year the rate applicable to the predecessor employer or employers on the date of acquisition of the business, as long as there was only one predecessor or, if more than one, the predecessors had identical rates. In the event the rates of the predecessor were not identical, the rate of the successor shall be the highest rate applicable to any of the predecessor employers on the date of acquisition of the business.

Irrespective of any other provisions of this Chapter, when an account is transferred in its entirety by an employer to a successor, the transferring employer shall thereafter pay the standard beginning rate of contributions set forth in G.S. 96-9(b)(1) and shall continue to pay at that rate until the transferring employer qualifies for a reduction, reacquires the account transferred or acquires the experience rating account of another employer, or is subject to an increase in rate under the conditions prescribed in G.S. 96-9(b)(2) and (3).

- c. In those cases where the organization, trade, or business of a deceased person, or insolvent debtor is taken over and operated by an administrator, administratrix, executor, executrix, receiver, or trustee in bankruptcy, such employing units shall automatically succeed to the account and rate of contribution of such deceased person, or insolvent debtor without the necessity of the filing of a formal application for the transfer of such account.
- (5) In the event any employer subject to this Chapter ceases to be such an employer, his account shall be closed and the same shall not be used in any future computation of such employer's rate nor shall any period prior to the effective date of the termination of such employer during which benefits were chargeable be considered in the application of G.S. 96-9(b)(2) of this Chapter.
- (6) If the Commission finds that an employer's business is closed solely because of the entrance of one or more of the owners, officers, partners, or the majority stockholder into the Armed Forces of the United States, or of any of its allies, or of the United Nations, such employer's experience rating account shall not be terminated; and, if the business is resumed within two years after the discharge or release from active duty in the Armed Forces of such person or persons, the employer's account shall be deemed to have been chargeable with benefits throughout more than 13 consecutive calendar months ending July 31 immediately preceding the computation date. This subdivision shall apply only to employers who are liable for contributions under the experience rating system of financing unemployment benefits. This subdivision shall not be construed to apply to employers who are liable for payments in lieu of contributions or to employers using the reimbursable method of financing benefit payments.

(d) Benefits paid to employees of nonprofit organizations shall be financed in accordance with the provisions of this paragraph. For the purposes of this paragraph, a nonprofit organization is an organization (or group of organizations) described in section 501(c)(3) of the Internal Revenue Code that is exempt from income tax under section 501(a) of the Internal Revenue Code.

- (1)a. Any nonprofit organization which becomes subject to this Chapter on or after January 1, 1972, shall pay contributions under the provisions of this Chapter, unless it elects in accordance with this paragraph to pay the Commission for the Unemployment Insur-

ance Fund an amount equal to the amount of regular benefits and of one half of the extended benefits paid, that is attributable to service in the employ of such nonprofit organization, to individuals for weeks of unemployment which begin within a benefit year established during the effective period of such election.

- b. Any nonprofit organization which is or becomes subject to this Chapter on or after January 1, 1972, may elect to become liable for payments in lieu of contributions for a period of not less than four calendar years beginning with the date on which subjectivity begins by filing a written notice of its election with the Commission not later than 30 days immediately following the date of written notification of the determination of such subjectivity. Provided if notification is not by registered mail, the election may be made on or after January 1, 1972, within six months following the date of the written notification of the determination of such subjectivity. If such election is not made as set forth herein, no election can be made until after four calendar years have elapsed under the contributions method of payment.
- c. Any nonprofit organization which makes an election in accordance with subparagraph b of this paragraph will continue after such four calendar years to be liable for payments in lieu of contributions until it files with the Commission a written notice terminating its election not later than 30 days prior to the next January 1, effective on such January 1. Provided, however, no employer granted or in reimbursement status will be allowed refund of any previous balances used in a transfer to reimbursement status.
- d. Any nonprofit organization which has been paying contributions under this Chapter for a period of at least four consecutive calendar years subsequent to January 1, 1972, may elect to change to a reimbursement basis by filing with the Commission not later than 30 days prior to the next January 1 a written notice of election to become liable for payments in lieu of contributions, effective on such January 1. Such election shall not be terminable for a period of four calendar years. In the event of such an election, the account of such employer shall be closed and shall not be used in any future computation of such employer's contribution rate in any manner whatsoever. Provided, however, any nonprofit employer formerly paying contributions who elects and qualifies to change to a reimbursement basis may be relieved of the requirement to pay one percent (1%) of taxable wages as required by G.S. 96-9(d)(2)a to the following extent and upon the following conditions:
  1. Any nonprofit employer which has, for the year the election will be effective, an experience rating of 1.7 or less, will have transferred from its experience rating account an amount equal to one percent (1%) of its payroll as reported for each of the four calendar quarters which constitute the election year;
  2. Any nonprofit employer which has, for the year the election will be effective, an experience rating of less than 2.7 but more than 1.7, will have transferred from its experience rating account an amount equal to one-half of one percent (.5%) of its payroll as reported for each of the four calendar quarters which constitute the election year. Such employers shall make advance payments to the Commission quarterly, computed at one-half of one percent (.5%) of the taxable wages reported as provided in G.S. 96-9(d)(2)a;



3. Any nonprofit employer which has, for the year the election will become effective, an experience rating of 2.7 or more, upon electing to change to a reimbursement basis, will meet all the requirements of G.S. 96-9(d)(2)a, including making advance payments computed at one percent (1%) of taxable wages.
  - e. The Commission, in accordance with such regulations as it may adopt, shall notify each nonprofit organization of any determination which it may make of its status as an employer and of the effective date of any election which it makes and of any termination of such election. Such determinations shall be subject to reconsideration, appeal and review.
- (2) Payments in lieu of contributions shall be made in accordance with the provisions of this subparagraph and shall be processed as provided herein.
- a. Quarterly contributions and wage reports and advance payments shall be submitted to the Commission quarterly under the same conditions and requirements of G.S. 96-9 and 96-10, except that the amount of advance payments shall be computed as one percent (1%) of taxable wages and entered on such reports; provided that such advance payments shall become effective only with respect to the first four thousand two hundred dollars (\$4,200) in wages paid in a calendar year until January 1, 1978. On and after that date advance payments shall be effective with respect to the federally required wage base provided that after December 31, 1983, the wage base shall be the same as that provided for in G.S. 96-9(a)(5). Collection of such advance payments shall be made as provided for the collection of contributions in G.S. 96-10.

Beginning January 1, 1978, any employer making quarterly reports of employment to the Commission and if such employer is a newly electing reimbursement employer he shall pay contributions of one percent (1%) of taxable wages entered on such reports.

Any employer paying by reimbursement having been, prior to July 1, under the reimbursement method of payment for the preceding calendar year, shall continue to file quarterly reports but shall make no payments with those reports.

- b. The Commission shall establish a separate account for each such employer and such account shall be credited, and maintained as provided in G.S. 96-9(c)(1), except that advance payments shall be credited in full and voluntary contributions are not applicable.
- c. Benefits paid shall be allocated to the employer's account in accordance with G.S. 96-9(c)(2)a but charged to such account without the application of any multiplier, and no benefits shall be noncharged except amounts equal to fifty percent (50%) of extended benefits paid and amounts equal to one hundred percent (100%) of benefits paid through error.
- d. As of July 31 of each year, and prior to January 1 of the succeeding year, the Commission shall determine the balance of each such employer's account and shall furnish him with a statement of all charges and credits thereto.

As of the second computation date (August 1) following the effective date of liability and as of each computation date thereafter, any credit balance remaining in the employer's account (after all applicable postings) in excess of whichever is the greater



(a) benefits charged to such account during the 12 months ending on such computation date, or (b) one percent (1%) of taxable wages for the 12 months ending on June 30 preceding such computation date shall be refunded. Any such refund shall be made prior to February 1 following such computation date.

Should the balance in such account not equal that requiring a refund, the employer shall upon notice and demand for payment mailed to his last known address pay into his account an amount that will bring such balance to the minimum required for a refund. Such amount shall become due on or before the tenth day following the mailing of such notice and demand for payment. Any such amount unpaid on the due date shall be collected in the same manner, including interest, as prescribed in G.S. 96-10.

Upon a change in election as to the method of payment from reimbursement to contributions, or upon termination of coverage and after all applicable benefits paid based on wages paid prior to such change in election or termination of coverage have been charged, any credit balance in such account shall be refunded to the employer.

Should there be a debit balance in such account, the employer shall, upon notice and demand for payment, mailed to his last-known address, pay into his account an amount equal to such debit balance. Such amount shall become due on or before the tenth day following the mailing of such notice and demand for payment.

Any such amount unpaid on the date due shall be collected in the same manner, including interest, as prescribed in G.S. 96-10.

Beginning January 1, 1978, each employer paying by reimbursement shall have his account computed on computation date (August 1) and if there is a deficit shall be billed for an amount necessary to bring his account to one percent (1%) of his taxable payroll. Any amount of his account in excess of that required to equal one percent (1%) of his payroll shall be refunded. Amounts due from any employer to bring his account to a one percent (1%) balance shall be billed as soon as practical and payment will be due within 25 days from the date of mailing of the statement of amount due. Amounts due from any nonprofit organization to bring its account to a one percent (1%) balance shall be billed as soon as practical, and payment will be due within 60 days from the date of mailing of the statement of the amount due.

- e. The Commission may make necessary rules and regulations with respect to coverage of a group of nonprofit organizations and with respect to the reimbursement of benefits payments by such group of nonprofit organizations.
- (3)a. Any benefits paid to any claimant which are based on previously uncovered employment which are reimbursable by the federal government shall not be charged to a nonprofit organization which makes payments to the State Unemployment Insurance Fund in lieu of contributions.
- b. For purposes of this paragraph previously uncovered employment for which benefits are reimbursable by the federal government means services performed before July 1, 1978, in the case of a week of unemployment beginning before July 1, 1978, or before January 1, 1978, in the case of a week of unemployment beginning after July 1, 1978, and to the extent that assistance under Title II of the Emergency Jobs and Unemployment Assistance Act

of 1974 (SUA) was not paid to such individuals on the basis of such service.

(e) In order that the Commission shall be kept informed at all times on the circumstances and conditions of unemployment within the State and as to whether the stability of the fund is being impaired under the operation and effect of the system provided in subsection (c) of this section, the actuarial study now in progress shall be continued and such other investigations and studies of a similar nature as the Commission may deem necessary shall be made.

(f)(1) On and after January 1, 1978, all benefits charged to a State or local governmental employing unit shall be paid to the Commission within 25 days from the date a list of benefit charges is mailed to the State or local governmental employing agency and the appropriate account(s) shall be credited with such payment(s).

(2) In lieu of paying for benefits by reimbursement as provided in subdivision (1) hereof, any State or local governmental employing unit may elect pursuant to rules and regulations established by the Commission:

a. To pay contributions on an experience rating basis as provided in G.S. 96-9(a), (b), and (c); or,

b. To pay to the Commission, within 25 days from the date a list of benefit charges is mailed to such employing unit, a sum equal to the amount which its account would be charged if it were a tax paying employer under G.S. 96-9(c)(2).

(3) State or local governmental employing units paying for benefits as provided in subdivision (1) herein may establish pool accounts; provided, that such pool accounts are established and maintained according to the rules and regulations of the Commission.

(4) Any governmental entity paying by reimbursement as provided in subdivision (1) hereof shall not have any benefits paid against its account noncharged or forgiven except as provided in G.S. 96-9(d)(2)c.

(g) Nothing contained in subsections (d), (f), and (i) of this section prevents the Commission from providing any reimbursing employer with informational bills or lists of charges on a basis more frequent than yearly, if in its sole discretion, the Commission considers such action to be in the best interest of the Commission and the affected employer(s).

(h)(1) Any nonprofit organization which has been paying contributions on a reimbursement basis for at least three consecutive calendar years during none of which years the benefit charges exceeded four tenths of one percent (.4%) of its taxable payroll may, before November 1 of the fourth or subsequent calendar year, elect to pay contributions by special reimbursement on the basis provided for in subdivision (2) below but only upon the following conditions:

a. Benefit charges in the year of election are less than four tenths of one percent (.4%) of taxable payroll.

b. The election shall apply to no less than the four calendar years following the year of election unless terminated by the Commission under subdivision (3) below.

c. All reimbursements during the year of election and the three preceding years were paid when due.

d. The election of special reimbursement shall not entitle the electing nonprofit organization to any refund of any portion of its account balance.

e. No later than January 1 of the first year to which its election applies, the electing nonprofit organization shall furnish the Commission a letter of credit in an amount equal to one hundred



fifty percent (150%) of the account balance required under subdivision (2) below.

- f. The Commission shall by regulation prescribe the form of the letter of credit and the criteria for the financial institution issuing such letter of credit along with the form of election under this section.
- (2) Any qualified nonprofit organization that meets the conditions of subdivision (1) above shall, upon the approval of its election by the Commission, pay contributions by special reimbursement as follows:
- a. The organization's account shall have a required minimum balance that shall be computed on August 1 of each calendar year for the following calendar year and shall be equal to the greater of:
    - 1. One-half the largest amount of claims charged to it during any of the three calendar years preceding the computation date; or,
    - 2. One-tenth of one percent (0.1%) of the highest total taxable payroll during any of the three calendar years preceding the computation date.
  - b. On the first day of each quarter of any calendar year, the Commission shall bill the employer for an amount necessary to bring its account to the required minimum balance, and the amount so billed is due no later than 25 days after the bill is mailed.
- (3) If any electing organization shall fail to make any quarterly payment when due:
- a. The Commission may draw the full amount of the letter of credit for application to the employer's account;
  - b. The organization's required minimum balance shall immediately and without notice become the greater of:
    - 1. A sum equal to its current minimum balance plus the full amount of the current letter of credit; or
    - 2. A sum equal to five tenths of one percent (.5%) of its total taxable payroll. Any amount necessary, after the application of any funds drawn from the letter of credit, to bring the employer's account to such balance shall be payable upon demand.
  - c. If, after demand, the organization shall fail to pay any sums required under paragraph b. above, the Commission may revoke the organization's election for special reimbursement and any difference between the employer's account balance and one percent (1%) of its total taxable payroll shall become immediately due and payable.
  - d. The Commission may, in addition, exercise any of the powers granted to it in G.S. 96-10 to collect any amount due.
  - e. Pursuant to such regulations as the Commission may adopt, the Commission shall afford any organization affected by this paragraph a hearing to determine if any increase in the organization's minimum required balance should be reduced, in whole or in part, or if any revocation of a special reimbursement election should be rescinded. If the Commission, in its sole discretion, is satisfied that the conditions giving rise to the increase or revocation have been corrected, it may reduce such increase or rescind such revocation provided that it may require as a condition of such reduction or rescission a new letter of credit up to three times the amount normally required.
  - f. When used in the subsection, "total taxable payroll" means the highest total taxable payroll during the three most recent, completed calendar years.



(i) Indian Tribes. — Benefits paid to employees of Indian tribe employing units shall be financed in accordance with the provisions of this subsection. For the purposes of this subsection, an “Indian tribe employing unit” is an Indian tribe, a subdivision or subsidiary of an Indian tribe, or a business enterprise wholly owned by an Indian tribe.

(1) Election. —

- a. An Indian tribe employing unit shall pay contributions under the provisions of this Chapter, unless it elects in accordance with this subsection to pay the Commission for the Unemployment Insurance Fund an amount equal to the amount of benefits paid that is attributable to service in the employ of the unit, to individuals for weeks of unemployment that begin within a benefit year established during the effective period of the election.
- b. An Indian tribe employing unit may elect to become liable for payments in lieu of contributions for a period of not less than three calendar years by filing a written notice of its election with the Commission at least 30 days before the January 1 effective date of the election.
- c. An Indian tribe employing unit that makes an election in accordance with this subsection will continue after the end of the three calendar years to be liable for payments in lieu of contributions until it files with the Commission a written notice terminating its election at least 30 days before the January 1 effective date of the termination.
- d. The account of an Indian tribe employing unit that has been paying contributions under this Chapter for a period of at least three consecutive calendar years and that elects to change to a reimbursement basis shall be closed and shall not be used in any future computation of the unit's contribution rate in any manner except that the unit may be relieved of the requirement to pay one percent (1%) of taxable wages as required by subdivision (2) of this subsection to the following extent and upon the following conditions:
  1. An Indian tribe employing unit that has, for the year the election will be effective, an experience rating of 1.7 or less will have transferred from its experience rating account an amount equal to one percent (1%) of its payroll as reported for each of the four calendar quarters that constitute the election year.
  2. An Indian tribe employing unit that has, for the year the election will be effective, an experience rating of less than 2.7 but more than 1.7 will have transferred from its experience rating account an amount equal to one-half of one percent (.5%) of its payroll as reported for each of the four calendar quarters that constitute the election year. These employing units shall make advance payments to the Commission quarterly, computed at one-half of one percent (.5%) of the taxable wages reported as provided in subdivision (2) of this subsection.
  3. An Indian tribe employing unit that has, for the year the election will become effective, an experience rating of 2.7 or more, upon electing to change to a reimbursement basis, will meet all the requirements of subdivision (2) of this subsection, including making advance payments computed at one percent (1%) of taxable wages.
- e. The Commission, in accordance with regulations it adopts, shall notify each Indian tribe employing unit of any determination of

the effective date of any election it makes and of any termination of the election. These determinations shall be subject to reconsideration, appeal, and review.

- (2) Procedure. — Indian tribe employing units' payments by reimbursement in lieu of contributions shall be made and processed as provided in this subdivision.

- a. Quarterly contributions and wage reports and advance payments shall be submitted to the Commission quarterly under the same conditions and requirements of G.S. 96-9 and G.S. 96-10, except that the amount of advance payments shall be computed as one percent (1%) of taxable wages and entered on the reports, and except that the wage base shall be the same as that provided for in G.S. 96-9(a)(5). Collection of these advance payments shall be made as provided for the collection of contributions in G.S. 96-10.

Any Indian tribe employing unit paying by reimbursement having been, prior to July 1, under the reimbursement method of payment for the preceding calendar year, shall continue to file quarterly reports but shall make no payments with those reports.

- b. The Commission shall establish a separate account for each Indian tribe employing unit paying by reimbursement. The account shall be credited and maintained as provided in G.S. 96-9(c)(1), except that advance payments shall be credited in full, and voluntary contributions are not applicable.
- c. Benefits paid shall be allocated to the employer's account in accordance with G.S. 96-9(c)(2)a. but charged to the account without the application of any multiplier, and no benefits shall be noncharged except amounts of benefits paid through error.
- d. As of July 31 of each year, and prior to January 1 of the succeeding year, the Commission shall determine the balance of each Indian tribe employing unit's account and shall furnish the unit with a statement of all charges and credits to the account.

As of August 1 of each year, there shall be refunded any credit balance remaining in the Indian tribe employing unit's account (after all applicable postings) in excess of one percent (1%) of taxable wages for the 12 months ending on June 30 preceding the computation date. The refund must be made before February 1 following the computation date.

If the balance in the account does not equal one percent (1%) of taxable wages, the Indian tribe employing unit must, upon notice and demand for payment mailed to its last known address, pay into the account an amount that will bring the balance to one percent (1%) of taxable wages. This amount becomes due on or before the 25th day after the notice and demand for payment is mailed. Any amount unpaid on the due date shall be collected in the same manner, including interest, as prescribed in G.S. 96-10.

Upon a change in election as to the method of payment from reimbursement to contributions, or upon termination of coverage and after all applicable benefits paid based on wages paid before the change in election or termination of coverage have been charged, any credit balance in the account shall be refunded to the Indian tribe employing unit.

If there is a debit balance in the account, the Indian tribe employing unit must, upon notice and demand for payment mailed to its last known address, pay into the account an amount necessary to bring the account to one percent (1%) of taxable wages. This amount becomes due on or before the 25th day after



the notice and demand for payment is mailed. Any amount unpaid on the due date shall be collected in the same manner, including interest, as prescribed in G.S. 96-10.

- e. Notices to Indian tribe employing units of payment and reporting delinquency must include information that failure to make full payment within the time prescribed will cause the unit to become liable for contributions under subsection (a) of this section, will cause the unit to lose the option of making payment by reimbursement in lieu of contributions, and could cause the unit to lose coverage under this Chapter for services performed for the unit.
- (3) Forfeiture of option. — If an Indian tribe employing unit fails to make payments, including interest and penalties, required under this subsection within 90 days after receipt of the bill, the unit loses the option to make payments by reimbursement in lieu of contributions for the following calendar year unless payment in full is made before contribution rates for the following calendar year are computed. An Indian tribe that has lost the option to make payments by reimbursement in lieu of contributions for a calendar year regains that option for the following calendar year if it makes all contributions timely during the year for which the option was lost, and no payments, penalties, or interest remain outstanding.
- (4) Forfeiture of coverage. — If an Indian tribe employing unit fails to make payments, including interest and penalties, required under this subsection after all collection activities considered necessary by the Commission have been exhausted, services performed for that employing unit are no longer treated as “employment” for the purpose of coverage under this Chapter. An Indian tribe employing unit that has lost coverage regains coverage under this Chapter for services performed for the employing unit if the Commission determines that all contributions, payments in lieu of contributions, penalties, and interest have been paid.

The Commission shall notify the Internal Revenue Service and the United States Department of Labor of any termination or reinstatement of coverage pursuant to this subdivision.

- (5) Extended benefits. — Extended benefits paid that are attributable to service in the employ of an Indian tribe employing unit and not reimbursed by the federal government shall be financed in their entirety by the Indian tribe employing unit. (Sess. 1936, c. 1, s. 7; 1939, c. 27, s. 6; 1941, c. 108, ss. 6, 8; c. 320; 1943, c. 377, ss. 11-14; 1945, c. 522, ss. 11-16; 1947, c. 326, ss. 13-15, 17; c. 881, s. 3; 1949, c. 424, ss. 9-13; c. 969; 1951, c. 322, s. 2; c. 332, ss. 4-7; 1953, c. 401, ss. 12-14; 1955, c. 385, ss. 5, 6; 1957, c. 1059, ss. 5-11; 1959, c. 362, ss. 7, 8; 1965, c. 795, ss. 6-10; 1969, c. 575, ss. 7, 8; 1971, c. 673, ss. 14-20; 1973, c. 172, ss. 2, 3; c. 740, s. 1; 1977, c. 727, ss. 37-49; 1979, c. 660, ss. 13-15; 1981, c. 160, ss. 13-15; c. 534; 1983, c. 585, ss. 1-11; 1985, c. 552, ss. 5-7, 13; 1987, c. 17, ss. 3-7; c. 197; 1987 (Reg. Sess., 1988), c. 999, ss. 2, 3; 1989, c. 583, ss. 4, 6; c. 770, s. 20; 1991, c. 276, s. 1; c. 421, s. 1; c. 458, ss. 2, 3; 1991, Ex. Sess., c. 6, s. 2; 1993, c. 85, s. 1; c. 424, s. 1; 1994, Ex. Sess., c. 10, ss. 1-3; 1995, c. 4, ss. 1-3; c. 463, ss. 1-3; 1996, 1st Ex. Sess., c. 1; 1997-398, s. 4; 1999-196, s. 3; 1999-321, ss. 1, 3-6; 1999-340, ss. 1-3; 1999-421, s. 1; 2000-140, s. 87; 2001-184, ss. 4, 5, 6; 2001-207, s. 1; 2001-251, ss. 2, 5; 2001-414, s. 40; 2001-424, ss. 30.5(f), 30.5(g), 30.5(h), 30.5(i), 30.5(j); 2001-513, s. 7; 2003-67, s. 1; 2003-220, ss. 2, 4; 2003-405, s. 1; 2004-124, s. 13.7B(a); 2004-170, s. 3(a); 2005-276, s. 6.37(j); 2005-410, ss. 2, 3, 5; 2006-251, s. 1.)



**Effect of Amendments. —**

Session Laws 2006-251, s. 1, effective August 16, 2006, and applicable to acquisitions made

on or after August 1, 2003, rewrote subdivision (c)(4)a.

## § 96-14. Disqualification for benefits.

### CASE NOTES

- I. General Consideration.
- III. Misconduct.
- VI. Judicial Review.

#### I. GENERAL CONSIDERATION.

**Construction. —**

G.S. 96-14(1) was not applicable to a former employee's case because that section applied to cases in which an employee terminated an employment relationship and then sought unemployment benefits. However, the employee's employment was terminated by the employer; therefore, the controlling statute was G.S. 96-14(2). *James v. Lemmons*, — N.C. App. —, 629 S.E.2d 324, 2006 N.C. App. LEXIS 1075 (2006).

**Cited in** *Workman v. Rutherford Elec. Mbrshp. Corp.*, 170 N.C. App. 481, 613 S.E.2d 243, 2005 N.C. App. LEXIS 1077 (2005).

#### III. MISCONDUCT.

**Violation of Attendance Rules. —**

Decision that petitioner was qualified to receive unemployment benefits was affirmed as findings of fact by the Employment Security Commission of North Carolina (ESC) did not indicate there was "substantial fault" under G.S. 96-14(2a) for petitioner's failure for failing to call in sick, as the ESC failed to enter specific findings of fact that the employer expressly warned him that failure to call in was a violation of employer's rules, and that continued violation of the rule would result in discharge. *Boyland v. Southern Structures, Inc.*, 172 N.C. App. 108, 615 S.E.2d 919, 2005 N.C. App. LEXIS 1434 (2005).

Former employee's absenteeism from her employment could not rise to the level of substantial fault, under G.S. 96-14(2a), because the evidence did not establish that the employee could exercise reasonable control over her actions resulting from her stress related medical problems. *James v. Lemmons*, — N.C. App. —, 629 S.E.2d 324, 2006 N.C. App. LEXIS 1075 (2006).

**Misconduct Not Shown. —**

Decision that petitioner was qualified to receive unemployment benefits was affirmed as findings by the Employment Security Commission of North Carolina (ESC) did not indicate there was "substantial fault" under G.S. 96-14(2a) for petitioner's failure to timely submit log notes; the ESC failed to enter specific findings that the employer expressly warned petitioner that failure to submit log notes was a violation of employer's rules, and that petitioner continued to violate this requirement after being warned. *Boyland v. Southern Structures, Inc.*, 172 N.C. App. 108, 615 S.E.2d 919, 2005 N.C. App. LEXIS 1434 (2005).

#### VI. JUDICIAL REVIEW.

**Conclusiveness of Findings of Fact on Appeal. —** Based on an employee's own testimony and documentary evidence that his failure to comply with the reasonable requirements of his job, specifically load and unload materials as directed and keep proper records, and because these requirements were reasonable and within his own control, the Employment Security Commission did not err by concluding that the employee was discharged for substantial fault and the trial court did not err by upholding this Commission's ruling. *Reeves v. Yellow Transp., Inc.*, 170 N.C. App. 610, 613 S.E.2d 350, 2005 N.C. App. LEXIS 1076 (2005), review denied, — N.C. —, 619 S.E.2d 511 (2005).

Evidence of the former employee's stress related medical problems was sufficient to permit the North Carolina Employment Security Commission to determine that the employee's absences were for good cause and that she did give her employer appropriate notice regarding her absences; thereby defeating the employer's argument that the employee's absenteeism constituted misconduct under G.S. 96-14(2). *James v. Lemmons*, — N.C. App. —, 629 S.E.2d 324, 2006 N.C. App. LEXIS 1075 (2006).

## § 96-15. Claims for benefits.

(a) Filing. — Claims for benefits shall be made in accordance with such regulations as the Commission may prescribe. Employers may file claims for employees through the use of automation in the case of partial unemployment.

Each employing unit shall post and maintain in places readily accessible to individuals performing services for it printed statements, concerning benefit rights, claims for benefits, and such other matters relating to the administration of this Chapter as the Commission may direct. Each employing unit shall supply to such individuals copies of such printed statements or other materials relating to claims for benefits as the Commission may direct. Such printed statements and other materials shall be supplied by the Commission to each employing unit without cost to the employing unit.

- (b)(1) Initial Determination. — A representative designated by the Commission shall promptly examine the claim and shall determine whether or not the claim is valid. If the claim is determined to be not valid for any reason other than lack of base period earnings, the claim shall be referred to an Adjudicator for a decision as to the issues presented. If the claim is determined to be valid, a monetary determination shall be issued showing the week with respect to when benefits shall commence, the weekly benefit amount payable, and the potential maximum duration thereof. The claimant shall be furnished a copy of such monetary determination showing the amount of wages paid him by each employer during his base period and the employers by whom such wages were paid, his benefit year, weekly benefit amount, and the maximum amount of benefits that may be paid to him for unemployment during the benefit year. When a claim is not valid due to lack of earnings in his base period, the determination shall so designate. The claimant shall be allowed 10 days from the earlier of mailing or delivery of his monetary determination to him within which to protest his monetary determination and upon the filing of such protest, unless said protest be satisfactorily resolved, the claim shall be referred to the Chief Deputy Commissioner or his designee for a decision as to the issues presented. All base period employers, as well as the most recent employer of a claimant on a temporary layoff, shall be notified upon the filing of a claim which establishes a benefit year.

At any time within one year from the date of the making of an initial determination, the Commission on its own initiative may reconsider such determination if it finds that an error in computation or identity has occurred in connection therewith or that additional wages pertinent to the claimant's benefit status have become available, or if such determination of benefit status was made as a result of a nondisclosure or misrepresentation of a material fact.

- (2) Adjudication. — When a protest is made by the claimant to the initial or monetary determination, or a question or issue is raised or presented as to the eligibility of a claimant under G.S. 96-13, or whether any disqualification should be imposed under G.S. 96-14, or benefits denied or adjusted pursuant to G.S. 96-18, the matter shall be referred to an adjudicator. The adjudicator may consider any matter, document or statement deemed to be pertinent to the issues, including telephone conversations, and after such consideration shall render a conclusion as to the claimant's benefit entitlements. The adjudicator shall notify the claimant and all other interested parties of the conclusion reached. The conclusion of the adjudicator shall be deemed the final decision of the Commission unless within 15 days after the date of notification or mailing of the conclusion, whichever is earlier, a written appeal is filed pursuant to such regulations as the Commission may adopt. The Commission shall be deemed an interested party for such purposes and may remove to itself or transfer to an appeals referee the proceedings involving any claim pending before an adjudicator.



Provided, any interested employer shall be allowed 10 days from the earlier of mailing or delivery of the notice of the filing of a claim against the employer's account to protest the claim and have the claim referred to an adjudicator for a decision on the question or issue raised. A copy of the notice of the filing shall be sent contemporaneously to the employer by telefacsimile transmission if a fax number is on file. Provided further, no question or issue may be raised or presented by the Commission as to the eligibility of a claimant under G.S. 96-13, or whether any disqualification should be imposed under G.S. 96-14, after 45 days from the first day of the first week after the question or issue occurs with respect to which week an individual filed a claim for benefits. None of the provisions of this subsection shall have the force and effect nor shall the same be construed or interested as repealing any other provisions of G.S. 96-18.

An employer shall receive written notice of the employer's appeal rights and any forms that are required to allow the employer to protest the claim. The forms shall include a section referencing the appropriate rules pertaining to appeals and the instructions on how to appeal.

(c) Appeals. — Unless an appeal from the adjudicator is withdrawn, an appeals referee shall set a hearing in which the parties are given reasonable opportunity to be heard. The conduct of hearings shall be governed by suitable regulations established by the Commission. The regulations need not conform to common law or statutory rules of evidence or technical or formal rules of procedure but shall provide for the conduct of hearings in such manner as to ascertain the substantial rights of the parties. The hearings may be conducted by conference telephone call or other similar means provided that if any party files with the Commission prior written objection to the telephone procedure, that party will be afforded an opportunity for an in-person hearing at such place in the State as the Commission by regulation shall provide. The hearing shall be scheduled for a time that, as much as practicable, least intrudes on and reasonably accommodates the ordinary business activities of an employer and the return to employment of a claimant. The appeals referee may affirm or modify the conclusion of the adjudicator or issue a new decision in which findings of fact and conclusions of law will be set out or dismiss an appeal when the appellant fails to appear at the appeals hearing to prosecute the appeal after having been duly notified of the appeals hearing. The evidence taken at the hearings before the appeals referee shall be recorded and the decision of the appeals referee shall be deemed to be the final decision of the Commission unless within 10 days after the date of notification or mailing of the decision, whichever is earlier a written appeal is filed pursuant to such regulations as the Commission may adopt. No person may be appointed as an appeals referee unless he or she possesses the minimum qualifications necessary to be a staff attorney eligible for designation by the Commission as a hearing officer under G.S. 96-4(m). No appeals referee in full-time permanent status may engage in the private practice of law as defined in G.S. 84-2.1 while serving in office as appeals referee; violation of this prohibition shall be grounds for removal. Whenever an appeal is taken from a decision of the appeals referee, the appealing party shall submit a clear written statement containing the grounds for the appeal within the time allowed by law for taking the appeal, and if such timely statement is not submitted, the Commission may dismiss the appeal.

(c1) Unless required for disposition of an ex parte matter authorized by law, a Commissioner, appeals referee, or employee assigned to make a decision or to make findings of facts and conclusions of law in a case shall not communicate, directly or indirectly, in connection with any issue of fact, or question of law, with any person or party or his representative, except on notice and opportunity for parties to participate.



(c2) Whenever a party is notified of an Adjudicator's, Appeals Referee's, or Deputy Commissioner's decision by mail, G.S. 1A-1, Rule 6(e) shall apply, and three days shall be added to the prescribed period to file a written appeal.

(d) Repealed by Session Laws 1977, c. 727, s. 54.

(d1) No continuance shall be granted except upon application to the Commissioner, the appeals referee, or other authority assigned to make the decision in the matter to be continued. A continuance may be granted only for good cause shown and upon such terms and conditions as justice may require. Good cause for granting a continuance shall include, but not be limited to, those instances when a party to the proceeding, a witness, or counsel of record has an obligation of service to the State, such as service as a member of the North Carolina General Assembly, or an obligation to participate in a proceeding in a court of greater jurisdiction.

(e) Review by the Commission. — The Commission or Deputy Commissioner may on its own motion affirm, modify, or set aside any decision of an appeals referee on the basis of the evidence previously submitted in such case, or direct the taking of additional evidence, or may permit any of the parties to such decision to initiate further appeals before it, or may provide for group hearings in such cases as the Commission or Deputy Commissioner may deem proper. The Commission or Deputy Commissioner may remove to itself or transfer to another appeals referee the proceedings on any claim pending before an appeals referee. The Commission shall promptly notify the interested parties of its findings and the decision. In all Commission matters heard by a Deputy Commissioner, the decision of the Deputy Commissioner shall constitute the decision of the Commission; except, the Commission may remove unto itself, upon its own motion, any claim pending for rehearing and redetermination, provided such removal is done prior to the expiration of appeal period applicable to the decision of the Deputy Commissioner.

(f) Procedure. — The manner in which disputed claims shall be presented, the reports thereon required from the claimant and from employers, and the conduct of hearings and appeals shall be in accordance with regulations prescribed by the Commission for determining the rights of the parties, whether or not such regulations conform to common-law or statutory rules of evidence and other technical rules of procedure. All testimony at any hearing before an appeals referee upon a disputed claim shall be recorded unless the recording is waived by all interested parties, but need not be transcribed unless the disputed claim is further appealed and, one or more of the parties objects, under such regulations as the Commission may prescribe, to being provided a copy of the tape recording of the hearing. Any other provisions of this Chapter notwithstanding, any individual receiving the transcript shall pay to the Commission such reasonable fee for the transcript as the Commission may by regulation provide. The fee so prescribed by the Commission for a party shall not exceed the lesser of sixty-five cents (65¢) per page or sixty-five dollars (\$65.00) per transcript. The Commission may by regulation provide for the fee to be waived in such circumstances as it in its sole discretion deems appropriate but in the case of an appeal in forma pauperis supported by such proofs as are required in G.S. 1-110, the Commission shall waive the fee.

(g) Witness Fees. — Witnesses subpoenaed pursuant to this section shall be allowed fees at a rate fixed by the Commission. Such fees and all expenses of proceedings involving disputed claims shall be deemed a part of the expense of administering this Chapter.

(h) Judicial Review. — Any decision of the Commission, in the absence of judicial review as herein provided, shall become final 30 days after the date of notification or mailing thereof, whichever is earlier. Judicial review shall be permitted only after a party claiming to be aggrieved by the decision has exhausted his remedies before the Commission as provided in this Chapter

and has filed a petition for review in the superior court of the county in which he resides or has his principal place of business. The petition for review shall explicitly state what exceptions are taken to the decision or procedure of the Commission and what relief the petitioner seeks. Within 10 days after the petition is filed with the court, the petitioner shall serve copies of the petition by personal service or by certified mail, return receipt requested, upon the Commission and upon all parties of record to the Commission proceedings. Names and addresses of the parties shall be furnished to the petitioner by the Commission upon request. The Commission shall be deemed to be a party to any judicial action involving any of its decisions and may be represented in the judicial action by any qualified attorney who has been designated by it for that purpose. Upon motion of the Commission, the court shall dismiss any review for which the petition is untimely filed, untimely or improperly served, or for which it otherwise fails to comply with the requirements of this subsection. Any party to the Commission proceeding may become a party to the review proceeding by notifying the court within 10 days after receipt of the copy of the petition. Any person aggrieved may petition to become a party by filing a motion to intervene as provided in G.S. 1A-1, Rule 24.

Within 45 days after receipt of the copy of the petition for review or within such additional time as the court may allow, the Commission shall transmit to the reviewing court the original or a certified copy of the entire record of the proceedings under review. With the permission of the court the record may be shortened by stipulation of all parties to the review proceedings. Any party unreasonably refusing to stipulate to limit the record may be taxed by the court for such additional cost as is occasioned by the refusal. The court may require or permit subsequent corrections or additions to the record when deemed desirable.

(i) Review Proceedings. — If a timely petition for review has been filed and served as provided in G.S. 96-15(h), the court may make party defendant any other party it deems necessary or proper to a just and fair determination of the case. The Commission may, in its discretion, certify to the reviewing court questions of law involved in any decision by it. In any judicial proceeding under this section, the findings of fact by the Commission, if there is any competent evidence to support them and in the absence of fraud, shall be conclusive, and the jurisdiction of the court shall be confined to questions of law. Such actions and the questions so certified shall be heard in a summary manner and shall be given precedence over all civil cases. An appeal may be taken from the judgment of the superior court, as provided in civil cases. The Commission shall have the right to appeal to the appellate division from a decision or judgment of the superior court and for such purpose shall be deemed to be an aggrieved party. No bond shall be required of the Commission upon appeal. Upon the final determination of the case or proceeding, the Commission shall enter an order in accordance with the determination. When an appeal has been entered to any judgment, order, or decision of the court below, no benefits shall be paid pending a final determination of the cause, except in those cases in which the final decision of the Commission allowed benefits.

(j) Repealed by Session Laws 1985, c. 197, s. 9.

(k) Irrespective of any other provision of this Chapter, the Commission may adopt minimum regulations necessary to provide for the payment of benefits to individuals promptly when due as required by section 303(a)(1) of the Social Security Act as amended (42 U.S.C.A., section 503(a)(1)). (Ex. Sess. 1936, c. 1, s. 6; 1937, c. 150; c. 448, s. 4; 1941, c. 108, s. 5; 1943, c. 377, ss. 9, 10; 1945, c. 522, ss. 30-32; 1947, c. 326, s. 23; 1951, c. 332, s. 15; 1953, c. 401, s. 19; 1959, c. 362, ss. 16, 17; 1961, c. 454, s. 21; 1965, c. 795, ss. 20-22; 1969, c. 575, ss. 13, 14; 1971, c. 673, ss. 30, 30.1; 1977, c. 727, s. 54; 1981, c. 160, ss. 27-32; 1983, c. 625, ss. 10-14; 1985, c. 197, s. 9; c. 552, ss. 18-20; 1987 (Reg. Sess., 1988), c.



999, s. 6; 1989, c. 583, ss. 11, 12; c. 707, s. 4; 1991, c. 723, ss. 1, 2; 1993, c. 343, ss. 4, 5; 1999-340, ss. 6, 7; 2004-124, s. 13.7B(c); 2005-122, s. 1; 2006-242, s. 1.)

**Effect of Amendments. —**

Session Laws 2006-242, s. 1, effective October 1, 2006, and applicable to claims filed on or after that date, in subdivision (b)(2), substi-

tuted “10 days” for “15 days” in the first sentence and added the second sentence in the second paragraph, and added the third paragraph.

**CASE NOTES**

**Scope of Superior Court’s Jurisdiction.**

— Because the trial court did not rule on the merits of an employee’s claim for unemployment benefits, but found that the Employment Security Commission’s order did not address all of the relevant issues raised by the record, and the findings were incomplete and failed to set out the sequence of events regarding the timing and notification of the employee’s discharge, the order was clearly interlocutory; hence, without evidence that the employee’s substantial rights were affected, or that any criteria for an immediate appeal was required, the employee’s appeal was dismissed. *Reeves v. Yellow Transp., Inc.*, 170 N.C. App. 610, 613 S.E.2d 350, 2005 N.C. App. LEXIS 1076 (2005), review denied, — N.C. —, 619 S.E.2d 511 (2005).

**Conclusiveness of Findings of Fact on Appeal. —**

Based on an employee’s own testimony and documentary evidence that his failure to comply with the reasonable requirements of his job, specifically load and unload materials as directed and keep proper records, and because these requirements were reasonable and within his own control, the Employment Secu-

rity Commission did not err by concluding that the employee was discharged for substantial fault and the trial court did not err by upholding this Commission’s ruling. *Reeves v. Yellow Transp., Inc.*, 170 N.C. App. 610, 613 S.E.2d 350, 2005 N.C. App. LEXIS 1076 (2005), review denied, — N.C. —, 619 S.E.2d 511 (2005).

Superior and appellate courts, under G.S. 96-15(i), were bound by the North Carolina Employment Security Commission’s findings of fact because there was sufficient evidence to establish that the former employee missed work for medical reasons. *James v. Lemmons*, — N.C. App. —, 629 S.E.2d 324, 2006 N.C. App. LEXIS 1075 (2006).

Superior court did not violate G.S. 96-15(i) by correcting an appeals referee’s finding of fact because the finding of fact contained a mere misstatement by the referee of no consequence to the ultimate determination that an employee’s discharge from employment with the employer was not due to substantial fault or misconduct in connection with the work. *James v. Lemmons*, — N.C. App. —, 629 S.E.2d 324, 2006 N.C. App. LEXIS 1075 (2006).

**Applied** in *Boylard v. Southern Structures, Inc.*, 172 N.C. App. 108, 615 S.E.2d 919, 2005 N.C. App. LEXIS 1434 (2005).



Chapter 97.  
Workers' Compensation Act.

Article 1.	Sec.	
<b>Workers' Compensation Act.</b>		quired; installments; payment without prejudice; notice to Commission; penalties.
Sec.		
97-7. State or subdivision and employees thereof.	97-19.1.	Truck, tractor, or truck tractor trailer driver's status as employee or independent contractor.
97-18. Prompt payment of compensation re-		

ARTICLE 1.  
*Workers' Compensation Act.*

§ 97-1. Short title.

CASE NOTES

**Wrongful Discharge Claim.** — Trial court did not err in granting an employer's G.S. 1A-1, N.C. R. Civ. P. 12(b)(6) motion, dismissing a employee's claim of wrongful discharge in violation of public policy because she engaged in a protected activity when she requested that her employer pay for a medical evaluation of a work-related injury, as her act of asking her employer to pay for a doctor's visit or other medical services was merely an abstract assertion, and not an assertion of rights under the Workers' Compensation Act, G.S. 97-1 et seq. (2003), and no evidence was presented that she filed a workers' compensation claim which would have triggered the statutory and common law protection against employer retaliation in violation of public policy. *Whitings v. Wolfson Casing Corp.*, 173 N.C. App. 218, 618 S.E.2d 750, 2005 N.C. App. LEXIS 1916 (2005).

**Appellate Review.** —

Under the North Carolina Workers' Compensation Act, G.S. 97-1 et seq., the Industrial Commission is the factfinding body, the sole judge of the credibility of witnesses, and the ultimate factfinder whether it is conducting a hearing or reviewing a cold record, and the commission's findings of fact could have been set aside on appeal only where there was a complete lack of competent evidence to support them; ample evidence supported the denial of an employee's workers' compensation claim where the full commission reviewed depositions from three qualified physicians, and reviewed notes from another physician who was not present, and only one of the doctors opined that the employee's job aggravated his underlying arthritis. *Armstrong v. W.R. Grace & Co.*, — N.C. App. —, 623 S.E.2d 820, 2006 N.C. App. LEXIS 127 (2006).

§ 97-2. Definitions.

CASE NOTES

- I. In General.
- II. Employment, Employees, and Employers.
  - A. In General.
  - B. State and Municipal Employees.
- III. Average Weekly Wages.
  - A. In General.
  - B. Illustrative Cases.
- V. Accident.
- VI. Arising Out of and in the Course of Employment.
  - A. In General.
  - B. Arising Out of.
  - C. In the Course of.
  - D. Risks Incident to the Employment.
- VII. Injuries While Acting for Benefit of Self or Third Person.

IX. Injuries Where Employment Entails Traveling.  
 X. Assaults and Fights.  
 XIII. Aggravation of Existing Condition or Infirmary.  
 XVII. Disability.

### I. IN GENERAL.

**“Compensability” and “Disability” Distinguished.** — North Carolina General Statutes and ample case law distinguished between the separate concepts of “compensability” and “disability,” where neither a Form 21 nor a Form 26 was filed, nor was a prior award by the industrial commission entered, an injured employee was not entitled to a presumption of continuing disability based on the insurer’s admission of compensability, and the industrial commission erred in placing on the insurer the burden to show that the injured employee was capable of returning to gainful employment. *Clark v. Wal-Mart*, 360 N.C. 41, 619 S.E.2d 491, 2005 N.C. LEXIS 990 (2005).

While the case law interpreting the specific traumatic incident provision of G.S. 97-2(6) requires the plaintiff to prove an injury at a cognizable time, this does not compel the plaintiff to allege the specific hour or day of the injury; where a Form 18 specifically described the accident causing an employee’s injury as a tire changing incident, this was sufficient to constitute a claim arising out of that incident, despite the fact that the form listed the date of a later truck exiting incident as the date of the accident. *Crane v. Berry’s Clean-Up & Landscaping, Inc.*, 169 N.C. App. 323, 610 S.E.2d 464, 2005 N.C. App. LEXIS 614 (2005).

**Applied** in *McGhee v. Bank of Am. Corp.*, 173 N.C. App. 422, 618 S.E.2d 833, 2005 N.C. App. LEXIS 2016 (2005).

**Cited** in *Workman v. Rutherford Elec. Mbrshp. Corp.*, 170 N.C. App. 481, 613 S.E.2d 243, 2005 N.C. App. LEXIS 1077 (2005); *Flynn v. EPSG Mgmt. Servs.*, 171 N.C. App. 353, 614 S.E.2d 460, 2005 N.C. App. LEXIS 1208 (2005).

## II. EMPLOYMENT, EMPLOYEES, AND EMPLOYERS.

### A. In General.

#### Employment Shown. —

Former employer’s subsequent sale of the division for which an injured employee worked to a buyer that later went bankrupt did not, standing alone, divest the North Carolina Industrial Commission of jurisdiction over the employer as the employee’s employer at the time of the employee’s accident. *Goodson v. P.H. Glatfelter Co.*, 171 N.C. App. 596, 615 S.E.2d 350, 2005 N.C. App. LEXIS 1315 (2005).

### B. State and Municipal Employees.

#### Deputy Sheriffs. —

Trial court did not abuse its discretion in extinguishing a county’s subrogation lien

against a deputy sheriff regarding a settlement that he received following an injury in the course of his employment because, based upon the fact that the county government was subject to the North Carolina Workers’ Compensation Act, G.S. 97-1 et seq., and its provisions regarding payment and compensation under the Act, there was specific statutory authority authorizing the deputy sheriff to seek a determination under G.S. 97-10.2(j) of the county’s authority to file a lien against his settlement proceeds. *Helsius v. Robertson*, — N.C. App. —, 621 S.E.2d 263, 2005 N.C. App. LEXIS 2469 (2005).

## III. AVERAGE WEEKLY WAGES.

### A. In General.

**Future Earnings Used To Calculate Wage of Professional Football Player.** — The North Carolina Industrial Commission was justified in using a different method of computing the average weekly wage of a professional football player by using the future earnings covered by his contract as the basis for calculating his average weekly wage, because such method most accurately approximated the amount which the player would have been earning if it were not for the injury he sustained, and the nature of the NFL players’ contract created exceptional reasons as to why it was not unfair to either party to use the future earnings covered by the player’s contract as a basis for calculating his average weekly wage. *Renfro v. Richardson Sports, Ltd. Partners*, 172 N.C. App. 176, 616 S.E.2d 317, 2005 N.C. App. LEXIS 1435 (2005).

#### Award Held Proper. —

North Carolina Industrial Commission’s findings, under G.S. 97-29, as to an injured city employee’s average weekly wage and compensation rate was supported by competent evidence based on the employee’s total yearly earnings, longevity bonus, and overtime adjustment for longevity, which were then divided by the number of weeks the employee worked in the year. *Cox v. City of Winston-Salem*, 171 N.C. App. 112, 613 S.E.2d 746, 2005 N.C. App. LEXIS 1161 (2005).

**Recreational Activities.** — As a fire and rescue service staffed by volunteers received tangible benefits from sponsoring a “Fun Day” for its employees, in the form of increased morale and camaraderie, the evidence supported the North Carolina Industrial Commission’s finding that the injuries a volunteer sustained during the event were compensable



under G.S. 97-2(6). *Frost v. Salter Path Fire & Rescue*, — N.C. App. —, 628 S.E.2d 22, 2006 N.C. App. LEXIS 539 (2006).

Volunteer employee was injured in a go-cart accident during "Fun Day," an event her employer held to boost volunteers' morale. She was properly awarded workers' compensation benefits under G.S. 97-2(6) because the presence of four of the six Chilton factors established that her injury occurred in the course of her employment. *Frost v. Salter Path Fire & Rescue*, — N.C. App. —, 628 S.E.2d 22, 2006 N.C. App. LEXIS 539 (2006).

### B. Illustrative Cases.

**Similarly Situated Employee's Average Weekly Wage.** — Under G.S. 97-2(5), the employee's average weekly wage was determined by average weekly wage of a similar situated employee who had been employed for more than one year, because the employee's employment prior to her injury extended over a period of less than 52 weeks. *Munoz v. Caldwell Mem'l Hosp.*, 171 N.C. App. 386, 614 S.E.2d 448, 2005 N.C. App. LEXIS 1265 (2005).

### V. ACCIDENT.

**Professional Football Player.** — Though an injury sustained while playing football may not be an unusual occurrence, such injury is not a probable, intended consequence of the employment and constitutes an unlooked for and untoward event that was not expected or designed; as such, sufficient evidence supported the findings of fact that a plaintiff, a professional football player, sustained a compensable injury by accident arising out of and in the course of his employment when his testimony explained that there was a technique he used to initiate a block by having his wrist in an upward position but, instead, his hand was forced into an awkward position wherein his wrist went downward and such testimony indicated that although he was engaging in his normal work duty of blocking an offensive lineman, he was injured because he was forced by another player into utilizing an unusual and awkward blocking or work technique that was not normally used in his normal work routine. *Renfro v. Richardson Sports, Ltd. Partners*, 172 N.C. App. 176, 616 S.E.2d 317, 2005 N.C. App. LEXIS 1435 (2005).

Football player's leg injury was a compensable injury by accident where the player sustained an injury while playing in the fifteenth game of the season, the injury was unusual in that the player had attempted to block numerous extra point attempts without sustaining a broken leg and torn tendons in his ankle, it was unexpected that one or more players would fall on the back of the injured player's leg causing a career-ending injury, and for such an injury to

occur required a force of 3000 pounds per square inch. *Swift v. Richardson Sports, Ltd.*, 173 N.C. App. 134, 620 S.E.2d 533, 2005 N.C. App. LEXIS 1898 (2005).

**Aneurysm Caused by Stress and Excitement While Deputy Sheriff Performed CPR.** — Employee's aneurysm, caused by stress and excitement while the employee was performing cardiopulmonary resuscitation (CPR) on a victim while working as deputy sheriff, was compensable; CPR was seldom done by deputies, and the testimony of the employee's doctor as to cause of the aneurysm was unequivocal and not speculative. *Ferreira v. Cumberland County*, — N.C. App. —, 623 S.E.2d 825, 2006 N.C. App. LEXIS 186 (2006).

### VI. ARISING OUT OF AND IN THE COURSE OF EMPLOYMENT.

#### A. In General.

**Injury Suffered in the Course of Employment.** —

Employee sustained an injury to his back as a direct result of a specific traumatic incident arising out of and in the course of employment where the employee's testimony and the accident report established that the employee sustained a lower back injury while lifting a hoist off a drum; a subsequent car accident while en route to a doctor's appointment was not an intervening cause that precluded compensation for aggravation of the employee's work-related injury since the accident was not the fault of the employee. *Cannon v. Goodyear Tire & Rubber Co.*, 171 N.C. App. 254, 614 S.E.2d 440, 2005 N.C. App. LEXIS 1254 (2005), cert. denied, 360 N.C. 61, 621 S.E.2d 177 (2005).

North Carolina Industrial Commission did not err by finding that an injured professional football player sustained a compensable injury by accident arising out of and in the course of his employment, under G.S. 97-2(6), as there was evidence to support the Commission's finding that the injury which the player suffered while playing during a game was unusual. *Swift v. Richardson Sports, Inc.*, — N.C. App. —, — S.E.2d —, 2005 N.C. App. LEXIS 725 (Apr. 5, 2005).

#### B. Arising Out of.

**Employment Must Be a Contributing Proximate Cause to Injury.** —

Where a hospital employee was assaulted and injured by a man when she was going from her office to the morgue to retrieve records, and the employer acknowledged that the assault upon the employee occurred "in the course of" her employment but argued that it did not "arise out of" her employment, the evidence supported the finding that the employment was a contributing cause of the injury; thus, the



employee was awarded total disability compensation, medical expenses, and psychological expenses under G.S. 97-2(6). *D'Aquisto v. Mission St. Joseph's Health Sys.*, 171 N.C. App. 216, 614 S.E.2d 583, 2005 N.C. App. LEXIS 1269 (2005).

**No Competent Evidence of Causation.** — North Carolina Industrial Commission properly found that no competent evidence supported a conclusion that a workers' compensation claimant's back injury occurred as a result of a traumatic incident where the claimant's credibility as it related to his testimony about the events that caused his back injury and the competency of his medical causation evidence were at issue; the claimant's medical evidence of causation was little more than speculation. *Rogers v. Smoky Mt. Petroleum Co.*, 172 N.C. App. 521, 617 S.E.2d 292, 2005 N.C. App. LEXIS 1779 (2005).

**Preexisting Injury Barred Recovery.** — North Carolina Industrial Commission properly found that a claimant's preexisting back injury barred his recovery where: (1) through the year, the claimant received pain treatment and physical therapy for a preexisting back injury; (2) the claimant's testimony of a subsequent back injury was not supported by other competent evidence; and (3) the expert medical testimony failed to establish that the claimant's current back problem was either caused or aggravated by an accident or specific traumatic work-related event. *Rogers v. Smoky Mt. Petroleum Co.*, 172 N.C. App. 521, 617 S.E.2d 292, 2005 N.C. App. LEXIS 1779 (2005).

**Claimant Failed to Meet His Burden of Proof.** — North Carolina Industrial Commission properly held that a claimant failed to show that he sustained a work-related back injury where: (1) he claimed having reported the injury to his supervisor, but his co-workers testified that he did not mention an injury to them, nor did they notice any change in the claimant's physical activities during the day; (2) he did not report the injury to his treating physician when he went for a previously-scheduled epidural injection; (3) he did not inform a second doctor that he had been undergoing treatment for back pain; and (4) he erroneously informed the second doctor that he had been out of work. *Rogers v. Smoky Mt. Petroleum Co.*, 172 N.C. App. 521, 617 S.E.2d 292, 2005 N.C. App. LEXIS 1779 (2005).

**Claimant Lacked Credibility.** — North Carolina Industrial Commission properly considered all of the competent evidence and properly found that a workers' compensation claimant lacked credibility. *Rogers v. Smoky Mt. Petroleum Co.*, 172 N.C. App. 521, 617 S.E.2d 292, 2005 N.C. App. LEXIS 1779 (2005).

#### C. In the Course of.

**Evidence Was Sufficient to Show Plaintiff's Injurious Exposure Occurred During Course of Employment.** —

Where an employee, who was a traveling

nursing assistant, had traveled to a patient's home, left on a personal errand, and was injured in an automobile accident on her return to the patient's home, the full North Carolina Industrial Commission's award of temporary total disability benefits was upheld on appeal, because the personal errand had been completed and the employee had resumed her business travel route when the accident occurred; thus, the accident was properly determined to have occurred in the course of employment, making the injury compensable. *Chavis v. TLC Home Health Care*, 172 N.C. App. 366, 616 S.E.2d 403, 2005 N.C. App. LEXIS 1770 (2005).

#### D. Risks Incident to the Employment.

**Bus Driver's Duties Placed Him at Increased Risk.** — Medical and testimonial evidence, including the testimony of an employee's neurologist, supported the findings and conclusions of the North Carolina Industrial Commission, which determined that the employee's ulnar nerve entrapment neuropathy condition, "double crush syndrome," and aggravation of his cervical spine condition were compensable as occupational diseases; the neurologist testified that the employee's job duties as a bus driver placed him at an increased risk of developing those types of symptoms, problems, and aggravation as opposed to the general population. *Chambers v. Transit Mgmt.*, 172 N.C. App. 540, 616 S.E.2d 372, 2005 N.C. App. LEXIS 1796 (2005).

**Increased Risk of Assault While Going from One Part to Another Part of Workplace.** — Substantial evidence supported the conclusion under G.S. 97-2(6) that hospital employee who went from one part of the hospital to another part while on business was subjected to an increased risk of assault because there were fewer people present along her route. *D'Aquisto v. Mission St. Joseph's Health Sys.*, 171 N.C. App. 216, 614 S.E.2d 583, 2005 N.C. App. LEXIS 1269 (2005).

### VII. INJURIES WHILE ACTING FOR BENEFIT OF SELF OR THIRD PERSON.

**Personal Comfort Not Applicable.** — Nurse's dropping off time reports required to be turned into office that day on her way to patient's home was not a distinct and total departure on a personal errand. *Munoz v. Caldwell Mem'l Hosp.*, 171 N.C. App. 386, 614 S.E.2d 448, 2005 N.C. App. LEXIS 1265 (2005).

### IX. INJURIES WHERE EMPLOYMENT ENTAILS TRAVELING.

**Distinct and Total Departure Not Applicable.** — Nurse's going to her employer's office on way to her patient's home in the same town as the office to drop off required time reports was not a distinct and total departure on a

personal errand even if she deviated from the most direct route to the home. *Munoz v. Caldwell Mem'l Hosp.*, 171 N.C. App. 386, 614 S.E.2d 448, 2005 N.C. App. LEXIS 1265 (2005).

**Traveling Salesman Exception.** — Nurse, who was required to see only one patient per day, to be paid excess mileage, and to turn in time and mileage that day, had a compensable accident going to the hospital's office while going to her patient's home in the same town under the traveling salesman exception. *Munoz v. Caldwell Mem'l Hosp.*, 171 N.C. App. 386, 614 S.E.2d 448, 2005 N.C. App. LEXIS 1265 (2005).

Because hospital's home health care nurse had multiple patients and work locations and did not have a fixed work location as in *Hunt v. Tender Loving Care Home Care Agency, Inc.*, 153 N.C. App. 266, 569 S.E.2d 675 (2002), her accident was compensable under the traveling salesman exception. *Munoz v. Caldwell Mem'l Hosp.*, 171 N.C. App. 386, 614 S.E.2d 448, 2005 N.C. App. LEXIS 1265 (2005).

**Contractual Duty Exception.** — Nurse, who was required to see only one patient per day, to be paid excess mileage, and to turn in time and mileage that day, had a compensable accident going to the hospital's office while going to her patient's home in the same town under the contractual duty exception. *Munoz v. Caldwell Mem'l Hosp.*, 171 N.C. App. 386, 614 S.E.2d 448, 2005 N.C. App. LEXIS 1265 (2005).

## X. ASSAULTS AND FIGHTS.

### Assault by Third Person. —

Substantial evidence supported the award of total disability compensation, medical expenses, and psychological expenses under G.S. 97-2(6) to a hospital employee who was assaulted and injured by a man when she was going from her office to the morgue to retrieve records. *D'Aquisto v. Mission St. Joseph's Health Sys.*, 171 N.C. App. 216, 614 S.E.2d 583, 2005 N.C. App. LEXIS 1269 (2005).

## XIII. AGGRAVATION OF EXISTING CONDITION OR INFIRMITY.

**Sufficient Evidence.** — North Carolina Industrial Commission's finding that a workers' compensation claimant's shoulder injury, which occurred when a coworker grabbed her by her arm and spun her around at work, arose out of and in the course of her employment, pursuant to G.S. 97-2(6) and aggravated a pre-existing shoulder condition was supported by sufficient evidence. This finding supported the Commission's conclusion that the claimant's injury by accident exacerbated her pre-existing condition and, thus, entitled her to temporary total disability compensation. *Davis v. Columbus County Schs.*, — N.C. App. —, 622 S.E.2d 671, 2005 N.C. App. LEXIS 2709 (2005).

**Mere Speculation was Insufficient to Support Finding of Aggravation of Kyphotic Deformity.** — Where employee sustained an injury to his back as a direct result of a specific traumatic incident arising out of and in the course of employment, the finding that the employee's kyphotic deformity was aggravated by the work-related injury was vacated because the testimony of a neurosurgeon that indicated the condition "likely" was aggravated, was insufficient to support such a finding as the opinion was mere speculation. *Cannon v. Goodyear Tire & Rubber Co.*, 171 N.C. App. 254, 614 S.E.2d 440, 2005 N.C. App. LEXIS 1254 (2005), cert. denied, 360 N.C. 61, 621 S.E.2d 177 (2005).

**While the case law interpreting the specific traumatic incident provision of G.S. 97-2(6) requires the plaintiff to prove an injury at a cognizable time, this does not compel the plaintiff to allege the specific hour or day of the injury;** following a work-related injury, was not an intervening cause that precluded compensation for aggravation of the employee's work-related injury since the accident was not the fault of the employee. *Cannon v. Goodyear Tire & Rubber Co.*, 171 N.C. App. 254, 614 S.E.2d 440, 2005 N.C. App. LEXIS 1254 (2005), cert. denied, 360 N.C. 61, 621 S.E.2d 177 (2005).

## XVII. DISABILITY.

### Ability to Work For Others After Injury.

— Football player was properly awarded 299 weeks of workers' compensation benefits as the North Carolina Industrial Commission's finding that the football player made another team, but was released from the other team because of limitations from his injury with the employer, was supported by competent evidence. *Swift v. Richardson Sports, Ltd.*, 173 N.C. App. 134, 620 S.E.2d 533, 2005 N.C. App. LEXIS 1898 (2005).

### Findings Held Inadequate to Establish Disability. —

Where the industrial commission found that a worker was unable to work in any capacity due to carpal tunnel syndrome, but the transcripts revealed no medical evidence that supported a finding that the worker was incapable of work in any employment, the commission erred in finding that the worker proved that she was temporarily totally disabled. *Teras v. AT&T*, — N.C. App. —, 622 S.E.2d 145, 2005 N.C. App. LEXIS 2591 (2005).

### Evidence of Disability Held Sufficient. —

Employee was disabled as a result of a right knee injury incurred when she fell on a degreaser at the employee's restaurant; the evidence showed that the employee experienced pain and swelling even after a knee replacement, that ultimately caused total dis-



ability. *Taylor v. Carolina Rest. Group, Inc.*, 170 N.C. App. 532, 613 S.E.2d 510, 2005 N.C. App. LEXIS 1079 (2005), *aff'd*, 360 N.C. 173, 622 S.E.2d 492 (2005).

North Carolina Industrial Commission did not err by finding that an employee proved that a work-related accident was the cause of her disability under G.S. 97-2(9) because expert testimony was adequate to establish the claim; the expert ruled out other causes of the employee's fibromyalgia; furthermore, the doctor's medical excuse was sufficient to establish the extent of the disability as well. *Singletary v. N.C. Baptist Hosp.*, 174 N.C. App. 147, 619 S.E.2d 888, 2005 N.C. App. LEXIS 2303 (2005).

Employee met her burden of proving disability through her treating doctor's testimony that her inability to perform her waitress position was related to an accident that occurred during an employer-sponsored recreational event. *Frost v. Salter Path Fire & Rescue*, — N.C. App. —, 628 S.E.2d 22, 2006 N.C. App. LEXIS 539 (2006).

#### **Evidence That Claimant No Longer Disabled. —**

North Carolina Industrial Commission did not err by finding that an employee failed to prove that her disability under G.S. 97-2(9) extended past a medical leave granted by a doctor where no other evidence was provided; there was no presumption of continuing disability since there was no previous opinion or settlement agreement. *Singletary v. N.C. Baptist Hosp.*, 174 N.C. App. 147, 619 S.E.2d 888, 2005 N.C. App. LEXIS 2303 (2005).

Evidence that an employee had been released to sedentary work with some restrictions, and the lack of evidence of the extent to which she was unable to work after that time, supported the North Carolina Industrial Commission's finding that her period of disability had ended. *Frost v. Salter Path Fire & Rescue*, — N.C. App. —, 628 S.E.2d 22, 2006 N.C. App. LEXIS 539 (2006).

## **§ 97-6. No special contract can relieve an employer of obligations.**

### **CASE NOTES**

#### **An employer is not permitted to escape his liability or obligations under this Article, etc. —**

North Carolina Industrial Commission, pursuant to G.S. 97-91, had jurisdiction over an employee's claim after the employee's employer sold the division for which the employee worked to a buyer that went bankrupt, and the sales agreement between the employer and the buyer, pursuant to G.S. 97-6, did not invalidate this jurisdiction by its terms for the transfer of liabilities. *Goodson v. P.H. Glatfelter Co.*, 171 N.C. App. 596, 615 S.E.2d 350, 2005 N.C. App. LEXIS 1315 (2005).

North Carolina Workers' Compensation Act, G.S. 97-1 et seq., prohibited contractual modification of the workers' compensation statutory provisions to permit dollar-for-dollar credit to an award for payments made by an employer. *Smith v. Richardson Sports Ltd.*, — N.C. App. —, — S.E.2d —, 2005 N.C. App. LEXIS 908 (May 3, 2005).

#### **Employer May Not Escape Liability or Obligations Because of Payment From Union. —**

North Carolina Industrial Commission did not abuse its discretion by awarding a time credit of one week rather than a dollar-for-dollar credit for payments made to a former professional football player by his employer and its insurance carrier after the player was injured in the next to last game of the season because the player returned to professional football for one week in the next season and exhibited earning capacity comparable to his average weekly wage. Further, dollar-for-dollar credits were precluded by North Carolina law as a payment that the player received for the last game of the season that he missed was made by the player's union under the terms of a collective bargaining agreement, and the agreement could not relieve the employer, in whole or in part, from its obligation to pay the player workers' compensation. *Swift v. Richardson Sports, Inc.*, — N.C. App. —, — S.E.2d —, 2005 N.C. App. LEXIS 725 (Apr. 5, 2005).

## **§ 97-7. State or subdivision and employees thereof.**

Neither the State nor any municipal corporation within the State, nor any political subdivision thereof, nor any employee of the State or of any such corporation or subdivision, shall have the right to reject the provisions of this Article relative to payment and acceptance of compensation, and G.S. 97-100(c) does not apply to them: Provided, that all such corporations or subdivisions are hereby authorized to self-insure or purchase insurance to secure its liability



under this Article and to include thereunder the liability of such subordinate governmental agencies as the county board of health, the school board, and other political and quasi-political subdivisions supported in whole or in part by the municipal corporation or political subdivision of the State. Each municipality is authorized to make appropriations for these purposes and to fund them by levy of property taxes pursuant to G.S. 153A-149 and G.S. 160A-209 and by the allocation of other revenues whose use is not otherwise restricted by law. (1929, c. 120, s. 8; 1931, c. 274, s. 1; 1945, c. 766; 1957, c. 1396, s. 1; 1961, c. 1200; 1973, c. 803, s. 34; c. 1291, s. 4; 2006-105, s. 1.10.)

**Editor's Note.** —

Session Laws 2006-105, s. 4, is a severability clause.

**Effect of Amendments.** — Session Laws

2006-105, s. 1.10, effective July 13, 2006, substituted "G.S. 97-100(c) does" for "the provisions of G.S. 97-100(j) shall" in the first sentence.

## CASE NOTES

**Extinguishment of County's Subrogation Lien.** — Trial court did not abuse its discretion in extinguishing a county's subrogation lien against a deputy sheriff regarding a settlement that he received following an injury in the course of his employment because, based upon the fact that the county government was subject to the North Carolina Workers' Compensation Act, G.S. 97-1 et seq., and its provi-

sions regarding payment and compensation under the Act, there was specific statutory authority authorizing the deputy sheriff to seek a determination under G.S. 97-10.2(j) of the county's authority to file a lien against his settlement proceeds. *Helsius v. Robertson*, — N.C. App. —, 621 S.E.2d 263, 2005 N.C. App. LEXIS 2469 (2005).

## § 97-10.2. Rights under Article not affected by liability of third party; rights and remedies against third parties.

## CASE NOTES

I. In General.

IV. Disbursement of Proceeds.

### I. IN GENERAL.

**Subsection (j) Held Constitutional.** —

Trial court did not abuse its discretion in extinguishing county's subrogation lien against a deputy sheriff regarding a settlement that he received following an injury in the course of his employment because G.S. 97-10.2(j) did not violate the Exclusive Emoluments Clause of N.C. Const. art. I, § 32. *Helsius v. Robertson*, — N.C. App. —, 621 S.E.2d 263, 2005 N.C. App. LEXIS 2469 (2005).

**Subsection (j) permitted superior court to adjust amount of a subrogation lien** if the agreement between the parties was finalized so that only performance of the agreement was necessary to bind the parties; a trial court erred in holding that it lacked jurisdiction to reduce liens held by an employer and an insurer against a workers' compensation award.

*Childress v. Fluor Daniel, Inc.*, 172 N.C. App. 166, 615 S.E.2d 868, 2005 N.C. App. LEXIS 1577 (2005).

### IV. DISBURSEMENT OF PROCEEDS.

**Employer's Lien Against Settlement.** —

Trial court did not abuse its discretion in extinguishing county's subrogation lien against deputy sheriff regarding a settlement that he received following an injury in the course of his employment because the county government was subject to the North Carolina Workers' Compensation Act, G.S. 97-1 et seq., regarding payment and compensation under the Act, and there was specific statutory authority authorizing the deputy sheriff to seek a determination under G.S. 97-10.2(j) of the county's authority to file a lien against his settlement proceeds. *Helsius v. Robertson*, — N.C. App. —, 621 S.E.2d 263, 2005 N.C. App. LEXIS 2469 (2005).

## § 97-12. Use of intoxicant or controlled substance; willful neglect; willful disobedience of statutory duty, safety regulation or rule.

### CASE NOTES

- I. In General.
- II. Illustrative Cases.

#### I. IN GENERAL.

**OSHA Regulations Applicable.** — By virtue of G.S. 95-131(a), the requirements of 29 C.F.R. § 1910.22(b)(1) are a statutory requirement that brings an employee's injury and an employer's subsequent citation within the scope of G.S. 97-12. *Brown v. Kroger Co.*, 169 N.C. App. 312, 610 S.E.2d 447, 2005 N.C. App. LEXIS 611 (2005).

#### II. ILLUSTRATIVE CASES.

**Employer Liability Based on OSHA Regulation.** — Full Commission of the North Carolina Industrial Commission did not err by awarding an injured employee a 10 percent

increase in compensation, after the employee tripped and fell over an extension cord in a hallway at work, because the presence of the extension cord in the hallway violated a federal regulation that was adopted by the State of North Carolina pursuant to G.S. 95-131(a) of the North Carolina Occupational Safety and Health Act, G.S. 95-126 et seq., and the employer was put on sufficient notice regarding the duties, consequences, and application of the North Carolina Workers' Compensation Act, G.S. 91-1 et seq., and its relevant safety standards. *Brown v. Kroger Co.*, 169 N.C. App. 312, 610 S.E.2d 447, 2005 N.C. App. LEXIS 611 (2005).

## § 97-17. Settlements allowed in accordance with Article.

### CASE NOTES

**No Determination of Whether Agreement Was Fair and Just.** — North Carolina Industrial Commission erred by failing to undertake a full investigation to determine if the settlement agreement was fair and just, as required by G.S. 97-17 and G.S. 97-82; determination that there was insufficient evidence to

justify setting aside the settlement agreements was not supported by competent evidence. *Smythe v. Waffle House*, 170 N.C. App. 361, 612 S.E.2d 345, 2005 N.C. App. LEXIS 999 (2005), cert. denied, 360 N.C. 66, 621 S.E.2d 876 (2005).

## § 97-18. Prompt payment of compensation required; installments; payment without prejudice; notice to Commission; penalties.

(a) Compensation under this Article shall be paid periodically, promptly and directly to the person entitled thereto unless otherwise specifically provided.

(b) When the employer or insurer admits the employee's right to compensation, the first installment of compensation payable by the employer shall become due on the fourteenth day after the employer has written or actual notice of the injury or death, on which date all compensation then due shall be paid. Compensation thereafter shall be paid in installments weekly except where the Commission determines that payment in installments should be made monthly or at some other period. Upon paying the first installment of compensation and upon suspending, reinstating, changing, or modifying such compensation for any cause, the insurer shall immediately notify the Commission, on a form prescribed by the Commission, that compensation has begun, or has been suspended, reinstated, changed, or modified. A copy of each notice shall be provided to the employee. The first notice of payment to the Commission shall contain the date and nature of the injury, the average weekly wages of the employee, the weekly compensation rate, the date the



disability resulting from the injury began, and the date compensation commenced.

(c) If the employer or insurer denies the employee's right to compensation, the employer or insurer shall notify the Commission, on or before the fourteenth day after it has written or actual notice of the injury or death, or within such reasonable additional time as the Commission may allow, and advise the employee in writing of its refusal to pay compensation on a form prescribed by the Commission. This notification shall (i) include the name of the employee, the name of the employer, the date of the alleged injury or death, the insurer on the risk, if any, and a detailed statement of the grounds upon which the right to compensation is denied, and (ii) advise the employee of the employee's right to request a hearing pursuant to G.S. 97-83. If the employer or insurer, in good faith, is without sufficient information to admit the employee's right to compensation, the employer or insurer may deny the employee's right to compensation.

(d) In any claim for compensation in which the employer or insurer is uncertain on reasonable grounds whether the claim is compensable or whether it has liability for the claim under this Article, the employer or insurer may initiate compensation payments without prejudice and without admitting liability. The initial payment shall be accompanied by a form prescribed by and filed with the Commission, stating that the payments are being made without prejudice. Payments made pursuant to this subsection may continue until the employer or insurer contests or accepts liability for the claim or 90 days from the date the employer has written or actual notice of the injury or death, whichever occurs first, unless an extension is granted pursuant to this section. Prior to the expiration of the 90-day period, the employer or insurer may upon reasonable grounds apply to the Commission for an extension of not more than 30 days. The initiation of payment does not affect the right of the employer or insurer to continue to investigate or deny the compensability of the claim or its liability therefor during this period. If at any time during the 90-day period or extension thereof, the employer or insurer contests the compensability of the claim or its liability therefor, it may suspend payment of compensation and shall promptly notify the Commission and the employee on a form prescribed by the Commission. The employer or insurer must provide on the prescribed form a detailed statement of its grounds for denying compensability of the claim or its liability therefor. If the employer or insurer does not contest the compensability of the claim or its liability therefor within 90 days from the date it first has written or actual notice of the injury or death, or within such additional period as may be granted by the Commission, it waives the right to contest the compensability of and its liability for the claim under this Article. However, the employer or insurer may contest the compensability of or its liability for the claim after the 90-day period or extension thereof when it can show that material evidence was discovered after that period that could not have been reasonably discovered earlier, in which event the employer or insurer may terminate or suspend compensation subject to the provisions of G.S. 97-18.1.

(e) The first installment of compensation payable under the terms of an award by the Commission, or under the terms of a judgment of the court upon an appeal from such an award, shall become due 10 days from the day following expiration of the time for appeal from the award or judgment or the day after notice waiving the right of appeal by all parties has been received by the Commission, whichever is sooner. Thereafter compensation shall be paid in installments weekly, except where the Commission determines that payment in installments shall be made monthly or in some other manner.

(f) The employer's or insurer's grounds for contesting the employee's claim or its liability therefor as specified in the notice suspending compensation



under subsection (d) of this section are the only bases for the employer's or insurer's defense on the issue of compensability in a subsequent proceeding, unless the defense is based on newly discovered material evidence that could not reasonably have been discovered prior to the notice suspending compensation.

(g) If any installment of compensation is not paid within 14 days after it becomes due, there shall be added to such unpaid installment an amount equal to ten per centum (10%) thereof, which shall be paid at the same time as, but in addition to, such installment, unless such nonpayment is excused by the Commission after a showing by the employer that owing to conditions over which he had no control such installment could not be paid within the period prescribed for the payment.

(h) Within 16 days after final payment of compensation has been made, the employer or insurer shall send to the Commission and the employee a notice, in accordance with a form prescribed by the Commission, stating that such final payment has been made, the total amount of compensation paid, the name of the employee and of any other person to whom compensation has been paid, the date of the injury or death, and the date to which compensation has been paid. If the employer or insurer fails to so notify the Commission or the employee within such time, the Commission shall assess against such employer or insurer a civil penalty in the amount of twenty-five dollars (\$25.00). The clear proceeds of civil penalties assessed pursuant to this section shall be remitted to the Civil Penalty and Forfeiture Fund in accordance with G.S. 115C-457.2.

(i) If any bill for services rendered under G.S. 97-25 by any provider of health care is not paid within 60 days after it has been approved by the Commission and returned to the responsible party, or within 60 days after it was properly submitted, in accordance with the provisions of this Article, to an insurer or managed care organization responsible for direct reimbursement pursuant to G.S. 97-26(g), there shall be added to such unpaid bill an amount equal to ten per centum (10%) thereof, which shall be paid at the same time as, but in addition to, such medical bill, unless such late payment is excused by the Commission.

(j) The employer or insurer shall promptly investigate each injury reported or known to the employer and at the earliest practicable time shall admit or deny the employee's right to compensation or commence payment of compensation as provided in subsections (b), (c), or (d) of this section. When an employee files a claim for compensation with the Commission, the Commission may order reasonable sanctions against an employer or insurer which does not, within 30 days following notice from the Commission of the filing of a claim, or within such reasonable additional time as the Commission may allow, do one of the following:

- (1) Notify the Commission and the employee in writing that it is admitting the employee's right to compensation and, if applicable, satisfy the requirements for payment of compensation under subsection (b) of this section.
- (2) Notify the Commission and the employee that it denies the employee's right to compensation consistent with subsection (c) of this section.
- (3) Initiate payments without prejudice and without liability and satisfy the requirements of subsection (d) of this section.

For purposes of this subsection, reasonable sanctions shall not prohibit the employer or insurer from contesting the compensability of or its liability for the claim. (1929, c. 120, s. 181/2; 1967, c. 1229, s. 2; 1979, c. 249, ss. 1, 2; c. 599; 1993 (Reg. Sess., 1994), c. 679, s. 3.1; 1998-215, s. 114; 2005-448, s. 4; 2006-264, s. 91.7.)

**Effect of Amendments. —**

Session Laws 2006-264, s. 91.7, effective August 27, 2006, added the last sentence of sub-

section (c) and deleted “deny the claim in good faith or” following “the employer or insurer may” in the first sentence of subsection (d).

**CASE NOTES****Sanctions Were Proper. —**

Where the Full Commission concluded that an employer's refusal to comply with its order to reinstate temporary partial disability compensation to the employee and the employer's denial of psychological treatment were made without any reasonable basis, Commission's conclusion that the employer's refusals were based on unfounded litigiousness was based on sufficient evidence such that its decision to award reasonable attorney's fees was appropriate. *Haley v. ABB, Inc.*, — N.C. App. —, 621 S.E.2d 180, 2005 N.C. App. LEXIS 2496 (2005).

**Failure to Address Estoppel Issues. —**

North Carolina Industrial Commission was required to make findings as to specific facts upon which the right to compensation depended, including the issue of estoppel; where the commission failed to address an employee's claim that the employer's failure to contest his claim estopped its later denial of the claim, the case was remanded for further proceedings. *Lewis v.*

*Beachview Exxon Serv.*, 174 N.C. App. 179, 619 S.E.2d 881, 2005 N.C. App. LEXIS 2248 (2005).

**Termination of Benefits Proper. —**

Employer's decision to deny a claim for workers' compensation benefits after initially paying was permitted under G.S. 97-18; the reasons given, such as credibility and causation, were sufficient to apprise the employee of the employer's arguments. *Singletary v. N.C. Baptist Hosp.*, 174 N.C. App. 147, 619 S.E.2d 888, 2005 N.C. App. LEXIS 2303 (2005).

**Applied** in *Smith v. Richardson Sports Ltd.*, — N.C. App. —, — S.E.2d —, 2005 N.C. App. LEXIS 908 (May 3, 2005).

**Cited** in *Smith v. Richardson Sports Ltd. Partners*, 172 N.C. App. 200, 616 S.E.2d 245, 2005 N.C. App. LEXIS 1440 (2005); *Perez v. Am. Airlines/AMR Corp.*, 174 N.C. App. 128, 620 S.E.2d 288, 2005 N.C. App. LEXIS 2304 (2005); *Mayfield v. Parker Hannifin*, — N.C. App. —, 621 S.E.2d 243, 2005 N.C. App. LEXIS 2472 (2005).

## § 97-19.1. Truck, tractor, or truck tractor trailer driver's status as employee or independent contractor.

(a) An individual in the interstate or intrastate carrier industry who operates a truck, tractor, or truck tractor trailer licensed by a governmental motor vehicle regulatory agency may be an employee or an independent contractor under this Article dependent upon the application of the common law test for determining employment status.

Any principal contractor, intermediate contractor, or subcontractor, irrespective of whether such contractor regularly employs three or more employees, who contracts with an individual in the interstate or intrastate carrier industry who operates a truck, tractor, or truck tractor trailer licensed by the United States Department of Transportation and who has not secured the payment of compensation in the manner provided for employers set forth in G.S. 97-93 for himself personally and for his employees and subcontractors, if any, shall be liable as an employer under this Article for the payment of compensation and other benefits on account of the injury or death of the independent contractor and his employees or subcontractors due to an accident arising out of and in the course of the performance of the work covered by such contract.

(b) Notwithstanding subsection (a) of this section, a principal contractor, intermediate contractor, or subcontractor shall not be liable as an employer under this Article for the payment of compensation on account of the injury or death of the independent contractor if the principal contractor, intermediate contractor, or subcontractor (i) contracts with an independent contractor who is an individual licensed by the United States Department of Transportation and (ii) the independent contractor personally is operating the vehicle solely pursuant to that license.

(c) The principal contractor, intermediate contractor, or subcontractor may insure any and all of his independent contractors and their employees or



subcontractors in a blanket policy, and when insured, the independent contractors, subcontractors, and employees will be entitled to compensation benefits under the blanket policy.

A principal contractor, intermediate contractor, or subcontractor may include in the governing contract with an independent contractor in the interstate or intrastate carrier industry who operates a truck, tractor, or truck tractor trailer licensed by a governmental motor vehicle regulatory agency an agreement for the independent contractor to reimburse the cost of covering that independent contractor under the principal contractor's, intermediate contractor's, or subcontractor's coverage of his business. (2003-235, s. 1; 2006-26, s. 1; 2006-259, s. 19.)

**Effect of Amendments.** — Session Laws 2006-26, s. 1, effective June 26, 2006, added the subsection designations and added present subsection (b).

Session Laws 2006-259, s. 19, effective August 23, 2006, substituted "the United States Department of Transportation" for "a governmental motor vehicle regulatory agency" in the

second paragraph of subsection (a); and in subsection (b), substituted "contractor who is an individual licensed by the United States Department of Transportation" for "contractor that is licensed by a governmental motor vehicle regulatory agency" in clause (i) and inserted "personally" and "solely" in clause (ii).

## § 97-22. Notice of accident to employer.

### CASE NOTES

#### **Effect of Personal Knowledge of Employer.** —

Because the employer had actual knowledge of a nursing assistant's accident, after receiving such information from the employee's father the day of the accident and no prejudice was shown by the employer, the employee's failure to give notice within 30 days was excused. *Chavis v. TLC Home Health Care*, 172 N.C. App. 366, 616 S.E.2d 403, 2005 N.C. App. LEXIS 1770 (2005).

#### **Sufficiency of the Industrial Commission's Findings of Fact.** — Decision by the

full North Carolina Industrial Commission was remanded for further findings of fact on the issues of whether an employee's claim was barred by his failure to timely notify the employer in writing of his injury under G.S. 97-22, and whether the employee sustained a compensable injury arising out of his employment, because the Commission failed to make adequate findings of fact for the appellate court to review the issues. *Watts v. Borg Warner Auto., Inc.*, 171 N.C. App. 1, 613 S.E.2d 715, 2005 N.C. App. LEXIS 1159 (2005), *aff'd*, 360 N.C. 169, 622 S.E.2d 492 (2005).

## § 97-24. Right to compensation barred after two years; destruction of records.

### CASE NOTES

**Medical Expenses Paid Within Two Years of Filing Claim.** — Worker's compensation claim was timely filed under G.S. 97-24 where the employer admitted to paying medical expenses within two years of the claim being filed. There was no restriction under the definition of medical compensation in G.S. 97-2(19) that such medical payments had to be made in the state to qualify as medical payments. *McGhee v. Bank of Am. Corp.*, 173 N.C. App. 422, 618 S.E.2d 833, 2005 N.C. App. LEXIS 2016 (2005).

#### **Form Sufficient for Claim Despite Incorrect Date.** — While the case law interpreting

the specific traumatic incident provision of G.S. 97-2(6) requires the plaintiff to prove an injury at a cognizable time, this does not compel the plaintiff to allege the specific hour or day of the injury; where a Form 18 specifically described the accident causing an employee's injury as a tire changing incident, this was sufficient to constitute a claim arising out of that incident, despite the fact that the form listed the date of a later truck exiting incident as the date of the accident. *Crane v. Berry's Clean-Up & Landscaping, Inc.*, 169 N.C. App. 323, 610 S.E.2d 464, 2005 N.C. App. LEXIS 614 (2005).



## § 97-25. Medical treatment and supplies.

### CASE NOTES

- I. In General.
- V. Selection of Physician by Employee.

#### I. IN GENERAL.

**Employer's Failure to Rebut Evidence of Causal Connection.** — Employee was entitled to additional medical compensation under G.S. 97-25 where the employer offered no evidence to rebut the employee's evidence showing that the herniated disc was directly related to the compensable injury she suffered when she slipped and fell while working as a flight attendant for the employer. *Perez v. Am. Airlines/AMR Corp.*, 174 N.C. App. 128, 620 S.E.2d 288, 2005 N.C. App. LEXIS 2304 (2005).

**Exclusion of Evidence.** — Exclusion of written response from a treating physician, which was in response to a facsimile sent by defense counsel that detailed three questions regarding causation of an employee's alleged work-related injury and subsequent disability, was proper since the communication was ex parte and consisted of interrogatories to a non-party, which were not authorized by any caselaw precedent nor any rule of evidence. *Mayfield v. Parker Hannifin*, — N.C. App. —, 621 S.E.2d 243, 2005 N.C. App. LEXIS 2472 (2005).

**Further Injury While En Route to Doctor's Appointment.** — Where employee sus-

tained an injury to his back as a direct result of a specific traumatic incident arising out of and in the course of employment, a subsequent car accident while en route to a doctor's appointment was not an intervening cause that precluded compensation for aggravation of the employee's work-related injury since the accident was not the fault of the employee. *Cannon v. Goodyear Tire & Rubber Co.*, 171 N.C. App. 254, 614 S.E.2d 440, 2005 N.C. App. LEXIS 1254 (2005), cert. denied, 360 N.C. 61, 621 S.E.2d 177 (2005).

#### V. SELECTION OF PHYSICIAN BY EMPLOYEE.

**Failure to Timely File Motion to Approve Choice of Osteopath.** — Where an employee appealing a decision of the North Carolina Industrial Commission did not assign as error the commission's finding that her motion to approve an osteopath's treatment was "not timely filed," that finding was binding on appeal; since the employee failed to obtain the commission's approval of the osteopath within a reasonable time, the employer was not required to pay for her treatments. *Thompson v. Fed. Express Ground*, — N.C. App. —, 623 S.E.2d 811, 2006 N.C. App. LEXIS 184 (2006).

### § 97-25.1. Limitation of duration of medical compensation.

### CASE NOTES

#### Illustrative Cases. —

Period of limitations provided by G.S. 97-25.1 was inherent in the Full Commission's award that an employer and a carrier pay for medical compensation incurred by an employee as a result of the injuries the employee sustained when she fell at work and subsequently at

home, as the award was based upon the Full Commission's prior conclusion of law, in which the Full Commission cited G.S. 97-25 and G.S. 97-25.1. *Brown v. Kroger Co.*, 169 N.C. App. 312, 610 S.E.2d 447, 2005 N.C. App. LEXIS 611 (2005).

## § 97-26. Fees allowed for medical treatment; malpractice of physician.

### CASE NOTES

**Applied** in *Carolinas Med. Ctr. v. Empls & Carriers Listed in Exhibit A*, 172 N.C. App. 549,

616 S.E.2d 588, 2005 N.C. App. LEXIS 1773 (2005).

## § 97-27. Medical examination; facts not privileged; refusal to be examined suspends compensation; autopsy.

### CASE NOTES

#### **Commission Approval of Request for Examination Is Discretionary. —**

Where employer chose the treating doctor who gave employee the disability rating for his right leg, and the employer failed to show any abuse of discretion by the Deputy Commissioner in finding that the employer was not

entitled to an independent medical evaluation for the employee's leg injury, the Full Commission did not err in affirming the Deputy Commissioner's findings and awarding the employee compensation for his leg injuries. *Haley v. ABB, Inc.*, — N.C. App. —, 621 S.E.2d 180, 2005 N.C. App. LEXIS 2496 (2005).

## § 97-29. Compensation rates for total incapacity.

### CASE NOTES

- I. In General.
- II. Permanent and Total Disability.

#### **I. IN GENERAL.**

**Calculation of Average Weekly Wage and Compensation Rate. —** North Carolina Industrial Commission's findings, under G.S. 97-29, as to an injured city employee's average weekly wage and compensation rate was supported by competent evidence based on the employee's total yearly earnings, longevity bonus, and overtime adjustment for longevity, which were then divided by the number of weeks the employee worked in the year. *Cox v. City of Winston-Salem*, 171 N.C. App. 112, 613 S.E.2d 746, 2005 N.C. App. LEXIS 1161 (2005).

North Carolina Industrial Commission's finding that an employee retained only minimal earning capacity was supported by the medical and record evidence and accorded to the appellate court's mandate in an earlier remand; the commission properly took judicial notice of the federal minimum wage to conclude that the employee was entitled to \$ 14,181 more under G. S. 97-30 than he was under the Form 26 agreement, and to set the agreement aside and award the employee \$ 14,181. *Lewis v. Craven Reg'l Med. Ctr.*, — N.C. App. —, 621 S.E.2d 259, 2005 N.C. App. LEXIS 2473 (2005).

#### **Evidence Held Sufficient to Show That Injurious Exposure Occurred During Course of Employment. —**

Where an employee, who was a traveling nursing assistant, had traveled to a patient's home, left on a personal errand, and was injured in an automobile accident on her return to the patient's home, the full North Carolina Industrial Commission's award of temporary total disability benefits was upheld on appeal, because the personal errand had been completed and the employee had resumed her busi-

ness travel route when the accident occurred; thus, the accident was properly determined to have occurred in the course of employment, making the injury compensable. *Chavis v. TLC Home Health Care*, 172 N.C. App. 366, 616 S.E.2d 403, 2005 N.C. App. LEXIS 1770 (2005).

#### **II. PERMANENT AND TOTAL DISABILITY.**

##### **Evidence of Total Disability Held Sufficient. —**

North Carolina Industrial Commission's denial of a workers' compensation claimant's application for temporary total disability benefits was affirmed as: (1) the Commission was entitled to give greater weight to the testimony of some doctors over others, (2) the Commission made findings sufficient to address the issues and evidence before it, and (3) a doctor's testimony did not justify overturning the Commission's findings that a lightning strike was the precipitating event for the claimant's somatization disorder, but did not establish causation. *Perkins v. United States Airways*, — N.C. App. —, 628 S.E.2d 402, 2006 N.C. App. LEXIS 867 (2006).

##### **Evidence of Total Disability Held Insufficient. —**

Workers' compensation claimant was not entitled to compensation under G.S. 97-29 or G.S. 97-30 after a Form 24 was approved as the evidence supported the North Carolina Industrial Commission's determinations that the claimant was capable of returning to full-duty work without restrictions and that she failed in her burden of proving that she remained disabled as a result of the compensable injury where, while there was medical evidence to



support a determination that the claimant could not return to full-time work as a flight attendant, this alone was insufficient to establish that she was incapable of earning wages at any job; the claimant's one contact with her employer about a light duty position was insuf-

ficient to establish she had made a reasonable effort to obtain employment under the second Russell option. *Perkins v. United States Airways*, — N.C. App. —, 628 S.E.2d 402, 2006 N.C. App. LEXIS 867 (2006).

## § 97-29.1. Increase in payments in cases for total and permanent disability occurring prior to July 1, 1973.

### CASE NOTES

**Commission Properly Found No Causation.** — North Carolina Industrial Commission properly held that a workers' compensation claimant's arthritic condition in her knees was not compensable as, although a prior award included "problems caused by falls" as compensable conditions, the degenerative arthritis was not the very injury that the Commission had previously determined to be the result of a compensable accident. *Clark v. Sanger Clinic, P.A.*, — N.C. App. —, 623 S.E.2d 293, 2005 N.C. App. LEXIS 2742 (2005).

North Carolina Industrial Commission properly found that a workers' compensation claimant's arthritic condition in her knees was not compensable where, although tears in the claimant's knees were related to falls, and therefore were compensable, the claimant failed to establish that she had a pre-existing arthritic condition in her knees and an expert testified that a long-standing tear could not cause arthritis of the knee; while there was evidence that the claimant's falls could have aggravated her degenerative knee condition, there was also testimony that the claimant's pre-existing obesity could have aggravated the degenerative changes in her knees. *Clark v. Sanger Clinic, P.A.*, — N.C. App. —, 623 S.E.2d 293, 2005 N.C. App. LEXIS 2742 (2005).

North Carolina Industrial Commission did not err in holding that the causal relationship between a workers' compensation claimant's compensable injuries and the need for restorative dental treatment was tenuous as an ex-

pert testified that the claimant's dental condition could have been caused by poor hygiene, xerostomia ("dry mouth" syndrome), possibly brought on by plaintiff's medications, stones in her salivary glands, or the six weeks that the claimant was in a coma following her unrelated gastric bypass procedure; while another expert testified that "dry mouth" syndrome was a potential side effect of several of the claimant's medications, there was no testimony as to what actually caused the claimant's dental condition. *Clark v. Sanger Clinic, P.A.*, — N.C. App. —, 623 S.E.2d 293, 2005 N.C. App. LEXIS 2742 (2005).

North Carolina Industrial Commission properly failed to specify treatment for a workers' compensation claimant's esophageal reflux, constipation, and nausea as compensable as there was no testimony as to what actually caused the conditions; while a treating physician testified that many of the claimant's medications had esophageal reflux, constipation, and nausea as side effects, there was no testimony that these conditions were causally related to the claimant's compensable injuries. Further, the physician testified that the claimant had ample reason to have nausea due to her gastric surgery, the complications from that, and her pain medication; further, if the claimant could establish that the conditions were related to her compensable injuries, her employer was obligated to provide the treatment for the ailments. *Clark v. Sanger Clinic, P.A.*, — N.C. App. —, 623 S.E.2d 293, 2005 N.C. App. LEXIS 2742 (2005).

## § 97-30. Partial incapacity.

### CASE NOTES

**Section Construed With G.S. 97-42.** — Where the employer and insurer paid workers' compensation benefits to the employee while he was incarcerated to which the employee was not entitled, the employer and insurer were entitled to credit under G.S. 97-42; because the award was for an indefinite period, the em-

ployer and insurer were permitted to reduce the amount of the employee's payments, as shortening the period of benefits was not possible because the employee's benefits were to terminate pursuant to G.S. 97-30, G.S. 97-31 when the employee returned to work and there would be no opportunity to shorten the period



of disability. *Easton v. J.D. Denson Mowing*, 173 N.C. App. 439, 620 S.E.2d 201, 2005 N.C. App. LEXIS 2014 (2005).

**Presumption of Disability Not Rebutted.**

Determination that a plaintiff suffered a fractured wrist was supported by competent evidence and he was properly found entitled to 300 weeks of partial disability payments, as the employer failed to show that the plaintiff was capable of earning his pre-injury wages post-injury since the plaintiff was not in professional football player condition due to his injury; in the future, the defendant was entitled to file a motion with the Commission pursuant to G.S. 97-47 for a modification of the plaintiff's award. *Renfro v. Richardson Sports, Ltd. Partners*, 172 N.C. App. 176, 616 S.E.2d 317, 2005 N.C. App. LEXIS 1435 (2005).

**Partial Disability Benefits Not Waranted.** —

Workers' compensation claimant was not entitled to compensation under G.S. 97-29 or G.S. 97-30 after a Form 24 was approved as the evidence supported the North Carolina Industrial Commission's determinations that the claimant was capable of returning to full-duty work without restrictions and that she failed in her burden of proving that she remained disabled as a result of the compensable injury where, while there was medical evidence to

support a determination that the claimant could not return to full-time work as a flight attendant, this alone was insufficient to establish that she was incapable of earning wages at any job; the claimant's one contact with her employer about a light duty position was insufficient to establish she had made a reasonable effort to obtain employment under the second Russell option. *Perkins v. United States Airways*, — N.C. App. —, 628 S.E.2d 402, 2006 N.C. App. LEXIS 867 (2006).

**Award Supported By the Evidence.** —

North Carolina Industrial Commission's finding that an employee retained only minimal earning capacity was supported by the medical and record evidence and accorded to the appellate court's mandate in an earlier remand; the commission properly took judicial notice of the federal minimum wage to conclude that the employee was entitled to \$14,181 more under G.S. 97-30 than he was under the Form 26 agreement, and to set the agreement aside and award the employee \$14,181. *Lewis v. Craven Reg'l Med. Ctr.*, — N.C. App. —, 621 S.E.2d 259, 2005 N.C. App. LEXIS 2473 (2005).

**Cited in** *Smith v. Richardson Sports Ltd. Partners*, 172 N.C. App. 200, 616 S.E.2d 245, 2005 N.C. App. LEXIS 1440 (2005); *Swift v. Richardson Sports, Inc.*, — N.C. App. —, — S.E.2d —, 2005 N.C. App. LEXIS 725 (Apr. 5, 2005).

## § 97-31. Schedule of injuries; rate and period of compensation.

### CASE NOTES

#### I. In General.

##### I. IN GENERAL.

**Section Construed With G.S. 97-42.** — Where the employer and insurer paid workers' compensation benefits to the employee while he was incarcerated to which the employee was not entitled, the employer and insurer were entitled to credit under G.S. 97-42; because the award was for an indefinite period, the employer and insurer were permitted to reduce the amount of the employee's payments, as shortening the period of benefits was not possible because the employee's benefits were to terminate pursuant to G.S. 97-30, G.S. 97-31 when the employee returned to work and there would be no opportunity to shorten the period of disability. *Easton v. J.D. Denson Mowing*, 173 N.C. App. 439, 620 S.E.2d 201, 2005 N.C. App. LEXIS 2014 (2005).

**Matter Remanded for Consideration of G.S. 97-31.** — Workers' compensation claimant's appeal was remanded to the North Carolina Industrial Commission for a determination of whether the claimant was entitled to compensation under G.S. 97-31 where the Commission did not address a doctor's opinion that the claimant had a 10 percent permanent partial disability rating to the right upper extremity; further, the Commission's opinion did not explain why the Commission did not believe that the claimant was entitled to compensation for permanent partial disability benefits based on that rating. *Perkins v. United States Airways*, — N.C. App. —, 628 S.E.2d 402, 2006 N.C. App. LEXIS 867 (2006).

## § 97-36. Accidents taking place outside State; employees receiving compensation from another state.

### CASE NOTES

**Commission did not have jurisdiction, etc. —**

Industrial commission properly determined that it lacked jurisdiction to hear a truck driver's workers' compensation action, as pursuant to G.S. 97-36, Virginia, rather than North Caro-

lina, was the driver's principle place of employment, as the worker was hired in Virginia, was paid in Virginia, and made the majority of his deliveries in Virginia. *Davis v. Great Coastal Express*, 169 N.C. App. 607, 610 S.E.2d 276, 2005 N.C. App. LEXIS 689 (2005).

## § 97-38. Where death results proximately from compensable injury or occupational disease; dependents; burial expenses; compensation to aliens; election by partial dependents.

### CASE NOTES

#### I. In General.

##### I. IN GENERAL.

**Constitutionality. —**

Court of Appeals of North Carolina holds that the time limitation in the fourth paragraph of G.S. 97-61.6 violates the Equal Protection Clauses of U.S. Const., Amend. XIV and N.C. Const. art. I, § 19 under the rational basis test because the statute imposes an additional burden for recovery — a shorter time frame for death benefits claims — for asbestosis or silico-

sis, and no rational basis exists for treating such occupational diseases differently from other latent occupational diseases; as the claim by a deceased employee's administratrix was within the applicable time limitation for other occupational diseases, under G.S. 97-38, the claim for death benefits was timely filed. *Payne v. Charlotte Heating & Air Conditioning*, 172 N.C. App. 496, 616 S.E.2d 356, 2005 N.C. App. LEXIS 1782 (2005).

## § 97-39. Widow, widower, or child to be conclusively presumed to be dependent; other cases determined upon facts; division of death benefits among those wholly dependent; when division among partially dependent.

### CASE NOTES

**Widow Was Entitled To Support. —**

There was some competent evidence to support the North Carolina Industrial Commission's award of total disability benefits and death benefits, pursuant to G.S. 97-39, to an estate administratrix on behalf of her deceased husband, who had been an employee of the employer for a period of time, where it was determined that the employer was the place

where the employee had his last injurious exposure to asbestos, pursuant to G.S. 97-57, and further, that he in fact had "asbestosis," as that term was defined under G.S. 97-62; credibility determinations were within the province of the Commission, and not for the court to redetermine. *Payne v. Charlotte Heating & Air Conditioning*, 172 N.C. App. 496, 616 S.E.2d 356, 2005 N.C. App. LEXIS 1782 (2005).



**§ 97-40. Commutation and payment of compensation in absence of dependents; “next of kin” defined; commutation and distribution of compensation to partially dependent next of kin; payment in absence of both dependents and next of kin.**

**CASE NOTES**

**Abandoning Parent Loses Share of Death Benefits of Child. —**

Operative language in G.S. 31A-2, precluding an abandoning parent from inheriting from an abandoned child, is nearly identical to that in G.S. 97-40, precluding the receipt of workers' compensation benefits by an abandoning parent due to the death of an abandoned child, as both statutes provide that a parent who has

abandoned the “care and maintenance” of a child loses the right to receive a specified benefit upon the child's death, and both provide an exception when the parent has resumed the “care and maintenance” of the child at least one year prior to the child's death or majority. In re Estate of Lunsford, 359 N.C. 382, 610 S.E.2d 366, 2005 N.C. LEXIS 358 (2005).

**§ 97-42. Deduction of payments.**

**CASE NOTES**

**Deduction Granted in Case of Indefinite Period of Benefits. —**

Where the employer and insurer paid workers' compensation benefits to the employee while he was incarcerated to which the employee was not entitled, the employer and insurer were entitled to credit under G.S. 97-42; because the award was for an indefinite period, the employer and insurer were permitted to reduce the amount of the employee's payments, as shortening the period of benefits was not possible because the employee's benefits were to terminate pursuant to G.S. 97-30, G.S. 97-31 when the employee returned to work and there would be no opportunity to shorten the period of disability. *Easton v. J.D. Denson Mowing*, 173 N.C. App. 439, 620 S.E.2d 201, 2005 N.C. App. LEXIS 2014 (2005).

**Due and Payable Benefits Are Not Deductible. —**

Employer and an insurance company could not seek a credit for a \$47,059 payment to a professional football player because it was due and payable when made; the North Carolina Industrial Commission's conclusion that the payment reflected the player's earnings for playing in a football game the day before was supported by competent evidence, as the players were paid after the weekly football game. *Smith v. Richardson Sports Ltd. Partners*, 172 N.C. App. 200, 616 S.E.2d 245, 2005 N.C. App. LEXIS 1440 (2005).

Employer and an insurance company could not seek a credit for a \$1 million roster bonus payment to a professional football player because it was due and payable when made, and the general manager's testimony indicated that

the roster bonus was neither paid as a result of the player's workers' compensation claim nor was it a part of a wage replacement plan for employees unable to work; rather, the player was contractually entitled to the bonus because the employer decided to place him on the roster, and the North Carolina Industrial Commission's finding that the bonus should be classified as earnings was supported by competent evidence. *Smith v. Richardson Sports Ltd. Partners*, 172 N.C. App. 200, 616 S.E.2d 245, 2005 N.C. App. LEXIS 1440 (2005).

Employer and an insurance company could not seek a credit for payments made to a professional football player for mini-camps, workouts, and an appearance fee, as the payments were due and payable when made, and according to the player's contract, he was obligated to participate in mini-camps, workouts, and to make appearances on behalf of the team; as the player's payment history indicated, the payments were for participating in these activities, and the North Carolina Commission's conclusion that these were post-injury earnings was supported by competent evidence. *Smith v. Richardson Sports Ltd. Partners*, 172 N.C. App. 200, 616 S.E.2d 245, 2005 N.C. App. LEXIS 1440 (2005).

Employer and an insurance company could not seek a credit for a \$4.5 million signing bonus payment to a professional football player because it was due and payable when made; the player became entitled to the signing bonus upon signing his contract, which occurred pre-injury. *Smith v. Richardson Sports Ltd. Partners*, 172 N.C. App. 200, 616 S.E.2d 245, 2005 N.C. App. LEXIS 1440 (2005).



While the North Carolina Industrial Commission correctly determined that an employer was not entitled to credit for bonus and appearance fees paid to a professional athlete who suffered an injury during a game, as these payments were due and payable under the employee's contract when made; furthermore, the Commission correctly found that the employee was entitled to 300 weeks of compensation. However, remand was necessary as to other payments made by the employer to determine whether the employer was entitled to credit regarding injury protection payments that were paid out of an employee-funded plan and injured reserve pay paid to the employee one year. *Smith v. Richardson Sports Ltd.*, — N.C. App. —, — S.E.2d —, 2005 N.C. App. LEXIS 908 (May 3, 2005).

**Limited Time Credit Was Not Abuse of Discretion.** — North Carolina Industrial Commission did not abuse its discretion by awarding a time credit of one week rather than a dollar-for-dollar credit for payments made to a former professional football player by his employer and its insurance carrier after the player was injured in the next to last game of the season because the player returned to professional football for one week in the next season and exhibited earning capacity comparable to his average weekly wage. Further, dollar-for-dollar credits were precluded by North Carolina law as a payment that the player received for the last game of the season that he missed was made by the player's union under the terms of a collective bargaining agreement, and the agreement could not relieve the employer, in whole or in part, from its obligation to pay the player workers' compensation. *Swift v. Richardson Sports, Inc.*, — N.C. App. —, — S.E.2d —, 2005 N.C. App. LEXIS 725 (Apr. 5, 2005).

**Employer was entitled to a dollar-for-dollar credit** for amounts paid after football player's injury under the terms of the NFL Collective Bargaining Agreement; the football player's severance pay was earned and was not subject to a credit. *Swift v. Richardson Sports, Ltd.*, 173 N.C. App. 134, 620 S.E.2d 533, 2005

N.C. App. LEXIS 1898 (2005).

**Employer Entitled to Dollar-for-Dollar Credit.** — Decision to award a dollar-for-dollar credit of \$35,294 to an employer for an injury grievance settlement received by the employee, a professional football player, was upheld on appeal as supported by competent evidence because the player's contract modified the provisions of G.S. 97-42 and allowed for such a credit and plainly stated that the credit shall be the amount of the payment made under the contract; because the player's plan provided for a credit based upon the payment itself, pursuant to G.S. 97-42, the credit was not based upon the number of weeks for which the player was paid, but rather the employer was entitled to a credit for the \$35,294 settlement paid to the player on a dollar-for-dollar basis. *Renfro v. Richardson Sports, Ltd. Partners*, 172 N.C. App. 176, 616 S.E.2d 317, 2005 N.C. App. LEXIS 1435 (2005).

**Credit Denied to a Self-Insured City for Disability Retirement Payments.** — North Carolina Industrial Commission's decision to deny a city credit for disability retirement payments that were made to an injured city employee from a public employee benefits program was not an abuse of discretion under G.S. 97-42 because the city and the employee jointly contributed to the plan, and competent evidence, in the form of testimony as to the funding of the disability benefits plan, existed to support the Commission's findings of fact and conclusions of law. *Cox v. City of Winston-Salem*, 171 N.C. App. 112, 613 S.E.2d 746, 2005 N.C. App. LEXIS 1161 (2005).

**Severance Payments Made to Terminated Employee Not Deductible.** — North Carolina Industrial Commission's decision to credit an employer for severance payments made to a terminated employee was reversed and remanded, because: (1) the employee's severance pay was an earned benefit of a contractual nature, which was due and payable when received; and (2) the employee's severance pay was not compensation for his disability. *Meares v. Dana Corporation/Wix Div.*, 172 N.C. App. 291, 615 S.E.2d 912, 2005 N.C. App. LEXIS 1433 (2005).

## § 97-47. Change of condition; modification of award.

### CASE NOTES

- I. In General.
- II. Change of Condition.
- III. Time Limitations.

#### I. IN GENERAL.

**Cited** in *Renfro v. Richardson Sports, Ltd. Partners*, 172 N.C. App. 176, 616 S.E.2d 317, 2005 N.C. App. LEXIS 1435 (2005); *Smith v. Richardson Sports Ltd. Partners*, 172 N.C. App.

200, 616 S.E.2d 245, 2005 N.C. App. LEXIS 1440 (2005).

#### II. CHANGE OF CONDITION.

**Decision Reversed Where There Was No**

**Notice to Employer.** — North Carolina Industrial Commission's decision that a workers' compensation claimant had sustained a change in condition was reversed as an employer did not have notice that the Commission would address a change in condition or the claimant's inability to comply with a mandated work schedule as the Commission had concluded that evidence that the claimant's condition had worsened was not relevant. *Branch v. Carolina Shoe Co.*, 172 N.C. App. 511, 616 S.E.2d 378, 2005 N.C. App. LEXIS 1802 (2005).

**ments Causing Statute of Limitations to Begin.** — Employee's claim for additional indemnity compensation was not time barred under G.S. 97-47, as the Form 60 payments did not resolve the extent of the employee's permanent disability and thus, at most, were an interlocutory award resolving the issue of compensability, but not the nature and extent of any disability. *Perez v. Am. Airlines/AMR Corp.*, 174 N.C. App. 128, 620 S.E.2d 288, 2005 N.C. App. LEXIS 2304 (2005).

### III. TIME LIMITATIONS.

**Form 60 Payments Were not Final Pay-**

## § 97-51. Joint employment; liabilities.

### CASE NOTES

**Cited in** *Goodson v. P.H. Glatfelter Co.*, 171 N.C. App. 596, 615 S.E.2d 350, 2005 N.C. App. LEXIS 1315 (2005).

## § 97-53. (See editor's note on condition precedent) Occupational diseases enumerated; when due to exposure to chemicals.

### CASE NOTES

- I. In General.
- II. Subdivision (13).
- III. Particular Diseases.

#### I. IN GENERAL.

**Cited in** *Payne v. Charlotte Heating & Air Conditioning*, 172 N.C. App. 496, 616 S.E.2d 356, 2005 N.C. App. LEXIS 1782 (2005).

#### II. SUBDIVISION (13).

##### **Causation Not Proven.** —

Employee was denied temporary total disability benefits for her alleged occupational disease, chemical sensitivity, under G.S. 91-53(13), where the experts opined that the employee had a heightened peculiar sensitivity to chemicals and that her personal sensitivity predated any exposure she alleged caused condition, and any expert opinion supporting the employee's position was based on mere speculation or possibility. *Hayes v. Tractor Supply Co.*, 170 N.C. App. 405, 612 S.E.2d 399, 2005 N.C. App. LEXIS 1003 (2005).

##### **Occupational Disease Found.** —

Medical and testimonial evidence, including the testimony of an employee's neurologist,

supported the findings and conclusions of the North Carolina Industrial Commission, which determined that the employee's ulnar nerve entrapment neuropathy condition, "double crush syndrome," and aggravation of his cervical spine condition were compensable as occupational diseases; the neurologist testified that the employee's job duties as a bus driver placed him at an increased risk of developing those types of symptoms, problems, and aggravation as opposed to the general population. *Chambers v. Transit Mgmt.*, 172 N.C. App. 540, 616 S.E.2d 372, 2005 N.C. App. LEXIS 1796 (2005).

##### **Occupational Disease Not Found.** —

North Carolina Industrial Commission did not err in concluding that an employee failed to show that he was suffering from an occupational disease because the employee presented no evidence, and the Commission made no findings to support a conclusion, that the employee's depression was due to causes and conditions characteristic of and peculiar to his employment in the aircraft section of his em-



ployer. *Bursell v. N.C. Indus. Comm'n I.C. No. 177846*, 172 N.C. App. 73, 616 S.E.2d 342, 2005 N.C. App. LEXIS 1427 (2005).

### III. PARTICULAR DISEASES.

**Torn Rotator Cuff.** — Industrial Commission properly determined that a worker suffered a compensable occupations disease as

defined by G.S. 97-53; the evidence indicated that the worker's employment as a cameraman predisposed him to a greater risk for rotator cuff and shoulder problems than the general public, as his work involved much overhead lifting and body contortion in order to get proper camera angles. *Flynn v. EPSG Mgmt. Servs.*, 171 N.C. App. 353, 614 S.E.2d 460, 2005 N.C. App. LEXIS 1208 (2005).

## § 97-57. Employer liable.

### CASE NOTES

**Liability of Employer in Whose Employment Employee Was Last Injuriouly Exposed.** —

There was some competent evidence to support the North Carolina Industrial Commission's award of total disability benefits and death benefits, pursuant to G.S. 97-39, to an estate administratrix on behalf of her deceased husband, who had been an employee of the employer for a period of time, where it was

determined that the employer was the place where the employee had his last injurious exposure to asbestos, pursuant to G.S. 97-57, and further, that he in fact had "asbestosis," as that term was defined under G.S. 97-62; credibility determinations were within the province of the Commission, and not for the court to redetermine. *Payne v. Charlotte Heating & Air Conditioning*, 172 N.C. App. 496, 616 S.E.2d 356, 2005 N.C. App. LEXIS 1782 (2005).

## § 97-59. Employer to pay for treatment.

### CASE NOTES

**Evidence From Unauthorized Physicians.** — North Carolina Industrial Commission did not err in relying upon the testimony of unauthorized physicians as, while the Commission could not require the employer to pay for

treatment by an unauthorized physician, the fact that a physician was not authorized did not render his or her evidence incompetent. *Branch v. Carolina Shoe Co.*, 172 N.C. App. 511, 616 S.E.2d 378, 2005 N.C. App. LEXIS 1802 (2005).

## § 97-61.6. Hearing after third examination and report; compensation for disability and death from asbestosis or silicosis.

### CASE NOTES

**Constitutionality.** — Court of Appeals of North Carolina holds that the time limitation in the fourth paragraph of G.S. 97-61.6 violates the Equal Protection Clauses of U.S. Const., Amend. XIV and N.C. Const. art. I, § 19 under the rational basis test because the statute imposes an additional burden for recovery — a

shorter time frame for death benefits claims — for asbestosis or silicosis, and no rational basis exists for treating such occupational diseases differently from other latent occupational diseases. *Payne v. Charlotte Heating & Air Conditioning*, 172 N.C. App. 496, 616 S.E.2d 356, 2005 N.C. App. LEXIS 1782 (2005).

## § 97-62. "Silicosis" and "asbestosis" defined.

### CASE NOTES

**Sufficient evidence supported the Commission's finding that plaintiff had asbestosis as defined in this section.**

There was some competent evidence to sup-

port the North Carolina Industrial Commission's award of total disability benefits and death benefits, pursuant to G.S. 97-39, to an estate administratrix on behalf of her deceased



husband, who had been an employee of the employer for a period of time, where it was determined that the employer was the place where the employee had his last injurious exposure to asbestos, pursuant to G.S. 97-57, and further, that he in fact had "asbestosis," as that

term was defined under G.S. 97-62; credibility determinations were within the province of the Commission, and not for the court to redetermine. *Payne v. Charlotte Heating & Air Conditioning*, 172 N.C. App. 496, 616 S.E.2d 356, 2005 N.C. App. LEXIS 1782 (2005).

## § 97-63. Period necessary for employee to be exposed.

### CASE NOTES

#### **Constitutionality. —**

Court of Appeals of North Carolina holds that the time limitation in the fourth paragraph of G.S. 97-61.6 violates the Equal Protection Clauses of U.S. Const., Amend. XIV and N.C. Const. art. I, § 19 under the rational basis test because, similar to the reasoning used for declaring G.S. 97-63 unconstitutional in the North Carolina Supreme Court's decision in *Walters v. Algernon Blair*, 120 N.C. App. 398,

462 S.E.2d 232 (1995), the statute imposes an additional burden for recovery — a shorter time frame for death benefits claims — for asbestosis or silicosis, and no rational basis exists for treating such occupational diseases differently from other latent occupational diseases. *Payne v. Charlotte Heating & Air Conditioning*, 172 N.C. App. 496, 616 S.E.2d 356, 2005 N.C. App. LEXIS 1782 (2005).

## § 97-77. North Carolina Industrial Commission created; members appointed by Governor; terms of office; chairman.

### CASE NOTES

**Hearing Commissioners Entitled To Absolute Quasi-Judicial Immunity. —** Workers' compensation commissioners were entitled to absolute quasi-judicial immunity because their role as Deputy Commissioners was indisputably judicial in nature under G.S. 97-77, and safeguards in the form of appeals from

Deputy Commissioners' decisions to the full Industrial Commission and the North Carolina Courts were available under G.S. 97-85, G.S. 97-86. *Sherwin v. Piner*, — F. Supp. 2d —, 2003 U.S. Dist. LEXIS 26855 (E.D.N.C. July 21, 2003).

## § 97-80. Rules and regulations; subpoena of witnesses; examination of books and records; depositions; costs.

### CASE NOTES

- I. In General.
- II. Rules and Rule Making.

#### **I. IN GENERAL.**

**Full Commission's Reservation of Decision. —** Full Commission of the North Carolina Industrial Commission did not abuse its discretion by reserving its decision regarding the issue of an injured employee's wage-earning capacity because the full extent of the employee's injuries had not yet been determined, and the employee was entitled to an opportunity to gather that information necessary to determine which of her conditions was causing her continuing incapacity for work. *Brown v. Kroger Co.*, 169 N.C. App. 312, 610 S.E.2d 447, 2005 N.C. App. LEXIS 611 (2005).

#### **II. RULES AND RULE MAKING.**

##### **Construction and Application of Rules.**

Workers' Comp. R. N.C. Indus. Comm'n art. VI, R. 601 was properly enacted under G.S. 97-80, was presumed valid, and did not shift the burden of proof to the employer by requiring it to come forward with any evidence to rebut an employee's claim. *D'Aquisto v. Mission St. Joseph's Health Sys.*, 171 N.C. App. 216, 614 S.E.2d 583, 2005 N.C. App. LEXIS 1269 (2005).

## § 97-82. Memorandum of agreement between employer and employee to be submitted to Commission on prescribed forms for approval; direct payment as award.

### CASE NOTES

**No Determination of Whether Agreement Was Fair and Just.** — North Carolina Industrial Commission erred by failing to undertake a full investigation to determine if the settlement agreement was fair and just, as required by G.S. 97-17 and G.S. 97-82; determination that there was insufficient evidence to justify setting aside the settlement agreements

was not supported by competent evidence. *Smythe v. Waffle House*, 170 N.C. App. 361, 612 S.E.2d 345, 2005 N.C. App. LEXIS 999 (2005), cert. denied, 360 N.C. 66, 621 S.E.2d 876 (2005).

**Cited in** *Perez v. Am. Airlines/AMR Corp.*, 174 N.C. App. 128, 620 S.E.2d 288, 2005 N.C. App. LEXIS 2304 (2005).

## § 97-85. Review of award.

### CASE NOTES

**Deputy Commissioner's Findings of Fact Not Conclusive.** — Full Commission of the North Carolina Industrial Commission was entitled to reverse a deputy commissioner's determination of credibility, even if that reversal was based upon an examination of the cold record rather than live testimony; therefore, the Full Commission did not err by reassessing the evidence and, contrary to the deputy commissioner, finding that an injured employee's fall at her home was a direct and natural result of the employee's prior fall and injury at work. *Brown v. Kroger Co.*, 169 N.C. App. 312, 610 S.E.2d 447, 2005 N.C. App. LEXIS 611 (2005).

**Scope of Issues on Appeals to Full Commission.** —

North Carolina Industrial Commission's decision that a workers' compensation claimant had sustained a change in condition was reversed as an employer did not have notice that the Commission would address a change in condition or the claimant's inability to comply with a mandated work schedule as the Commission had concluded that evidence that the claimant's condition had worsened was not relevant. *Branch v. Carolina Shoe Co.*, 172 N.C. App. 511, 616 S.E.2d 378, 2005 N.C. App. LEXIS 1802 (2005).

Where an employee who filed a total disability benefits claim in a North Carolina Industrial Commission (NCIC) proceeding died before the determination was made by the deputy commissioner, and the decedent's estate administratrix filed a form in order to be substituted in and to seek death benefits, the issue of death benefits was properly before the NCIC for determination, as the necessary form for review was filed and pursuant to G.S. 97-85, the ad-

ministratrix was entitled to have the full NCIC respond to the questions directly raised by the appeal from the commissioner's determination; the employer and its insurer did not show that they were denied an opportunity to be heard, as they chose not to ask the NCIC for the opportunity to present additional evidence at a time when they were aware that death benefits would be at issue. *Payne v. Charlotte Heating & Air Conditioning*, 172 N.C. App. 496, 616 S.E.2d 356, 2005 N.C. App. LEXIS 1782 (2005).

**Review of Findings of Hearing Commissioner.** —

Workers' compensation commissioners were entitled to absolute quasi-judicial immunity because their role as Deputy Commissioners was indisputably judicial in nature under G.S. 97-77, and safeguards in the form of appeals from Deputy Commissioners' decisions to the full Industrial Commission and the North Carolina Courts were available under G.S. 97-85, G.S. 97-86. *Sherwin v. Piner*, — F. Supp. 2d —, 2003 U.S. Dist. LEXIS 26855 (E.D.N.C. July 21, 2003).

**Failure of Commission to Make Findings and Conclusions.** —

Full Commission of the North Carolina Industrial Commission did not abuse its discretion by reserving its decision regarding the issue of an injured employee's wage-earning capacity because the full extent of the employee's injuries had not yet been determined, and the employee was entitled to an opportunity to gather that information necessary to determine which of her conditions was causing her continuing incapacity for work. *Brown v. Kroger Co.*, 169 N.C. App. 312, 610 S.E.2d 447, 2005 N.C. App. LEXIS 611 (2005).



## § 97-86. Award conclusive as to facts; appeal; certified questions of law.

### CASE NOTES

- II. Review, Generally.
- III. Jurisdiction.
- V. Scope of Review.

#### II. REVIEW, GENERALLY.

##### **Certification of Questions of Law. —**

When employers and insurers objected to paying hospitals certain amounts which had been approved by the Industrial Commission, in workers' compensation claims, and the employers and insurers challenged the constitutionality of the statute under which these amounts were approved, the Industrial Commission could have certified the question of the statute's constitutionality to the appellate court before making its final decision. *Carolinas Med. Ctr. v. Empls & Carriers Listed in Exhibit A*, 172 N.C. App. 549, 616 S.E.2d 588, 2005 N.C. App. LEXIS 1773 (2005).

When the North Carolina Industrial Commission exceeded its authority by finding a prior version of G.S. 97-26(b) unconstitutional, the question of the statute's constitutionality was not properly presented to an appellate court on appeal of the Commission's decision because, among other reasons, no party filed a certiorari petition, pursuant to N.C. R. App. P. 21, nor did a party seek suspension of the Rules of Appellate Procedure, under N.C. R. App. P. 2, nor did the Commission certify the question to the appellate court, under G.S. 97-86. *Carolinas Med. Ctr. v. Empls & Carriers Listed in*

*Exhibit A*, 172 N.C. App. 549, 616 S.E.2d 588, 2005 N.C. App. LEXIS 1773 (2005).

#### III. JURISDICTION.

**Certification of Questions of Law. —** G.S. 97-86 allows an appellate court to consider questions of law certified to it by the Industrial Commission, but it does not presume to allow the court to certify matters to itself for review and consideration. *Carolinas Med. Ctr. v. Empls & Carriers Listed in Exhibit A*, 172 N.C. App. 549, 616 S.E.2d 588, 2005 N.C. App. LEXIS 1773 (2005).

#### V. SCOPE OF REVIEW.

**The Commission's legal conclusions are subject to court review.**

Workers' compensation commissioners were entitled to absolute quasi-judicial immunity because their role as Deputy Commissioners was indisputably judicial in nature under G.S. 97-77, and safeguards in the form of appeals from Deputy Commissioners' decisions to the full Industrial Commission and the North Carolina Courts were available under G.S. 97-85, G.S. 97-86. *Sherwin v. Piner*, — F. Supp. 2d —, 2003 U.S. Dist. LEXIS 26855 (E.D.N.C. July 21, 2003).

## § 97-86.1. Payment of award pending appeal in certain cases.

### CASE NOTES

**Applied** in *Goodson v. P.H. Glatfelter Co.*, 171 N.C. App. 596, 615 S.E.2d 350, 2005 N.C. App. LEXIS 1315 (2005).

**Cited** in *Carolinas Med. Ctr. v. Empls &*

*Carriers Listed in Exhibit A*, 172 N.C. App. 549, 616 S.E.2d 588, 2005 N.C. App. LEXIS 1773 (2005).

## § 97-88. Expenses of appeals brought by insurers.

### CASE NOTES

**Award of Attorneys' Fees Is Within Discretion of Commission. —**

North Carolina Industrial Commission did not abuse its discretion in denying an injured city employee attorney's fees where the Commission on remand reversed its decision to credit a city, which was self-insured, for disabil-

ity retirement benefits paid to the employee because the decision to award attorneys fees was consigned to the discretion of the Commission. *Cox v. City of Winston-Salem*, 171 N.C. App. 112, 613 S.E.2d 746, 2005 N.C. App. LEXIS 1161 (2005).



## § 97-88.1. Attorney's fees at original hearing.

### CASE NOTES

#### **Discretion of Industrial Commission.** —

Full commission did not abuse its discretion in awarding costs and attorney's fees as its findings were not manifestly unsupported by reason. *D'Aquisto v. Mission St. Joseph's Health Sys.*, 171 N.C. App. 216, 614 S.E.2d 583, 2005 N.C. App. LEXIS 1269 (2005).

Decision whether to award or deny attorney's fees rests within the sound discretion of the North Carolina Industrial Commission and will not be overturned absent a showing that the decision was manifestly unsupported by reason; the commission did not abuse its discretion in refusing to award attorney's fees to an employee based on her claim seeking payment for the treatment rendered to her by an unauthorized physician. *Thompson v. Fed. Express Ground*, — N.C. App. —, 623 S.E.2d 811, 2006 N.C. App. LEXIS 184 (2006).

**Necessity of Findings of Fact and Conclusions of Law.** — Award of attorney fees was error where the workers' compensation award and opinion did not contain findings of fact or conclusions of law pertaining to attorney fees; the Commission was instructed to specifically state the statute it relied upon in making the award and to make the necessary findings of fact and conclusions of law supporting the award. *Swift v. Richardson Sports, Ltd.*, 173 N.C. App. 134, 620 S.E.2d 533, 2005 N.C. App. LEXIS 1898 (2005).

**Failure to Make Findings of Fact to Support Award.** — Decision by the North Carolina Industrial Commission to award attorney fees was error where the Commission failed to specifically state the statute it relied upon in making the award and failed to make the necessary findings of fact and conclusions of law to support the award; the Commission's opinion contained no findings of fact or conclusions of law pertaining to attorney fees. *Swift v. Richardson Sports, Inc.*, — N.C. App. —, S.E.2d —, 2005 N.C. App. LEXIS 725 (Apr. 5, 2005).

#### **Fees Upheld.** —

Employer was required to pay its employee's attorney fees and costs in the amount of 25

percent of her total indemnity benefits based upon its stubborn, unfounded litigiousness, presenting no witnesses, denying her assault, not subpoenaing her, and not producing documents and performing a reasonable investigation. *D'Aquisto v. Mission St. Joseph's Health Sys.*, 171 N.C. App. 216, 614 S.E.2d 583, 2005 N.C. App. LEXIS 1269 (2005).

Where the Full Commission concluded that an employer's refusal to comply with its order to reinstate temporary partial disability compensation to the employee and the employer's denial of psychological treatment were made without any reasonable basis, Commission's conclusion that the employer's refusals were based on unfounded litigiousness was based on sufficient evidence such that its decision to award reasonable attorney's fees was appropriate. *Haley v. ABB, Inc.*, — N.C. App. —, 621 S.E.2d 180, 2005 N.C. App. LEXIS 2496 (2005).

#### **Fees Denied.** —

North Carolina Industrial Commission properly refused to award a workers' compensation claimant attorney's fees where: (1) although an employer was obligated to modify the claimant's house, the claimant lived out of state and was trying to sell the house and did not return to the house and contact the employer about the modifications until about one month before she filed a Form 33, (2) the claimant had not been billed for some unpaid medical expenses, and (3) the claimant advised the provider that other visits were unrelated to workers' compensation, and they, in fact, were for degenerative arthritis, which was not a compensable injury. *Clark v. Sanger Clinic, P.A.*, — N.C. App. —, 623 S.E.2d 293, 2005 N.C. App. LEXIS 2742 (2005).

Where the record showed that an employer challenged an employee's credibility and the cause of her fibromyalgia, sanctions were properly denied since there was sufficient reason for a defense of the claim. *Singletary v. N.C. Baptist Hosp.*, 174 N.C. App. 147, 619 S.E.2d 888, 2005 N.C. App. LEXIS 2303 (2005).

## § 97-91. Commission to determine all questions.

### CASE NOTES

#### **Jurisdiction Over Employee's Claim.** —

North Carolina Industrial Commission, pursuant to G.S. 97-91, had jurisdiction over an employee's claim after the employee's employer sold the division for which the employee worked to a buyer that went bankrupt, and the sales agreement between the employer and the buyer, pursuant to G.S. 97-6, did not invalidate

this jurisdiction by its terms for the transfer of liabilities; however, the method of handling the certificate of deposit belonging to the buyer that was deposited with the North Carolina Department of Insurance (DOI) fell within the ambit of the DOI's jurisdiction. *Goodson v. P.H. Glatfelter Co.*, 171 N.C. App. 596, 615 S.E.2d 350, 2005 N.C. App. LEXIS 1315 (2005).

**§ 97-93. Employers required to carry insurance or prove financial ability to pay for benefits; employers required to post notice; self-insured employers regulated by Commissioner of Insurance.**

**CASE NOTES**

**Self-insured Former Employer Required to Secure Its Obligation.** — North Carolina Industrial Commission properly exercised its authority in determining that the former employer of the employee was the employee's employer, subject to the North Carolina Workers' Compensation Act, G.S. 97-1 et seq., after the employer sold the division for

which the employee worked to a buyer that later went bankrupt, and that the employer had to secure its obligation to the employee by one of the permitted statutory methods in order to accomplish the Commission's opinion and disability award to the employee. *Goodson v. P.H. Glatfelter Co.*, 171 N.C. App. 596, 615 S.E.2d 350, 2005 N.C. App. LEXIS 1315 (2005).

**§ 97-94. Employers required to give proof that they have complied with preceding section; penalty for not keeping liability insured; review; liability for compensation; criminal penalties for failure to secure payment of compensation.**

**CASE NOTES**

**Authority of Industrial Commission.** — North Carolina Industrial Commission properly exercised its authority in determining that the former employer of the employee was the employee's employer, subject to the North Carolina Workers' Compensation Act, G.S. 97-1 et seq., after the employer sold the division for which the employee worked to a buyer that

later went bankrupt, and that the employer had to secure its obligation to the employee by one of the permitted statutory methods in order to accomplish the Commission's opinion and disability award to the employee. *Goodson v. P.H. Glatfelter Co.*, 171 N.C. App. 596, 615 S.E.2d 350, 2005 N.C. App. LEXIS 1315 (2005).

**§ 97-98. Policy must contain agreement promptly to pay benefits; continuance of obligation of insurer in event of default.**

**CASE NOTES**

**Applied** in *Smith v. Richardson Sports Ltd.*, — N.C. App. —, — S.E.2d —, 2005 N.C. App. LEXIS 908 (May 3, 2005).

**Cited** in *Smith v. Richardson Sports Ltd. Partners*, 172 N.C. App. 200, 616 S.E.2d 245, 2005 N.C. App. LEXIS 1440 (2005).

**ARTICLE 5.**

*Individual Employers.*

**§ 97-165. Definitions.**

**CASE NOTES**

**Applied** in *Goodson v. P.H. Glatfelter Co.*, 171 N.C. App. 596, 615 S.E.2d 350, 2005 N.C. App. LEXIS 1315 (2005).

§ 97-185. Deposits; surety bonds; letters of credit.

CASE NOTES

**Surety bond of an employee's former employer was improperly released** by the North Carolina Department of Insurance, pursuant to G.S. 97-185(h), because the employer had not secured its obligations under the North Carolina Workers' Compensation Act, G.S. 97-1 et seq., when it sold the division for which the

employee worked to a buyer that later went bankrupt, in a manner compliant with G.S. 97-185(g); therefore, the North Carolina Industrial Commission could order the employer to pay the employee's disability award. *Goodson v. P.H. Glatfelter Co.*, 171 N.C. App. 596, 615 S.E.2d 350, 2005 N.C. App. LEXIS 1315 (2005).



## Chapter 99B.

### Products Liability.

#### § 99B-1. Definitions.

##### CASE NOTES

**Cited in** Indem. Ins. Co. of N. Am. v. Am. Eurocopter LLC, — F. Supp. 2d —, 2005 U.S. Dist. LEXIS 34011 (M.D.N.C. July 8, 2005).

##### § 99B-1.1. Strict liability.

##### CASE NOTES

**Cited in** Indem. Ins. Co. of N. Am. v. Am. Eurocopter LLC, — F. Supp. 2d —, 2005 U.S. Dist. LEXIS 34011 (M.D.N.C. July 8, 2005).

##### § 99B-1.2. Breach of warranty.

##### CASE NOTES

**Cited in** Indem. Ins. Co. of N. Am. v. Am. Eurocopter LLC, — F. Supp. 2d —, 2005 U.S. Dist. LEXIS 34011 (M.D.N.C. July 8, 2005).

#### § 99B-2. Seller's opportunity to inspect; privity requirements for warranty claims.

##### CASE NOTES

##### **Privity Requirement.** —

Trial court did not err in dismissing general contractor's breach of implied warranty claims against the manufacturer because there was no privity. Since the generators were installed as a component part of the system, the plant only suffered economic loss and, pursuant to G.S.

99B-2(b), of the North Carolina Products Liability Act, in order for the general contractor to maintain an action against the manufacturer there had to be privity. *Atl. Coast Mech., Inc. v. Arcadis, Geraghty & Miller of N.C., Inc.*, — N.C. App. —, 623 S.E.2d 334, 2006 N.C. App. LEXIS 58 (2006).

#### § 99B-3. Alteration or modification of product.

##### CASE NOTES

##### **Misuse of Product Must Be a Proximate Cause.** —

Helicopter manufacturer and related defendants were not entitled to summary judgment on product liability claims stemming from the crash of a medical helicopter because a fact issue remained as to whether there was an improper alteration or misuse of the helicop-

ter's gearbox by the pilot or mechanic under the provisions of G.S. 99B-3 and whether the pilot and mechanic used the product (helicopter) contrary to express and adequate instructions or acted unreasonably under the provisions of G.S. 99B-4. *Indem. Ins. Co. of N. Am. v. Am. Eurocopter LLC*, — F. Supp. 2d —, 2005 U.S. Dist. LEXIS 34011 (M.D.N.C. July 8, 2005).

§ 99B-4. Knowledge or reasonable care.

CASE NOTES

**Failure to Follow Instructions. —**  
Helicopter manufacturer and related defendants were not entitled to summary judgment on product liability claims stemming from the crash of a medical helicopter because a fact issue remained as to whether there was an improper alteration or misuse of the helicopter's gearbox by the pilot or mechanic under the

provisions of G.S. 99B-3 and whether the pilot and mechanic used the product (helicopter) contrary to express and adequate instructions or acted unreasonably under the provisions of G.S. 99B-4. *Indem. Ins. Co. of N. Am. v. Am. Eurocopter LLC*, — F. Supp. 2d —, 2005 U.S. Dist. LEXIS 34011 (M.D.N.C. July 8, 2005).

**Chapter 104A.**  
**Degrees of Kinship.**

**§ 104A-1. Degrees of kinship; how computed.**

CASE NOTES

**Applied** in *Conaway v. Polk*, 453 F.3d 567, 2006 U.S. App. LEXIS 17304 (4th Cir. 2006).



## Chapter 105.

### Taxation.

#### SUBCHAPTER I. LEVY OF TAXES.

##### Article 1A.

##### Estate Taxes.

Sec.

- 105-32.2. Estate tax imposed in amount equal to federal state death tax credit.
- 105-32.8. Federal determination that changes the amount of tax payable to the State.

##### Article 2.

##### Privilege Taxes.

- 105-40. Amusements — Certain exhibitions, performances, and entertainments exempt from tax.

##### Article 2C.

##### Alcoholic Beverage License And Excise Taxes.

##### Part 4. Excise Taxes, Distribution of Tax Revenue.

- 105-113.81A. (Effective until July 1, 2007) Distribution of part of wine taxes attributable to North Carolina wine.
- 105-113.81A. (Effective July 1, 2007) Distribution of part of wine taxes attributable to North Carolina wine.
- 105-113.82. Distribution of part of beer and wine taxes.

##### Article 3.

##### Franchise Tax.

- 105-114. Nature of taxes; definitions.
- 105-114.1. (Effective for taxable years beginning on or after January 1, 2007) Limited liability companies.
- 105-116. Franchise or privilege tax on electric power, water, and sewerage companies.
- 105-120.2. Franchise or privilege tax on holding companies.
- 105-122. Franchise or privilege tax on domestic and foreign corporations.
- 105-122.1. (Effective for taxable years beginning on or after January 1, 2007) Credit for additional annual report fees paid by limited liability companies subject to franchise tax.

#### Article 3A.

##### Tax Incentives for New and Expanding Businesses

[See note for repeal of this Article.]

Sec.

- 105-129.2. (See note for repeal) Definitions.
- 105-129.2A. Sunset; studies.
- 105-129.3A. (See note for repeal) Development zone designation.
- 105-129.3B. Agrarian growth zone designation.
- 105-129.4. (See note for repeal) Eligibility; forfeiture.
- 105-129.6. (See note for repeal) Fees and reports.
- 105-129.7. (See note for repeal) Substantiation.
- 105-129.8. (See note for repeal) Credit for creating jobs.
- 105-129.9. (See note for repeal) Credit for investing in machinery and equipment.

#### Article 3B.

##### Business And Energy Tax Credits.

- 105-129.15. Definitions.
- 105-129.16D. (Repealed effective for facilities placed in service on or after January 1, 2011) Credit for constructing renewable fuel facilities.
- 105-129.16E. (Effective for taxable years beginning on or after January 1, 2007, and expires for taxable years beginning on or after January 1, 2009) Credit for small business employee health benefits.
- 105-129.16F. (Effective for taxable years beginning on or after January 1, 2008, and repealed for taxable years beginning on or after January 1, 2010) Credit for biodiesel producers.

#### Article 3D.

##### Historic Rehabilitation Tax Credits.

- 105-129.35. Credit for rehabilitating income-producing historic structure.
- 105-129.36. Credit for rehabilitating nonincome-producing historic structure.

#### Article 3F.

##### Research and Development.

- 105-129.51. (See notes) Administration; sunset.

Sec.

105-129.55. (See notes) Credit for North Carolina research and development.

### Article 3H.

#### Mill Rehabilitation Tax Credit.

- 105-129.70. Definitions.  
 105-129.71. Credit for income-producing rehabilitated mill property.  
 105-129.72. Credit for nonincome-producing rehabilitated mill property.  
 105-129.73. Tax credited; cap.  
 105-129.74. Coordination with Article 3D of this Chapter.  
 105-129.75. Sunset.

### Article 3I.

#### [Reserved.]

105-129.78, 105-129.79. [Reserved.]

### Article 3J.

#### Tax Credits for Growing Businesses.

- 105-129.80. (Effective for taxable years beginning on or after January 1, 2007) Legislative findings.  
 105-129.81. (Effective for taxable years beginning on or after January 1, 2007) Definitions.  
 105-129.82. (Effective for taxable years beginning on or after January 1, 2007) Sunset; studies.  
 105-129.83. (Effective for taxable years beginning on or after January 1, 2007) Eligibility; forfeiture.  
 105-129.84. (Effective for taxable years beginning on or after January 1, 2007) Tax election; cap; carryforwards; limitations.  
 105-129.85. (Effective for taxable years beginning on or after January 1, 2007) Fees and reports.  
 105-129.86. (Effective for taxable years beginning on or after January 1, 2007) Substantiation.  
 105-129.87. (Effective for taxable years beginning on or after January 1, 2007) Credit for creating jobs.  
 105-129.88. (Effective for taxable years beginning on or after January 1, 2007) Credit for investing in business property.  
 105-129.89. (Effective for taxable years beginning on or after January 1, 2007) Credit for investment in real property.

### Article 4.

#### Income Tax.

##### Part 1. Corporation Income Tax.

- 105-130.2. Definitions.  
 105-130.5. Adjustments to federal taxable in-

Sec.

come in determining State net income.

- 105-130.7A. Royalty income reporting option.  
 105-130.9. Contributions.  
 105-130.17. Time and place of filing returns.  
 105-130.20. Federal corrections.  
 105-130.47. Credit for qualifying expenses of a production company.  
 105-130.48. (Repealed for taxable years beginning on or after January 1, 2011) Credit for recycling oyster shells.

##### Part 1A. S Corporation Income Tax.

- 105-131.2. Adjustment and characterization of income.

##### Part 2. Individual Income Tax.

- 105-134. Purpose.  
 105-134.2. Individual income tax imposed.  
 105-134.6. Adjustments to taxable income.  
 105-151.11. Credit for child care and certain employment-related expenses.  
 105-151.12. Credit for certain real property donations.  
 105-151.26. (Expires for taxable years beginning on or after January 1, 2011) Credit for charitable contributions by nonitemizers.  
 105-151.29. (Repealed January 1, 2010) Credit for qualifying expenses of a production company.  
 105-151.30. (Repealed for taxable years beginning on or after January 1, 2011) Credit for recycling oyster shells.  
 105-152. Income tax returns.  
 105-155. Time and place of filing returns; extensions; affirmation.  
 105-159. Federal corrections.  
 105-159.2. Designation of tax to North Carolina Public Campaign Fund.

##### Part 3. Income Tax—Estates, Trusts, and Beneficiaries.

- 105-160.3. Tax credits.

### Article 4A.

#### Withholding; Estimated Income Tax for Individuals.

- 105-163.2B. North Carolina State Lottery Commission must withhold taxes.

### Article 5.

#### Sales and Use Tax.

##### Part 1. Title, Purpose and Definitions.

- 105-164.3. Definitions.

##### Part 2. Taxes Levied.

- 105-164.4. Tax imposed on retailers.  
 105-164.4B. Sourcing principles.

Sec.

- 105-164.4C. Telecommunications service and ancillary service.
- 105-164.4D. Bundled services.
- 105-164.6. Complementary use tax.
- 105-164.7. Sales tax part of purchase price.
- 105-164.12B. Tangible personal property bundled with service contract.

**Part 3. Exemptions and Exclusions.**

- 105-164.13. Retail sales and use tax.
- 105-164.14. Certain refunds authorized.

**Part 4. Reporting and Payment.**

- 105-164.15A. Effective date of rate changes for services.
- 105-164.16. (Effective until October 1, 2007) Returns and payment of taxes.
- 105-164.16. (Effective October 1, 2007) Returns and payment of taxes.
- 105-164.21B. [Repealed.]

**Part 5. Records Required to Be Kept.**

- 105-164.27A. Direct pay permit.

**Part 7A. Uniform Sales and Use Tax Administration Act.**

- 105-164.42H. Certification of certified automated system and effect of certification.

**Part 8. Administration and Enforcement.**

- 105-164.44F. Distribution of part of telecommunications taxes to cities.
- 105-164.44I. Distribution of part of sales tax on video programming service and telecommunications service to counties and cities.

**Article 5E.**

**Piped Natural Gas Tax.**

- 105-187.43. (Effective October 1, 2007) Payment of the tax.

**Article 5F.**

**Manufacturing Fuel and Certain Machinery and Equipment.**

- 105-187.51B. (Effective July 1, 2007) Tax imposed on certain recyclers and research and development companies.
- 105-187.52. Administration.
- 105-187.53. Commercial logging items.

**Article 6.**

**Gift Taxes.**

- 105-197.1. Federal corrections.

**Article 8B.**

**Taxes Upon Insurance Companies.**

Sec.

- 105-228.5. Taxes measured by gross premiums.

**Article 9.**

**General Administration; Penalties and Remedies.**

- 105-228.90. Scope and definitions.
- 105-233, 105-234. [Repealed.]
- 105-236. Penalties; situs of violations; penalty disposition.
- 105-243.1. Collection of tax debts.
- 105-249.2. Due date extended and penalties waived for certain military personnel or persons affected by a presidentially declared disaster.
- 105-256. Reports prepared by Secretary of Revenue.
- 105-259. Secrecy required of officials; penalty for violation.

**SUBCHAPTER II. LISTING, APPRAISAL, AND ASSESSMENT OF PROPERTY AND COLLECTION OF TAXES ON PROPERTY.**

**Article 11.**

**Short Title, Purpose, and Definitions.**

- 105-273. Definitions.

**Article 12.**

**Property Subject to Taxation.**

- 105-277.4. Agricultural, horticultural and forestland — Application; appraisal at use value; appeal; deferred taxes.
- 105-278. Historic properties.

**Article 17.**

**Administration of Listing.**

- 105-304. Place for listing tangible personal property.
- 105-307. Length of listing period; extension; preliminary work.

**Article 20.**

**Approval, Preparation, Disposition of Records.**

- 105-321. Disposition of tax records and receipts; order of collection.

**Article 22A.**

**Motor Vehicles.**

- 105-330. Definitions.
- 105-330.2. Appraisal, ownership, and situs.



- Sec.  
105-330.4. Due date, interest, and enforcement remedies.  
105-330.5. (For effective date, see note) Listing and collecting procedures.  
105-330.7. (For repeal, see note) List of delinquents sent to Division of Motor Vehicles.  
105-330.10. (Effective until July 1, 2010) Disposition of interest.  
105-330.10. (Effective July 1, 2010) Disposition of interest.

**Article 26.**

**Collection and Foreclosure of Taxes.**

- 105-369. Advertisement of tax liens on real property for failure to pay taxes.  
105-373. Settlements.  
105-374. Foreclosure of tax lien by action in nature of action to foreclose a mortgage.  
105-375. In rem method of foreclosure.  
105-378. Limitation on use of remedies.

**SUBCHAPTER V. MOTOR FUEL TAXES.**

**Article 36B.**

**Tax on Carriers Using Fuel Purchased Outside State.**

- 105-449.48. [Repealed.]  
105-449.49. Temporary permits.

**Article 36C.**

**Gasoline, Diesel, and Blends.**

**Part 1. General Provisions.**

- 105-449.60. Definitions.

**Part 2. Licensing.**

- 105-449.65. List of persons who must have a license.

**Part 3. Tax and Liability.**

- 105-449.88A. Liability for tax due on motor fuel designated as exempt by the use of cards or codes.

**Part 4. Payment and Reporting.**

- 105-449.90. When tax return and payment are due.  
105-449.93. Percentage discount for licensed distributors and some licensed importers.  
105-449.94. [Repealed.]

- Sec.  
105-449.97. Deductions and discounts allowed a supplier when filing a return.  
105-449.100. Terminal operator to file informational return showing changes in amount of motor fuel at the terminal.  
105-449.101. (Effective until July 1, 2007) Motor fuel transporter to file informational return showing deliveries of imported or exported motor fuel.  
105-449.101. (Effective July 1, 2007) Motor fuel transporter to file informational return showing deliveries of motor fuel.  
105-449.102. Distributor to file return showing exports from a bulk plant.

**Part 5. Refunds.**

- 105-449.105A. Monthly refunds for kerosene.  
105-449.106. Quarterly refunds for nonprofit organizations, taxicabs, and special mobile equipment.  
105-449.107. Annual refunds for off-highway use and use by certain vehicles with power attachments.

**Part 6. Enforcement and Administration.**

- 105-449.120. Acts that are misdemeanors.

**Part 7. Use of Revenue.**

- 105-449.127. [Repealed.]

**Article 36D.**

**Alternative Fuel.**

- 105-449.137. Liability for and payment of the tax.

**SUBCHAPTER VIII. LOCAL GOVERNMENT SALES AND USE TAX.**

**Article 39.**

**First One-Cent (1¢) Local Government Sales and Use Tax.**

- 105-467. Scope of sales tax.

**Article 42.**

**Second One-Half Cent (½¢) Local Government Sales and Use Tax.**

- 105-501. Distribution of additional taxes.

SUBCHAPTER I. LEVY OF TAXES.

§ 105-1. Title and purpose of Subchapter.

**Editor’s Note.** —  
Session Laws 2004-161, s. 46.7, as amended by Session Laws 2006-248, s. 38, provides: “Report. — The Commission may make an interim report to the 2006 Regular Session of the 2005 General Assembly not later than its

convening, and must make its final report to the 2007 General Assembly upon its convening. The Commission shall terminate the earlier of the filing of its final report or upon the convening of the 2007 General Assembly.”

ARTICLE 1A.

*Estate Taxes.*

§ 105-32.2. Estate tax imposed in amount equal to federal state death tax credit.

(a) Tax. — An estate tax is imposed on the estate of a decedent when a federal estate tax is imposed on the estate under section 2001 of the Code and any of the following apply:

- (1) The decedent was a resident of this State at death.
- (2) The decedent was not a resident of this State at death and owned any of the following:
  - a. Real property or tangible personal property that is located in this State.
  - b. Intangible personal property that has a tax situs in this State.

(b) Amount. — The amount of the estate tax imposed by this section is the amount of the state death tax credit that, as of December 31, 2001, would have been allowed under section 2011 of the Code against the federal taxable estate. The tax may not exceed the amount of federal estate tax due under the Code. The federal taxable estate and the amount of the federal estate tax due are determined without taking into account the deduction for state death taxes allowed under Section 2058 of the Code and the credits allowed under sections 2011 through 2015 of the Code.

If any property in the estate is located in a state other than North Carolina, the amount of tax payable depends on whether the decedent was a resident of this State at death. If the decedent was a resident of this State at death, the amount of tax due under this section is reduced by the lesser of the amount of the death tax paid the other state or an amount computed by multiplying the credit by a fraction, the numerator of which is the gross value of the estate that has a tax situs in another state and the denominator of which is the value of the decedent's gross estate. If the decedent was not a resident of this State at death, the amount of tax due under this section is an amount computed by multiplying the credit by a fraction, the numerator of which is the gross value of real property that is located in North Carolina plus the gross value of any personal property that has a tax situs in North Carolina and the denominator of which is the value of the decedent's gross estate. For purposes of this section, the gross value of property is its gross value as finally determined in the federal estate tax proceedings. (1998-212, s. 29A.2(b); 2002-87, s. 9; 2002-126, ss. 30C.3(a), 30C.3(b); 2003-284, ss. 37A.4, 37A.5; 2003-416, s. 1; 2004-170, ss. 1, 4(a), (b); 2005-144, ss. 8.1, 8.2; 2006-162, s. 26.)

**Effect of Amendments.** —  
Session Laws 2006-162, s. 26, effective July

24, 2006, and applicable to the estates of decedents dying on or after January 1, 2005, sub-

stituted the present first through fourth sentences for the former first sentence of subsection (b) which read: "The amount of the estate tax imposed by this section for estates of decedents dying on or after January 1, 2002, is the maximum credit for state death taxes al-

lowed under section 2011 of the Code without regard to the phase-out and termination of that credit under subdivision (b)(2) and subsection (f) of that section and without regard to the deduction for state death taxes allowed under Section 2058 of the Code."

### **§ 105-32.8. Federal determination that changes the amount of tax payable to the State.**

If the federal government corrects or otherwise determines the gross estate tax imposed under section 2001 of the Code or the amount of the maximum state death tax credit allowed an estate under section 2011 of the Code, the personal representative must, within six months after being notified of the correction or final determination by the federal government, file an estate tax return with the Secretary reflecting the correct amount of tax payable under this Article. If the federal government corrects or otherwise determines the amount of the maximum state generation-skipping transfer tax credit allowed under section 2604 of the Code, the person who made the transfer must, within six months after being notified of the correction or final determination by the federal government, file a tax return with the Secretary reflecting the correct amount of tax payable under this Article.

The Secretary must assess and collect any additional tax due as provided in Article 9 of this Chapter and must refund any overpayment of tax as provided in Article 9 of this Chapter. A person who fails to report a federal correction or determination in accordance with this section forfeits the right to any refund due by reason of the determination. (1998-212, s. 29A.2(b); 1999-337, s. 13; 2005-435, s. 24; 2006-18, s. 3.)

#### **Effect of Amendments. —**

Session Laws 2006-18, s. 3, effective July 1, 2006, and applicable to federal determinations

made on or after that date, substituted "six months" for "two years" throughout the section.

## **ARTICLE 2.**

### *Privilege Taxes.*

### **§ 105-40. Amusements — Certain exhibitions, performances, and entertainments exempt from tax.**

The following forms of amusement are exempt from the taxes imposed under this Article:

- (1) All exhibitions, performances, and entertainments, except as in this Article expressly mentioned as not exempt, produced by local talent exclusively, for the benefit of religious, charitable, benevolent or educational purposes, as long as no compensation is paid to the local talent.
- (2) The North Carolina Symphony Society, Incorporated, as specified in G.S. 140-10.1.
- (3) All exhibits, shows, attractions, and amusements operated by a society or association organized under the provisions of Chapter 106 of the General Statutes where the society or association has obtained a permit from the Secretary to operate without the payment of taxes under this Article.
- (4) All outdoor historical dramas, as specified in Article 19C of Chapter 143 of the General Statutes.



- (5) All elementary and secondary school athletic contests, dances, and other amusements.
- (6) The first one thousand dollars (\$1,000) of gross receipts derived from dances and other amusements actually promoted and managed by civic organizations when the entire proceeds of the dances or other amusements are used exclusively for civic and charitable purposes of the organizations and not to defray the expenses of the organization conducting the dance or amusement. The mere sponsorship of a dance or another amusement by a civic or fraternal organization does not exempt the dance or other amusement, because the exemption applies only when the dance or amusement is actually managed and conducted by the civic or fraternal organization.
- (6a) A youth athletic contest with an admissions price that does not exceed ten dollars (\$10.00) sponsored by a person exempt from income tax under Article 4 of this Chapter. For the purpose of this subdivision, a youth athletic contest means a contest in which each participating athlete is less than 20 years of age.
- (7) All dances, motion picture shows, and other amusements promoted and managed by a qualifying corporation that operates a center for the performing and visual arts if the dance or other amusement is held at the center. "Qualifying corporation" means a corporation that is exempt from income tax under G.S. 105-130.11(a)(3). "Center for the performing and visual arts" means a facility, having a fixed location, that provides space for dramatic performances, studios, classrooms, and similar accommodations to organized arts groups and individual artists. This exemption does not apply to athletic events.
- (7a) All exhibitions, performances, and entertainments promoted and managed by a nonprofit arts organization that is exempt from income tax under G.S. 105-130.11(a)(3). This exemption does not apply to athletic events.
- (8) A person that is exempt from income tax under Article 4 of this Chapter and is engaged in the business of operating a teen center. A "teen center" is a fixed facility whose primary purpose is to provide recreational activities, dramatic performances, dances, and other amusements exclusively for teenagers.
- (9) All entertainments or amusements offered or given on the Cherokee Indian reservation when the person giving, offering, or managing the entertainment or amusement is authorized to do business on the reservation and pays the tribal gross receipts levy to the tribal council.
- (10) Arts festivals held by a person that is exempt from income tax under Article 4 of this Chapter and that meets the following conditions:
  - a. The person holds no more than two arts festivals during a calendar year.
  - b. Each of the person's arts festivals last no more than seven days.
  - c. The arts festivals are held outdoors on public property and involve a variety of exhibitions, entertainments, and activities.
- (11) Community festivals held by a person who is exempt from income tax under Article 4 of this Chapter and that meets all of the following conditions:
  - a. The person holds no more than one community festival during a calendar year.
  - b. The community festival lasts no more than seven days.
  - c. The community festival involves a variety of exhibitions, entertainments, and activities, the majority of which are held outdoors and are open to the public.

- (12) All farm-related exhibitions, shows, attractions, or amusements offered on land used for bona fide farm purposes as defined in G.S. 153A-340. (1939, c. 158, s. 108; 1998-95, ss. 5.1, 6; 1998-96, s. 2; 1999-337, s. 15(b); 2000-140, s. 61; 2004-84, s. 1; 2006-216, s. 1.)

**Effect of Amendments.** —

Session Laws 2006-216, s. 1, effective retroactively to January, 1, 1999, and applicable to

activities occurring on or after that date, added subdivision (12).

## ARTICLE 2C.

### *Alcoholic Beverage License And Excise Taxes.*

#### Part 4. Excise Taxes, Distribution of Tax Revenue.

#### **§ 105-113.81A. (Effective until July 1, 2007) Distribution of part of wine taxes attributable to North Carolina wine.**

The Secretary shall on a quarterly basis credit to the Department of Commerce the net proceeds of the excise tax collected on unfortified wine bottled in North Carolina during the previous quarter and the net proceeds of the excise tax collected on fortified wine bottled in North Carolina during the previous quarter, except that the amount credited to the Department of Commerce under this section shall not exceed five hundred thousand dollars (\$500,000) per fiscal year. The Department of Commerce shall allocate the funds received under this section to the North Carolina Wine and Grape Growers Council to be used to promote the North Carolina grape and wine industry and to contract for research and development services to improve viticultural and enological practices in North Carolina. Any funds credited to the Department of Commerce under this section that are not expended by June 30 of any fiscal year may not revert to the General Fund, but shall remain available to the Department for the uses set forth in this section. (1987, c. 836, s. 1; 1987 (Reg. Sess., 1988), c. 1036, s. 12(a); 1991 (Reg. Sess., 1992), c. 900, s. 176(b); 1996, 2nd Ex. Sess., c. 18, ss. 25.2(a), 25.2(b); 1997-261, s. 109; 1997-443, s. 14.4; 1999-237, s. 13.7; 2001-475, s. 1; 2005-276, s. 11.4; 2005-380, s. 4(c); 2006-264, s. 98.3(b).)

**Section Set Out Twice.** — The section

above is effective until July 1, 2007. For the section as amended July 1, 2007, see the following section, also numbered G.S. 105-113.81A.

**Effect of Amendments.** —

Session Laws 2006-264, s. 98.3(b), effective August 27, 2006, inserted "Wine and" in the second sentence.

#### **§ 105-113.81A. (Effective July 1, 2007) Distribution of part of wine taxes attributable to North Carolina wine.**

The Secretary shall on a quarterly basis credit to the Department of Commerce two hundred thousand dollars (\$200,000) from the net proceeds of the excise tax collected on unfortified wine. The Department of Commerce shall allocate the funds received under this section to the North Carolina Wine and Grape Growers Council to be used to promote the North Carolina grape and wine industry and to contract for research and development services to improve viticultural and enological practices in North Carolina. Any funds credited to the Department of Commerce under this section that are not



**G.S. 105-113.81A is set out twice. See notes.**

expended by June 30 of any fiscal year do not revert to the General Fund, but remain available to the Department for the uses set forth in this section. (1987, c. 836, s. 1; 1987 (Reg. Sess., 1988), c. 1036, s. 12(a); 1991 (Reg. Sess., 1992), c. 900, s. 176(b); 1996, 2nd Ex. Sess., c. 18, ss. 25.2(a), 25.2(b); 1997-261, s. 109; 1997-443, s. 14.4; 1999-237, s. 13.7; 2001-475, s. 1; 2005-276, s. 11.4; 2005-380, s. 4(c); 2006-264, s. 98.3(b); 2006-227, s. 14.)

**Section Set Out Twice.** — The section above is effective July 1, 2007. For the section as in effect until July 1, 2007, see the preceding section, also numbered G.S. 105-113.81A.

**Effect of Amendments.** — Session Laws 2006-227, s. 14, effective July 1, 2007, rewrote

the first sentence, and substituted “do not revert” for “may not revert” and deleted “shall” preceding “remain” in the second sentence.

Session Laws 2006-264, s. 98.3(b), effective August 27, 2006, inserted “Wine and” in the second sentence.

**§ 105-113.82. Distribution of part of beer and wine taxes.**

(a) Amount, Method. — The Secretary shall distribute annually the following percentages of the net amount of excise taxes collected on the sale of malt beverages and wine during the preceding 12-month period ending March 31, less the amount of the net proceeds credited to the Department of Commerce under G.S. 105-113.81A, to the counties and cities in which the retail sale of these beverages is authorized in the entire county or city:

- (1) Of the tax on malt beverages levied under G.S. 105-113.80(a), twenty-three and three-fourths percent (23¾%);
- (2) Of the tax on unfortified wine levied under G.S. 105-113.80(b), sixty-two percent (62%); and
- (3) Of the tax on fortified wine levied under G.S. 105-113.80(b), twenty-two percent (22%).

If malt beverages, unfortified wine, or fortified wine may be licensed to be sold at retail in both a county and a city located in the county, both the county and city shall receive a portion of the amount distributed, that portion to be determined on the basis of population. If one of these beverages may be licensed to be sold at retail in a city located in a county in which the sale of the beverage is otherwise prohibited, only the city shall receive a portion of the amount distributed, that portion to be determined on the basis of population. The amounts distributed under subdivisions (1), (2), and (3) shall be computed separately.

(b) Repealed by Session Laws 2000, c. 173, s. 3, effective August 2, 2000.

(c) Exception. — Notwithstanding subsection (a), in a county in which ABC stores have been established by petition, the revenue shall be distributed as though the entire county had approved the retail sale of a beverage whose retail sale is authorized in part of the county.

(d) Time. — The revenue shall be distributed to cities and counties within 60 days after March 31 of each year. The General Assembly finds that the revenue distributed under this section is local revenue, not a State expenditure, for the purpose of Section 5(3) of Article III of the North Carolina Constitution. Therefore, the Governor may not reduce or withhold the distribution.

(e) Population Estimates. — To determine the population of a city or county for purposes of the distribution required by this section, the Secretary shall use the most recent annual estimate of population certified by the State Budget Officer.

(f) City Defined. — As used in this section, the term “city” means a city as defined in G.S. 153A-1(1) or an urban service district defined by the governing body of a consolidated city-county.



(g) Use of Funds. — Funds distributed to a county or city under this section may be used for any public purpose.

(h) Disqualification. — No municipality may receive any funds under this section if it was incorporated with an effective date of on or after January 1, 2000, and is disqualified from receiving funds under G.S. 136-41.2. No municipality may receive any funds under this section, incorporated with an effective date on or after January 1, 2000, unless a majority of the mileage of its streets is open to the public. The previous sentence becomes effective with respect to distribution of funds on or after July 1, 1999. (1985, c. 114, s. 1; 1987, c. 836, s. 2; 1989 (Reg. Sess., 1990), c. 813, s. 5; 1991, c. 689, s. 28(b); 1993, c. 321, s. 26(g); c. 485, s. 2; 1995, c. 17, s. 1; 1996, 2nd Ex. Sess., c. 18, s. 25.2(a); 1997-261, s. 109; 1999-458, s. 10; 2000-173, s. 3; 2002-120, s. 1; 2004-203, s. 5(d); 2005-435, s. 34(a); 2006-162, s. 1.)

**Effect of Amendments. —**

Session Laws 2006-162, s. 1, effective July 24, 2006, substituted “Department of Com-

merce” for “Department of Agriculture and Consumer Services” near the middle of subsection (a).

## Part 5. Administration.

### § 105-113.89. Other applicable administrative provisions.

#### CASE NOTES

**Cited** in N.C. Sch. Bds. Ass’n v. Moore, 359 N.C. 474, 614 S.E.2d 504, 2005 N.C. LEXIS 694 (2005).

#### ARTICLE 2D.

### *Unauthorized Substances Taxes.*

### § 105-113.105. Purpose.

#### CASE NOTES

**Monies Received for Excise Tax Versus Penalties and Interest Payments.** — Excise tax on unauthorized substances is not a penalty subject to the provisions of N.C. Const. art. IX, § 7 and is, therefore, not payable to public schools; however, the penalties and interest payments collected by the Department of Rev-

enue for enforcement of the excise tax are classified as penalties to be disbursed to public school systems, pursuant to N.C. Const. art. IX, § 7. N.C. Sch. Bds. Ass’n v. Moore, 359 N.C. 474, 614 S.E.2d 504, 2005 N.C. LEXIS 694 (2005).

### § 105-113.106. Definitions.

#### CASE NOTES

**Monies Received for Excise Tax Versus Penalties and Interest Payments.** — Excise tax on unauthorized substances is not a penalty subject to the provisions of N.C. Const. art. IX, § 7 and is, therefore, not payable to public

schools; however, the penalties and interest payments collected by the Department of Revenue for enforcement of the excise tax are classified as penalties to be disbursed to public school systems, pursuant to N.C. Const. art. IX,

§ 7. N.C. Sch. Bds. Ass'n v. Moore, 359 N.C. 474, 614 S.E.2d 504, 2005 N.C. LEXIS 694 (2005).

## § 105-113.107. Excise tax on unauthorized substances.

### CASE NOTES

**Monies Received for Excise Tax Versus Penalties and Interest Payments.** — Excise tax on unauthorized substances is not a penalty subject to the provisions of N.C. Const. art. IX, § 7 and is, therefore, not payable to public schools; however, the penalties and interest payments collected by the Department of Rev-

enue for enforcement of the excise tax are classified as penalties to be disbursed to public school systems, pursuant to N.C. Const. art. IX, § 7. N.C. Sch. Bds. Ass'n v. Moore, 359 N.C. 474, 614 S.E.2d 504, 2005 N.C. LEXIS 694 (2005).

## § 105-113.108. Reports; revenue stamps.

### CASE NOTES

**Monies Received for Excise Tax Versus Penalties and Interest Payments.** — Excise tax on unauthorized substances is not a penalty subject to the provisions of N.C. Const. art. IX, § 7 and is, therefore, not payable to public schools; however, the penalties and interest payments collected by the Department of Revenue for enforcement of the excise tax are classified as penalties to be disbursed to public school systems, pursuant to N.C. Const. art. IX, § 7. N.C. Sch. Bds. Ass'n v. Moore, 359 N.C. 474, 614 S.E.2d 504, 2005 N.C. LEXIS 694 (2005).

**Deprivation of Rights Claims.** — United States Supreme Court had declined to hold that

a former version of the Unauthorized Substances Tax (UST), (now G.S. 105-113.108(b) and related sections), created a criminal or punitive penalty for purposes of constitutional safeguards and defendants (an arresting deputy and a state tax official), in their official capacities, were immune from liability pursuant to the Eleventh Amendment; further, taxpayers were barred by principles of comity from asserting 42 U.S.C.S. § 1983 actions against the validity of state tax systems in federal courts. Leon-Sanchez v. Tolson, — F. Supp. 2d —, 2004 U.S. Dist. LEXIS 28903 (W.D.N.C. Aug. 5, 2004).

## § 105-113.109. When tax payable.

### CASE NOTES

**Monies Received for Excise Tax Versus Penalties and Interest Payments.** — Excise tax on unauthorized substances is not a penalty subject to the provisions of N.C. Const. art. IX, § 7 and is, therefore, not payable to public schools; however, the penalties and interest payments collected by the Department of Rev-

enue for enforcement of the excise tax are classified as penalties to be disbursed to public school systems, pursuant to N.C. Const. art. IX, § 7. N.C. Sch. Bds. Ass'n v. Moore, 359 N.C. 474, 614 S.E.2d 504, 2005 N.C. LEXIS 694 (2005).

## § 105-113.110A. Administration.

### CASE NOTES

**Monies Received for Excise Tax Versus Penalties and Interest Payments.** — Excise tax on unauthorized substances is not a penalty subject to the provisions of N.C. Const. art. IX, § 7 and is, therefore, not payable to public

schools; however, the penalties and interest payments collected by the Department of Revenue for enforcement of the excise tax are classified as penalties to be disbursed to public school systems, pursuant to N.C. Const. art. IX,

§ 7. N.C. Sch. Bds. Ass'n v. Moore, 359 N.C. 474, 614 S.E.2d 504, 2005 N.C. LEXIS 694 (2005).

## § 105-113.112. Confidentiality of information.

### CASE NOTES

**Monies Received for Excise Tax Versus Penalties and Interest Payments.** — Excise tax on unauthorized substances is not a penalty subject to the provisions of N.C. Const. art. IX, § 7 and is, therefore, not payable to public schools; however, the penalties and interest payments collected by the Department of Rev-

enue for enforcement of the excise tax are classified as penalties to be disbursed to public school systems, pursuant to N.C. Const. art. IX, § 7. N.C. Sch. Bds. Ass'n v. Moore, 359 N.C. 474, 614 S.E.2d 504, 2005 N.C. LEXIS 694 (2005).

## § 105-113.113. Use of tax proceeds.

**Editor's Note.** — Session Laws 2006-66, s. 1.2, provides: "This act shall be known as 'The Current Operations and Capital Improvements Appropriations Act of 2006'."

Session Laws 2006-66, s. 19.4(a), provides: "Notwithstanding G.S. 143-18, the Department of Revenue may expend up to two million four hundred thirty-four thousand two hundred seventy dollars and seventy-one cents (\$2,434,270.71) of unencumbered maintenance appropriations as of June 30, 2006, for the purpose of paying the Civil Penalty and Forfeiture Fund. The amount to be expended represents Unauthorized Substance Tax penalty collections that were paid to local law enforcement agencies for the period of July 1, 2005, through December 31, 2005. The source of the unencumbered funds shall come entirely from the Department of Revenue. If unencumbered funds are not sufficient on June 30, 2006, the Department shall use anticipated unencumbered funds as of July 1, 2006."

Session Laws 2006-66, s. 19.4(b), provides: "Through the 2008-2009 fiscal year, the Department of Revenue shall reduce succeeding distributions to a law enforcement agency under G.S. 105-113.113 to offset the amount that was improperly distributed to that agency, as described in subsection (a) of this section, and the Department shall deposit the funds collected into a reserve account which shall revert at the end of each fiscal year."

Session Laws 2006-66, s. 28.3, provides: "Except for statutory changes or other provisions that clearly indicate an intention to have effects beyond the 2006 2007 fiscal year, the textual provisions of this act apply only to funds appropriated for, and activities occurring during, the 2006 2007 fiscal year."

Session Laws 2006-66, s. 28.6 is a severability clause.

### CASE NOTES

**Monies Received for Excise Tax Versus Penalties and Interest Payments.** — Excise tax on unauthorized substances is not a penalty subject to the provisions of N.C. Const. art. IX, § 7 and is, therefore, not payable to public schools; however, the penalties and interest payments collected by the Department of Rev-

enue for enforcement of the excise tax are classified as penalties to be disbursed to public school systems, pursuant to N.C. Const. art. IX, § 7. N.C. Sch. Bds. Ass'n v. Moore, 359 N.C. 474, 614 S.E.2d 504, 2005 N.C. LEXIS 694 (2005).

## ARTICLE 3.

### *Franchise Tax.*

## § 105-114. Nature of taxes; definitions.

(a) Nature of Taxes. — The taxes levied in this Article upon persons and partnerships are for the privilege of engaging in business or doing the act named.



(a1) Scope. — The taxes levied in this Article upon corporations are privilege or excise taxes levied upon:

- (1) Corporations organized under the laws of this State for the existence of the corporate rights and privileges granted by their charters, and the enjoyment, under the protection of the laws of this State, of the powers, rights, privileges and immunities derived from the State by the form of such existence; and
- (2) Corporations not organized under the laws of this State for doing business in this State and for the benefit and protection which these corporations receive from the government and laws of this State in doing business in this State.

(a2) Condition for Doing Business. — If the corporation is organized under the laws of this State, the payment of the taxes levied by this Article is a condition precedent to the right to continue in the corporate form of organization. If the corporation is not organized under the laws of this State, payment of these taxes is a condition precedent to the right to continue to engage in doing business in this State.

(a3) Tax Year. — The taxes levied in this Article are for the fiscal year of the State in which the taxes become due, except that the taxes levied in G.S. 105-122 are for the income year of the corporation in which the taxes become due.

(a4) No Double Taxation. — G.S. 105-122 does not apply to holding companies taxed under G.S. 105-120.2. G.S. 105-122 applies to a corporation taxed under another section of this Article only to the extent the taxes levied on the corporation in G.S. 105-122 exceed the taxes levied in other sections of this Article on the corporation or on a limited liability company whose assets must be included in the corporation's tax base under G.S. 105-114.1.

(b) Definitions. — The following definitions apply in this Article:

(1) City. — Defined in G.S. 105-228.90.

(1a) Code. — Defined in G.S. 105-228.90.

(2) **(Effective for taxable years beginning before January 1, 2007)**

Corporation. — A domestic corporation, a foreign corporation, an electric membership corporation organized under Chapter 117 of the General Statutes or doing business in this State, or an association that is organized for pecuniary gain, has capital stock represented by shares, whether with or without par value, and has privileges not possessed by individuals or partnerships. The term includes a mutual or capital stock savings and loan association or building and loan association chartered under the laws of any state or of the United States. The term does not include a limited liability company.

(2) **(Effective for taxable years beginning on or after January 1, 2007)** Corporation. — A domestic corporation, a foreign corporation, an electric membership corporation organized under Chapter 117 of the General Statutes or doing business in this State, or an association that is organized for pecuniary gain, has capital stock represented by shares, whether with or without par value, and has privileges not possessed by individuals or partnerships. The term includes a mutual or capital stock savings and loan association or building and loan association chartered under the laws of any state or of the United States. The term includes a limited liability company that elects to be taxed as a C Corporation under the Code, but does not otherwise include a limited liability company.

(3) Doing business. — Each and every act, power, or privilege exercised or enjoyed in this State, as an incident to, or by virtue of the powers and privileges granted by the laws of this State.

(4) Income year. — Defined in G.S. 105-130.2(4b).

(c) Recodified as G.S. 105-114.1 by Session Laws 2002-126, s. 30G.2.(b), effective January 1, 2003. (1939, c. 158, s. 201; 1943, c. 400, s. 3; 1945, c. 708, s. 3; 1965, c. 287, s. 16; 1967, c. 286; 1969, c. 541, s. 6; 1973, c. 1287, s. 3; 1983, c. 713, s. 66; 1985, c. 656, s. 7; 1985 (Reg. Sess., 1986), c. 853, s. 1; 1987, c. 778, s. 1; 1987 (Reg. Sess., 1988), c. 1015, s. 2; 1989, c. 36, s. 2; 1989 (Reg. Sess., 1990), c. 981, s. 2; 1991, c. 30, s. 2; c. 689, s. 250; 1991 (Reg. Sess., 1992), c. 922, s. 3; 1993, c. 12, s. 4; c. 354, s. 11; c. 485, s. 5; 1997-118, s. 4; 1998-98, ss. 60, 76; 1999-337, s. 20; 2000-173, s. 8; 2001-327, s. 2(b); 2002-126, s. 30G.2(b); 2005-435, s. 59.2(a); 2006-66, s. 24A.2(a); 2006-162, ss. 3(b), 22.)

**Subdivision (b)(2) is set out twice.** — The first version of subdivision (b)(2) set out above is effective for taxable years beginning before January 1, 2007. The second version of subdivision (b)(2) set out above is effective for taxable years beginning on or after January 1, 2007.

**Editor's Note.** —

Session Laws 2006-66, s. 1.2, provides: "This act shall be known as 'The Current Operations and Capital Improvements Appropriations Act of 2006'."

Session Laws 2006-66, s. 28.6 is a severability clause.

**Effect of Amendments.** — Session Laws

2005-435, s. 59.2(a), as amended by Session Laws 2006-162, s. 22, effective July 24, 2006, in subsection (a4), deleted "on the corporation" following "exceed the taxes levied" and added the language beginning "on the corporation or on a limited liability company" at the end.

Session Laws 2006-66, s. 24A.2(a), effective for taxable years beginning on or after January 1, 2007, rewrote the last sentence in subdivision (b)(2).

Session Laws 2006-162, s. 3(b), effective July 24, 2006, substituted "G.S. 105-130.2(4b)" for "G.S. 105-130.2(5)" in subdivision (b)(4).

## § 105-114.1. (Effective for taxable years beginning on or after January 1, 2007) Limited liability companies.

(a) Definitions. — The following definitions apply in this section:

- (1) Affiliated group. — Defined in section 1504 of the Code.
- (2) Capital interest. — The right under a limited liability company's governing law to receive a percentage of the company's assets upon dissolution after payments to creditors.
- (3) Entity. — A person that is not a human being.
- (4) Governing law. — A limited liability company's governing law is determined under G.S. 57C-6-05 or G.S. 57C-7-01, as applicable.
- (5) Noncorporate limited liability company. — A limited liability company that does not elect to be taxed as a C Corporation under the Code.

(b) Controlled Companies. — If a corporation or an affiliated group of corporations owns more than fifty percent (50%) of the capital interests in a noncorporate limited liability company, the corporation or group of corporations must include in its three tax bases pursuant to G.S. 105-122 the same percentage of (i) the noncorporate limited liability company's capital stock, surplus, and undivided profits; (ii) fifty-five percent (55%) of the noncorporate limited liability company's appraised ad valorem tax value of property; and (iii) the noncorporate limited liability company's actual investment in tangible property in this State, as appropriate.

(c) Constructive Ownership. — Ownership of the capital interests in a noncorporate limited liability company is determined by reference to the constructive ownership rules for partnerships, estates, and trusts in section 318(a)(2)(A) and (B) of the Code with the following modifications:

- (1) The term "capital interest" is substituted for "stock" each place it appears.
- (2) A noncorporate limited liability company and any noncorporate entity other than a partnership, estate, or trust is treated as a partnership.
- (3) The operating rule of section 318(a)(5) of the Code applies without regard to section 318(a)(5)(C).



**G.S. 105-114.1 is set out twice. See notes.**

(d) No Double Inclusion. — If a corporation is required to include a percentage of a noncorporate limited liability company's assets in its tax bases under this Article pursuant to subsection (b) of this section, its investment in the noncorporate limited liability company is not included in its computation of capital stock base under G.S. 105-122(b).

(e) Affiliated Group. — If the owner of the capital interests in a noncorporate limited liability company is an affiliated group of corporations, the percentage to be included pursuant to subsection (b) of this section by each group member that is doing business in this State is determined by multiplying the capital interests in the noncorporate limited liability company owned by the affiliated group by a fraction. The numerator of the fraction is the capital interests in the noncorporate limited liability company owned by the group member, and the denominator of the fraction is the capital interests in the noncorporate limited liability company owned by all group members that are doing business in this State.

(f) Exemption. — This section does not apply to assets owned by a noncorporate limited liability company if the total book value of the noncorporate limited liability company's assets never exceeded one hundred fifty thousand dollars (\$150,000) during its taxable year.

(g) Timing. — Ownership of the capital interests in a noncorporate limited liability company is determined as of the last day of its taxable year. The adjustments pursuant to subsections (b) and (d) of this section must be made to the owner's next following return filed under this Article. If a noncorporate limited liability company and a corporation or an affiliated group of corporations have engaged in a pattern of transferring assets between them with the result that each did not own the capital interests on the last day of its taxable year, the ownership of the capital interests in the noncorporate limited liability company must be determined as of the last day of the corporation or group of corporations' taxable year.

(h) Penalty. — A taxpayer who, because of fraud with intent to evade tax, underpays the tax under this Article on assets attributable to it under this section is guilty of a Class H felony in accordance with G.S. 105-236(7). (2002-126, s. 30G.2(b); 2002-126, s. 30G.2(b); 2004-74, ss. 1, 2; 2004-170, s. 8.1; 2006-66, s. 24A.2(b).)

**Section Set Out Twice.** — The section above is effective for taxable years beginning on or after January 1, 2007. For this section as effective for taxable years beginning before January 1, 2007, see the main volume.

**Editor's Note.** — Session Laws 2006-66, s. 1.2, provides: "This act shall be known as 'The Current Operations and Capital Improvements Appropriations Act of 2006'."

Session Laws 2006-66, s. 28.6 is a severability clause.

**Effect of Amendments.** — Session Laws 2006-66, s. 24A.2.(b), effective for taxable years beginning on or after January 1, 2007, added subdivision (a)(5); and added "noncorporate" preceding "limited liability" throughout the section.

**§ 105-116. Franchise or privilege tax on electric power, water, and sewerage companies.**

(a) Tax. — An annual franchise or privilege tax is imposed on the following:

- (1) An electric power company engaged in the business of furnishing electricity, electric lights, current, or power.
- (2), (2a) Repealed by Session Laws 1998-22, s. 2, effective July 1, 1999.
- (3) A water company engaged in owning or operating a water system subject to regulation by the North Carolina Utilities Commission.



**G.S. 105-116(b) is set out twice. See notes.**

- (4) A public sewerage company engaged in owning or operating a public sewerage system.

The tax on an electric power company is three and twenty-two hundredths percent (3.22%) of the company's taxable gross receipts from the business of furnishing electricity, electric lights, current, or power. The tax on a water company is four percent (4%) of the company's taxable gross receipts from owning or operating a water system subject to regulation by the North Carolina Utilities Commission. The tax on a public sewerage company is six percent (6%) of the company's taxable gross receipts from owning or operating a public sewerage company. A company's taxable gross receipts are its gross receipts from business inside the State less the amount of gross receipts from sales reported under subdivision (b)(2). A company that engages in more than one business taxed under this section shall pay tax on each business.

(b) **(Effective until October 1, 2007)** Report and Payment. — The tax imposed by this section is payable quarterly, semimonthly, or monthly as specified in this subsection. A return is due quarterly.

A water company or public sewerage company must pay tax quarterly when filing a return. An electric power company must pay tax in accordance with the schedule that applies to its payments of sales and use tax under G.S. 105-164.16 and must file a return quarterly. An electric power company is not subject to interest on or penalties for an underpayment for a semimonthly or monthly payment period if the electric power company timely pays at least ninety-five percent (95%) of the amount due for each semimonthly or monthly payment period and includes the underpayment with the quarterly return for those semimonthly or monthly payment periods.

A quarterly return covers a calendar quarter and is due by the last day of the month that follows the quarter covered by the return. A taxpayer must submit a return on a form provided by the Secretary. The return must include the taxpayer's gross receipts from all property it owned or operated during the reporting period in connection with its business taxed under this section. A taxpayer must report its gross receipts on an accrual basis. A return must contain the following information:

- (1) The taxpayer's gross receipts for the reporting period from business inside and outside this State, stated separately.
- (2) The taxpayer's gross receipts from commodities or services described in subsection (a) that are sold to a vendee subject to the tax levied by this section or to a joint agency established under Chapter 159B of the General Statutes or a city having an ownership share in a project established under that Chapter.
- (3) The amount of and price paid by the taxpayer for commodities or services described in subsection (a) that are purchased from others engaged in business in this State and the name of each vendor.
- (4) For an electric power company the entity's gross receipts from the sale within each city of the commodities and services described in subsection (a).

(b) **(Effective October 1, 2007)** Report and Payment. — The tax imposed by this section is payable quarterly or monthly as specified in this subsection. A return is due quarterly.

A water company or public sewerage company must pay tax quarterly when filing a return. An electric power company must pay tax in accordance with the schedule and requirements that apply to payments of sales and use tax under G.S. 105-164.16 and must file a return quarterly.

A quarterly return covers a calendar quarter and is due by the last day of the month that follows the quarter covered by the return. A taxpayer must submit

**G.S. 105-116(b) is set out twice. See notes.**

a return on a form provided by the Secretary. The return must include the taxpayer's gross receipts from all property it owned or operated during the reporting period in connection with its business taxed under this section. A taxpayer must report its gross receipts on an accrual basis. A return must contain the following information:

- (1) The taxpayer's gross receipts for the reporting period from business inside and outside this State, stated separately.
  - (2) The taxpayer's gross receipts from commodities or services described in subsection (a) that are sold to a vendee subject to the tax levied by this section or to a joint agency established under Chapter 159B of the General Statutes or a city having an ownership share in a project established under that Chapter.
  - (3) The amount of and price paid by the taxpayer for commodities or services described in subsection (a) that are purchased from others engaged in business in this State and the name of each vendor.
  - (4) For an electric power company the entity's gross receipts from the sale within each city of the commodities and services described in subsection (a).
- (c) Repealed by Session Laws 1998-22, s. 2, effective July 1, 1999.
- (d) Distribution. — Part of the taxes imposed by this section on electric power companies is distributed to cities under G.S. 105-116.1. If a taxpayer's return does not state the taxpayer's taxable gross receipts derived within a city, the Secretary must determine a practical method of allocating part of the taxpayer's taxable gross receipts to the city.
- (e) Local Tax. — So long as there is a distribution to cities from the tax imposed by this section, no city shall impose or collect any greater franchise, privilege or license taxes, in the aggregate, on the businesses taxed under this section, than was imposed and collected on or before January 1, 1947.
- (e1) An electric power company engaged in the business of furnishing electricity, electric lights, current, or power that collects the annual franchise or privilege tax pursuant to subsection (a) of this section and remits the tax collected to the Secretary shall not be subject to any additional franchise or privilege tax imposed upon it by any city or county.
- (f) Repealed by Session Laws 1998-22, s. 2, effective July 1, 1999. (1939, c. 158, s. 203; 1949, c. 392, s. 2; 1951, c. 643, s. 3; 1955, c. 1313, s. 2; 1957, c. 1340, s. 3; 1959, c. 1259, s. 3; 1963, c. 1169, s. 1; 1965, c. 517; 1967, c. 519, ss. 1, 3; c. 1272, ss. 1, 3; 1971, c. 298, s. 1; c. 833, s. 1; 1973, c. 476, s. 193; c. 537, s. 3; c. 1287, s. 3; c. 1349; 1975, c. 812; 1983 (Reg. Sess., 1984), c. 1097, ss. 2, 16; 1987 (Reg. Sess., 1988), c. 882, s. 4.4; 1989 (Reg. Sess., 1990), c. 813, s. 3; c. 814, s. 10; c. 945, ss. 3, 17; 1991, c. 598, s. 4; c. 689, s. 28(c); 1991 (Reg. Sess., 1992), c. 1007, s. 2; 1993, c. 321, s. 26(h); 1997-118, s. 2; 1997-426, s. 3; 1998-22, s. 2; 1998-98, s. 72; 1998-217, s. 32(a); 2000-140, s. 62; 2001-427, s. 6(c), (d); 2002-72, s. 10; 2002-120, s. 8; 2006-33, s. 10; 2006-162, s. 31.)

**Subsection (b) is set out twice.** — The first version of subsection (b) set out above is effective until October 1, 2007. The second version of subsection (b) set out above is effective October 1, 2007.

**Effect of Amendments.** — Session Laws

2006-33, s. 10, as amended by Session Laws 2006-162, s. 31, effective October 1, 2007, substituted "quarterly" for "quarterly, semi-monthly" in the first sentence of subsection (b), and rewrote the second paragraph.

## **§ 105-120.2. Franchise or privilege tax on holding companies.**

- (a) Every corporation, domestic and foreign, incorporated or, by an act,



domesticated under the laws of this State or doing business in this State which, at the close of its taxable year is a holding company as defined in subsection (c) of this section, shall, pursuant to the provisions of G.S. 105-122:

- (1) Make a report and statement, and
- (2) Determine the total amount of its issued and outstanding capital stock, surplus and undivided profits, and
- (3) Apportion such outstanding capital stock, surplus and undivided profits to this State.

(b)(1) Every corporation taxed under this section shall annually pay to the Secretary of Revenue, at the time the report and statement are due, a franchise or privilege tax, which is hereby levied, at the rate of one dollar and fifty cents (\$1.50) per one thousand dollars (\$1,000) of the amount determined under subsection (a) of this section, but in no case shall the tax be more than seventy-five thousand dollars (\$75,000) nor less than thirty-five dollars (\$35.00).

- (2) Notwithstanding the provisions of subdivision (1) of this subsection, if the tax produced pursuant to application of this paragraph (2) exceeds the tax produced pursuant to application of subdivision (1), then the tax shall be levied at the rate of one dollar and fifty cents (\$1.50) per one thousand dollars (\$1,000) on the greater of the amounts of
  - a. Fifty-five percent (55%) of the appraised value as determined for ad valorem taxation of all the real and tangible personal property in this State of each such corporation plus the total appraised value of intangible property returned for taxation of intangible personal property as computed under G.S. 105-122(d); or
  - b. The total actual investment in tangible property in this State of such corporation as computed under G.S. 105-122(d).

(c) **(Effective for taxable years beginning before January 1, 2007)** For purposes of this section, a "holding company" is any corporation which receives during its taxable year more than eighty percent (80%) of its gross income from corporations in which it owns directly or indirectly more than fifty percent (50%) of the outstanding voting stock.

(c) **(Effective for taxable years beginning on or after January 1, 2007)** For purposes of this section, a "holding company" is a corporation that receives during its taxable year more than eighty percent (80%) of its gross income from corporations in which it owns directly or indirectly more than fifty percent (50%) of the outstanding voting stock or voting capital interests.

(d) Repealed by Session Laws 1985, c. 656, s. 39.

(e) Counties, cities and towns shall not levy a franchise tax on corporations taxed under this section. The tax imposed under the provisions of G.S. 105-122 shall not apply to businesses taxed under the provisions of this section.

(f) In determining the total tax payable by any holding company under this section, there shall be allowed as a credit on such tax the amount of the credit authorized under Part 5 of Article 4 of this Chapter. (1975, c. 130, s. 1; 1985, c. 656, s. 39; 1985 (Reg. Sess., 1986), c. 854, s. 1; 1987 (Reg. Sess., 1988), c. 882, s. 4.2; 1991, c. 30, s. 4; 1998-98, s. 72; 2006-196, s. 9.)

**Subsection (c) is set out twice.** — The first version of subsection (c) set out above is effective for taxable years beginning before January 1, 2007. The second version of subsection (c) set out above is effective for taxable years beginning on or after January 1, 2007.

**Editor's Note.** — Session Laws 2006-196, s. 13, provides: "The Revenue Laws Study Committee shall study the following issues:

"(1) The simplification of the additional tax imposed on insurance contracts on property coverage, as enacted in Section 3 of this act, and the distribution of the revenue generated by the tax. The study of this issue may include a recommendation on the percentage of revenue to be distributed to the firemen's local relief funds and the formula for making this distribution. The study may also consider the in-



creasing difference between the amount of revenue available in the Volunteer Fire Department Fund for matching grants to purchase equipment and make capital improvements and the amount of grant requests received.

“(2) The authority of the Secretary of Revenue to require taxpayers to file consolidated returns. The study of this issue may include consideration of whether the State should require some corporations or all corporations to file a consolidated return.

“(3) The feasibility of replacing the State’s

current corporate income and franchise tax laws with a commercial activity tax based upon business gross receipts.

“(4) The administrative process for the review of disputed tax matters.”

**Effect of Amendments.** — Session Laws 2006-196, s. 9, effective January 1, 2007, and applicable for taxable years beginning on or after that date, in subsection (c), substituted “a corporation that” for “any corporation which” near the middle and added “or voting capital interests” at the end.

## **§ 105-122. Franchise or privilege tax on domestic and foreign corporations.**

(a) Every corporation, domestic and foreign, incorporated, or, by an act, domesticated under the laws of this State or doing business in this State, except as otherwise provided in this Article, shall, on or before the fifteenth day of the third month following the end of its income year, annually make and deliver to the Secretary in the form prescribed by the Secretary a full, accurate, and complete report and statement signed by either its president, vice-president, treasurer, assistant treasurer, secretary or assistant secretary, containing the facts and information required by the Secretary as shown by the books and records of the corporation at the close of the income year.

There shall be annexed to the return required by this subsection the affirmation of the officer signing the return.

(b) **(Effective for taxable years beginning before January 1, 2007)** Every such corporation taxed under this section shall determine the total amount of its issued and outstanding capital stock, surplus and undivided profits; no reservation or allocation from surplus or undivided profits shall be allowed other than for definite and accrued legal liabilities, except as herein provided; taxes accrued, dividends declared and reserves for depreciation of tangible assets as permitted for income tax purposes shall be treated as deductible liabilities. There shall also be treated as a deductible liability reserves for the entire cost of any air-cleaning device or sewage or waste treatment plant, including waste lagoons, and pollution abatement equipment purchased or constructed and installed which reduces the amount of air or water pollution resulting from the emission of air contaminants or the discharge of sewage and industrial wastes or other polluting materials or substances into the outdoor atmosphere or streams, lakes, or rivers, upon condition that the corporation claiming such deductible liability shall furnish to the Secretary a certificate from the Department of Environment and Natural Resources or from a local air pollution control program for air-cleaning devices located in an area where the Environmental Management Commission has certified a local air pollution control program pursuant to G.S. 143-215.112 certifying that the Environmental Management Commission or local air pollution control program has found as a fact that the air-cleaning device, waste treatment plant or pollution abatement equipment purchased or constructed and installed as above described has actually been constructed and installed and that such plant or equipment complies with the requirements of the Environmental Management Commission or local air pollution control program with respect to such devices, plants or equipment, that such device, plant or equipment is being effectively operated in accordance with the terms and conditions set forth in the permit, certificate of approval, or other document of approval issued by the Environmental Management Commission

**G.S. 105-122(b) is set out twice. See notes.**

or local air pollution control program and that the primary purpose thereof is to reduce air or water pollution resulting from the emission of air contaminants or the discharge of sewage and waste and not merely incidental to other purposes and functions. The cost of purchasing and installing equipment or constructing facilities for the purpose of recycling or resource recovering of or from solid waste or for the purpose of reducing the volume of hazardous waste generated shall be treated as deductible for the purposes of this section upon condition that the corporation claiming such deductible liability shall furnish to the Secretary a certificate from the Department of Environment and Natural Resources certifying that the Department of Environment and Natural Resources has found as a fact that the equipment or facility has actually been purchased, installed or constructed, that it is in conformance with all rules and regulations of the Department of Environment and Natural Resources, and the recycling or resource recovering is the primary purpose of the facility or equipment. The cost of constructing facilities of any private or public utility built for the purpose of providing sewer service to residential and outlying areas shall be treated as deductible for the purposes of this section; the deductible liability allowed by this section shall apply only with respect to such pollution abatement plants or equipment constructed or installed on or after January 1, 1955. Treasury stock shall not be considered in computing the capital stock, surplus and undivided profits as the basis for franchise tax, but shall be excluded proportionately from said capital stock, surplus and undivided profits as the case may be upon the basis and to the extent of the cost thereof. In the case of an international banking facility, the capital base shall be reduced by the excess of the amount as of the end of the taxable year of all assets of an international banking facility which are employed outside the United States over liabilities of the international banking facility owed to foreign persons. For purposes of such reduction, foreign persons shall have the same meaning as defined in G.S. 105-130.5(b)(13)d.

Every corporation doing business in this State which is a parent, subsidiary, or affiliate of another corporation shall add to its capital stock, surplus and undivided profits all indebtedness owed to a parent, subsidiary or affiliated corporation as a part of its capital used in its business and as a part of the base for franchise tax under this section. The term "indebtedness" as used in this paragraph includes all loans, credits, goods, supplies, or other capital of whatsoever nature furnished by a parent, subsidiary, or affiliated corporation, other than indebtedness endorsed, guaranteed, or otherwise supported by one of these corporations. The terms "parent," "subsidiary," and "affiliate" as used in this paragraph shall have the meaning specified in G.S. 105-130.6. If any part of the capital of the creditor corporation is capital borrowed from a source other than a parent, subsidiary or affiliate, the debtor corporation, which is required under this paragraph to include in its tax base the amount of debt by reason of being a parent, subsidiary, or affiliate of the said creditor corporation, may deduct from the debt thus included a proportionate part determined on the basis of the ratio of such borrowed capital as above specified of the creditor corporation to the total assets of the said creditor corporation. Further, in case the creditor corporation as above specified is also taxable under the provisions of this section, such creditor corporation shall be allowed to deduct from the total of its capital, surplus and undivided profits the amount of any debt owed to it by a parent, subsidiary or affiliated corporation to the extent that such debt has been included in the tax base of said parent, subsidiary or affiliated debtor corporation reporting for taxation under the provisions of this section.

**(b) (Effective for taxable years beginning on or after January 1, 2007) Determination of Capital Base.** — A corporation taxed under this section



**G.S. 105-122(b) is set out twice. See notes.**

shall determine the total amount of its issued and outstanding capital stock, surplus, and undivided profits. No reservation or allocation from surplus or undivided profits is allowed except as provided below:

- (1) Definite and accrued legal liabilities.
- (2) Taxes accrued, dividends declared, and reserves for depreciation of tangible assets as permitted for income tax purposes.
- (3) When including deferred tax liabilities, a corporation may reduce the amount included in its base by netting against that amount deferred tax assets. The reduction may not decrease deferred tax liabilities below zero (0).
- (4) Reserves for the cost of any air-cleaning device or sewage or waste treatment plant, including waste lagoons, and pollution abatement equipment purchased or constructed and installed which reduces the amount of air or water pollution resulting from the emission of air contaminants or the discharge of sewage and industrial wastes or other polluting materials or substances into the outdoor atmosphere or streams, lakes, or rivers, upon condition that the corporation claiming such deductible liability shall furnish to the Secretary a certificate from the Department of Environment and Natural Resources or from a local air pollution control program for air-cleaning devices located in an area where the Environmental Management Commission has certified a local air pollution control program pursuant to G.S. 143-215.112 certifying that the Environmental Management Commission or local air pollution control program has found as a fact that the air-cleaning device, waste treatment plant or pollution abatement equipment purchased or constructed and installed as above described has actually been constructed and installed and that such plant or equipment complies with the requirements of the Environmental Management Commission or local air pollution control program with respect to such devices, plants or equipment, that such device, plant or equipment is being effectively operated in accordance with the terms and conditions set forth in the permit, certificate of approval, or other document of approval issued by the Environmental Management Commission or local air pollution control program and that the primary purpose thereof is to reduce air or water pollution resulting from the emission of air contaminants or the discharge of sewage and waste and not merely incidental to other purposes and functions.
- (5) Reserves for the cost of purchasing and installing equipment or constructing facilities for the purpose of recycling or resource recovering of or from solid waste or for the purpose of reducing the volume of hazardous waste generated shall be treated as deductible for the purposes of this section upon condition that the corporation claiming such deductible liability shall furnish to the Secretary a certificate from the Department of Environment and Natural Resources certifying that the Department of Environment and Natural Resources has found as a fact that the equipment or facility has actually been purchased, installed or constructed, that it is in conformance with all rules and regulations of the Department of Environment and Natural Resources, and the recycling or resource recovering is the primary purpose of the facility or equipment.
- (6) Reserves for the cost of constructing facilities of any private or public utility built for the purpose of providing sewer service to residential and outlying areas shall be treated as deductible for the purposes of



**G.S. 105-122(b) is set out twice. See notes.**

this section; the deductible liability allowed by this section shall apply only with respect to such pollution abatement plants or equipment constructed or installed on or after January 1, 1955.

(7) The cost of treasury stock.

(8) In the case of an international banking facility, the capital base shall be reduced by the excess of the amount as of the end of the taxable year of all assets of an international banking facility which are employed outside the United States over liabilities of the international banking facility owed to foreign persons. For purposes of such reduction, foreign persons shall have the same meaning as defined in G.S. 105-130.5(b)(13)d.

Every corporation doing business in this State which is a parent, subsidiary, or affiliate of another corporation shall add to its capital stock, surplus, and undivided profits all indebtedness owed to a parent, subsidiary, or affiliated corporation as a part of its capital used in its business and as a part of the base for franchise tax under this section. If any part of the capital of the creditor corporation is capital borrowed from a source other than a parent, subsidiary, or affiliate, the debtor corporation, which is required under this subsection to include in its tax base the amount of debt by reason of being a parent, subsidiary, or affiliate of the creditor corporation, may deduct from the debt included a proportionate part determined on the basis of the ratio of the borrowed capital of the creditor corporation to the total assets of the creditor corporation. If the creditor corporation is also taxable under the provisions of this section, the creditor corporation is allowed to deduct from the total of its capital, surplus, and undivided profits the amount of any debt owed to it by a parent, subsidiary or affiliated corporation to the extent that the debt has been included in the tax base of the parent, subsidiary, or affiliated debtor corporation reporting for taxation under the provisions of this section.

The following definitions apply in this subsection:

(1) Affiliate. — The same meaning as specified in G.S. 105-130.6.

(2) Indebtedness. — All loans, credits, goods, supplies, or other capital of whatsoever nature furnished by a parent, subsidiary, or affiliated corporation, other than indebtedness endorsed, guaranteed, or otherwise supported by one of these corporations.

(3) Parent. — The same meaning as specified in G.S. 105-130.6.

(4) Subsidiary. — The same meaning as specified in G.S. 105-130.6.

(c)(1) After ascertaining and determining the amount of its capital stock, surplus and undivided profits, as provided herein, every corporation permitted to allocate and apportion its net income for income tax purposes under the provisions of Article 4 of this Chapter shall apportion its capital stock, surplus and undivided profits to this State through use of the fraction computed for apportionment of its apportionable income under that Article. A corporation that is subject to franchise tax under this Article but is not subject to income tax under Article 4 of this Chapter must apportion its capital stock, surplus, and undivided profits to this State by using the apportionment formula that would apply to the corporation if it were subject to Article 4.

Notwithstanding the foregoing, if a corporation is authorized by the Tax Review Board to apportion its apportionable income by use of an alternative formula or method, the corporation may not use this alternative formula or method for apportioning its capital stock, surplus and undivided profits unless specifically authorized to do so by order of the Tax Review Board.

A corporation that is required to pay an income tax to this State on its entire net income shall apportion its entire capital stock, surplus and undivided profits to this State.

- (2) If any corporation believes that the method of allocation or apportionment hereinbefore described as administered by the Secretary has operated or will so operate as to subject it to taxation on a greater portion of its capital stock, surplus and undivided profits than is reasonably attributable to business within the State, it may file with the Tax Review Board a petition setting forth the facts upon which its belief is based and its argument with respect to the application of the allocation formula. This petition shall be filed in such form and within such time as the Tax Review Board may prescribe. The Board shall grant a hearing on the petition. The time limitations set in G.S. 105-241.2 for the date of the hearing, notification to the taxpayer, and a decision following the hearing apply to a hearing held pursuant to this subdivision.

At least three members of the Tax Review Board shall attend any hearing pursuant to such petition. In such cases the Tax Review Board's membership shall be augmented by the addition of the Secretary, who shall sit as a member of the Board with full power to participate in its deliberations and decisions with respect to petitions filed under the provisions of this section. An informal record containing in substance the evidence, contentions and arguments presented at the hearing shall be made. All members of the augmented Tax Review Board shall consider such evidence, contentions and arguments, and the decision thereon shall be made by a majority vote of the augmented Board.

If the corporation employs in its books of account a detailed allocation of receipts and expenditures which reflects more clearly than the applicable allocation formula or alternative formulas prescribed by this section the portion of the capital stock, surplus and undivided profits attributable to the business within this State, application for permission to base the return upon the taxpayer's books of account shall be considered by the Tax Review Board. The Board may permit such separate accounting method in lieu of applying the applicable allocation formula if the Board finds that method best reflects the portion of the capital stock, surplus and undivided profits attributable to this State.

If the corporation shows that any other method of allocation than the applicable allocation formula or alternative formulas prescribed by this section reflects more clearly the portion of the capital stock, surplus and undivided profits attributable to the business within this State, application for permission to base the return upon such other method shall be considered by the Tax Review Board. The application shall be accompanied by a statement setting forth in detail, with full explanations, the method the taxpayer believes will more nearly reflect the portion of its capital stock, surplus and undivided profits attributable to the business within this State. If the Board concludes that the allocation formula and the alternative formulas prescribed by this section allocate to this State a greater portion of the capital stock, surplus and undivided profits of the corporation than is reasonably attributable to business within this State, it shall determine the allocable portion by such other method as it finds best calculated to assign to this State for taxation the portion reasonably attributable to its business within this State.

There shall be a presumption that the appropriate allocation formula reasonably attributes to this State the portion of the corpo-



ration's capital stock, surplus and undivided profits reasonably attributable to its business in this State and the burden shall rest upon the corporation to show the contrary. The relief herein authorized shall be granted by the Board only in cases of clear, cogent and convincing proof that the petitioning taxpayer is entitled thereto. No corporation shall use any alternative formula or method other than the applicable allocation formula provided by statute in making a franchise tax report or return to this State except upon order in writing of the Board and any return in which any alternative formula or other method other than the applicable allocation formula prescribed by statute is used without the permission of the Board, shall not be a lawful return.

When the Board determines, pursuant to the provisions of this Article, that an alternative formula or other method more accurately reflects the portion of the capital stock surplus and undivided profits allocable to North Carolina and renders its decision with regard thereto, the corporation shall allocate its capital stock, surplus and undivided profits for future years in accordance with such determination and decision of the Board so long as the conditions constituting the basis upon which the decision was made remain unchanged or until such time as the business method of operation of the corporation changes. Provided, however, that the Secretary may, with respect to any subsequent year, require the corporation to furnish information relating to its property, operations and activities.

A corporation which proposes to do business in this State may file a petition with the Board setting forth the facts upon which it contends that the applicable allocation formula will allocate a greater portion of the corporation's capital stock, surplus and undivided profits to North Carolina than will be reasonably attributable to its proposed business within the State. Upon a proper showing in accordance with the procedure described above for determination by the Board, the Board may authorize such corporation to allocate its capital stock, surplus and undivided profits to North Carolina on the basis prescribed by the Board under the provisions of this section for such future years as the conditions constituting the basis upon which the Board's decision is made remain unchanged and the business operations of the corporation continue to conform to the statement of proposed methods of business operations presented by the corporation to the Board.

When the Secretary asserts liability under the formula adjustment decision of the Tax Review Board, an aggrieved taxpayer may pay the tax under protest and bring a civil action for recovery under the provisions of G.S. 105-241.4.

- (3) The proportion of the total capital stock, surplus and undivided profits of each such corporation so allocated shall be deemed to be the proportion of the total capital stock, surplus and undivided profits of each such corporation used in connection with its business in this State and liable for annual franchise tax under the provisions of this section.

(d) After determining the proportion of its total capital stock, surplus and undivided profits as set out in subsection (c) of this section, which amount shall not be less than fifty-five percent (55%) of the appraised value as determined for ad valorem taxation of all the real and tangible personal property in this State of each corporation nor less than its total actual investment in tangible property in this State, every corporation taxed under this section shall annually pay to the Secretary of Revenue, at the time the report and statement are due, a franchise or privilege tax at the rate of one dollar and fifty cents (\$1.50) per one thousand dollars (\$1,000) of the total amount of capital stock,



surplus and undivided profits as provided in this section. The tax imposed in this section shall not be less than thirty-five dollars (\$35.00) and shall be for the privilege of carrying on, doing business, and/or the continuance of articles of incorporation or domestication of each corporation in this State. Appraised value of tangible property including real estate is the ad valorem valuation for the calendar year next preceding the due date of the franchise tax return. The term "total actual investment in tangible property" as used in this section means the total original purchase price or consideration to the reporting taxpayer of its tangible properties, including real estate, in this State plus additions and improvements thereto less reserve for depreciation as permitted for income tax purposes, and also less any indebtedness incurred and existing by virtue of the purchase of any real estate and any permanent improvements made thereon. In computing "total actual investment in tangible personal property" there shall also be deducted reserves for the entire cost of any air-cleaning device or sewage or waste treatment plant, including waste lagoons, and pollution abatement equipment purchased or constructed and installed which reduces the amount of air or water pollution resulting from the emission of air contaminants or the discharge of sewage and industrial wastes or other polluting materials or substances into the outdoor atmosphere or into streams, lakes, or rivers, upon condition that the corporation claiming this deduction shall furnish to the Secretary a certificate from the Department of Environment and Natural Resources or from a local air pollution control program for air-cleaning devices located in an area where the Environmental Management Commission has certified a local air pollution control program pursuant to G.S. 143-215.112 certifying that said Department or local air pollution control program has found as a fact that the air-cleaning device, waste treatment plant or pollution abatement equipment purchased or constructed and installed as above described has actually been constructed and installed and that the device, plant or equipment complies with the requirements of the Environmental Management Commission or local air pollution control program with respect to the devices, plants or equipment, that the device, plant or equipment is being effectively operated in accordance with the terms and conditions set forth in the permit, certificate of approval, or other document of approval issued by the Environmental Management Commission or local air pollution control program and that the primary purpose is to reduce air or water pollution resulting from the emission of air contaminants or the discharge of sewage and waste and not merely incidental to other purposes and functions. The cost of constructing facilities of any private or public utility built for the purpose of providing sewer service to residential and outlying areas is treated as deductible for the purposes of this section; the deductible liability allowed by this section shall apply only with respect to pollution abatement plants or equipment constructed or installed on or after January 1, 1955.

(d1) Credits. — A corporation is allowed a credit against the tax imposed by this section for a taxable year equal to one-half of the amount of tax payable during the taxable year under Article 5E of this Chapter. The credit allowed by this subsection may not exceed the amount of tax imposed by this section for the taxable year, reduced by the sum of all other credits allowed against that tax, except tax payments made by or on behalf of the taxpayer.

(e) Any corporation which changes its income year, and files a "short period" income tax return pursuant to G.S. 105-130.15 shall file a franchise tax return in accordance with the provisions of this section in the manner and as of the date specified in subsection (a) of this section. Such corporation shall be entitled to deduct from the total franchise tax computed (on an annual basis) on such return the amount of franchise tax previously paid which is applicable to the period subsequent to the beginning of the new income year.

(f) The report, statement and tax required by this section shall be in addition to all other reports required or taxes levied and assessed in this State.

(g) Counties, cities and towns shall not levy a franchise tax on corporations taxed under this section.

(h) Repealed by Session Laws 1981 (Regular Session, 1982), c. 1211, s. 5. (1939, c. 158, s. 210; 1941, c. 50, s. 4; 1943, c. 400, s. 3; 1945, c. 708, s. 3; 1947, c. 501, s. 3; 1951, c. 643, s. 3; 1953, c. 1302, s. 3; 1955, c. 1100, s. 2½; c. 1350, s. 17; 1957, c. 1340, s. 3; 1959, c. 1259, s. 3; 1963, c. 1169, s. 1; 1967, c. 286; c. 892, ss. 10, 11; c. 1110, s. 2; 1973, c. 476, s. 193; c. 695, s. 17; c. 1262, s. 23; c. 1287, s. 3; 1975, c. 764, s. 2; 1977, c. 771, s. 4; 1981, c. 704, s. 18; c. 855, s. 3; 1981 (Reg. Sess., 1982), c. 1211, s. 5; 1985, c. 656, s. 40; 1985 (Reg. Sess., 1986), c. 826, s. 6; c. 854, s. 1; 1987 (Reg. Sess., 1988), c. 882, s. 4.3; 1989, c. 148, s. 1; c. 727, ss. 218(39), 219(27); 1991, c. 30, s. 5; 1993, c. 532, s. 11; 1995 (Reg. Sess., 1996), c. 560, s. 1; 1997-443, s. 11A.119(a); 1998-22, ss. 8, 9; 1998-98, ss. 72, 77; 1998-217, s. 43; 1999-337, s. 21; 2001-427, s. 12(a); 2003-416, s. 5(j); 2006-95, s. 1.1; 2006-162, s. 2.)

**Subsection (b) set out twice.** — The first version of subsection (b) set out above is effective for taxable years beginning before January 1, 2007. The second version of subsection (b) set out above is effective for taxable years beginning on or after January 1, 2007.

**Effect of Amendments.** —

Session Laws 2006-95, s. 1.1, effective for taxable years beginning on or after January 1, 2007, rewrote (b).

Session Laws 2006-162, s. 2, effective July 24, 2006, rewrote (d).

**§ 105-122.1. (Effective for taxable years beginning on or after January 1, 2007) Credit for additional annual report fees paid by limited liability companies subject to franchise tax.**

A limited liability company subject to tax under this Article is allowed a credit against the tax imposed by this Article equal to the difference between the annual report fee for corporations under G.S. 55-1-22 and the annual report fee for limited liability companies under G.S. 57C-1-22(a). The credit allowed by this section may not exceed the amount of tax imposed by this Article for the taxable year reduced by the sum of all credits allowed, except payments of tax made by or on behalf of the taxpayer. (2006-66, s. 24A.2(c).)

**Editor's Note.** — Session Laws 2006-66, s. 1.2, provides: "This act shall be known as 'The Current Operations and Capital Improvements Appropriations Act of 2006'."

Session Laws 2006-66, s. 28.6 is a severability clause.

Session Laws 2006-66, s. 24A.2(d), makes this section effective for taxable years beginning on or after January 1, 2007.

**ARTICLE 3A.**

*Tax Incentives For New And Expanding Businesses.*

**(See note for repeal of this Article.)**

**§ 105-129.2. (See note for repeal) Definitions.**

The following definitions apply in this Article:

- (1) Agrarian growth zone. — An area designated as an agrarian growth zone pursuant to G.S. 105-129.3B.
- (1a) Air courier services. — The furnishing of air delivery of individually addressed letters and packages for compensation, except by the United States Postal Service.



**Article 3A has a delayed repeal date. See notes.**

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- (2) Central office or aircraft facility. — Any of the following:
- a. A corporate, subsidiary, or regional managing office, as defined by NAICS.
  - b. An auxiliary subdivision of an interstate passenger air carrier engaged primarily in centralized training for the carrier at its hub.
  - c. An auxiliary subdivision of an interstate passenger air carrier engaged primarily in aircraft maintenance and repair services or aircraft rebuilding as defined by NAICS.
- (3) Computer services. — Any of the following industries or industry groups, as defined by NAICS, if the taxpayer provides the services primarily to persons who are not related entities with respect to the taxpayer:
- a. Computer systems design and related services.
  - b. Software publishing.
  - c. Software reproducing.
  - d. On-line information services.
- (4) Cost. — In the case of property owned by the taxpayer, cost is determined pursuant to regulations adopted under section 1012 of the Code. In the case of property the taxpayer leases from another, cost is value as determined pursuant to G.S. 105-130.4(j)(2).
- (5) Customer service center. — An establishment of a telecommunications or financial services company, as defined by NAICS, that is primarily engaged in providing support services to the company's customers by telephone to support products or services of the company. For the purpose of this definition, an establishment is primarily engaged in providing support services by telephone if at least sixty percent (60%) of its calls are incoming.
- (6) Data processing. — Any combination of the services listed in this subdivision, if the taxpayer provides the services primarily to persons who are not related entities with respect to the taxpayer. The term does not include payroll services, text processing, desktop publishing, or financial transaction processing.
- a. Data entry and preparation.
  - b. Database creation, conversion, and management, including warehousing, retrieval, and utilization of data in databases.
  - c. Data capture and imaging, including optical scanning and microfilm recording and imaging.
  - d. Computer processing time rental.
  - e. Data storage media conversion.
  - f. Data file format conversion.
- (7) Development zone. — An area designated as a development zone pursuant to G.S. 105-129.3A.
- (8) Electronic mail order house. — An electronic shopping and mail order house, as defined by NAICS.
- (8a) Eligible major industry. — A taxpayer is an eligible major industry for the purposes of this Article if the taxpayer is primarily engaged in one of the industries listed in G.S. 105-164.14(j)(3) and the Secretary of Commerce has certified that the owner of the facility will invest at least one hundred million dollars (\$100,000,000) of private funds to acquire, construct, and equip a facility in this State to engage in one or more of those industries.
- (9) Enterprise tier. — The classification assigned to an area pursuant to G.S. 105-129.3.



## Article 3A has a delayed repeal date. See notes.

- (10) Establishment. — Defined by NAICS.
- (11) Full-time job. — A position that requires at least 1,600 hours of work per year and is intended to be held by one employee during the entire year. A full-time employee is an employee who holds a full-time job.
- (12) Hub. — Defined in G.S. 105-164.3.
- (12a) Interstate air courier. — Defined in G.S. 105-164.3.
- (13) Interstate passenger air carrier. — Defined in G.S. 105-164.3.
- (14) Large investment. — Defined in G.S. 105-129.4(b1).
- (15) Machinery and equipment. — Engines, machinery, equipment, tools, and implements used or designed to be used in the business for which the credit is claimed. The term does not include real property as defined in G.S. 105-273 or rolling stock as defined in G.S. 105-333.
- (16) Manufacturing. — An industry in manufacturing sectors 31 through 33, as defined by NAICS, but not including quick printing or retail bakeries.
- (17) NAICS. — The North American Industry Classification System adopted by the United States Office of Management and Budget as of December 31, 1997.
- (17a) Overdue tax debt. — Defined in G.S. 105-243.1.
- (18) Purchase. — Defined in section 179 of the Code.
- (19) Related entity. — Defined in G.S. 105-130.7A.
- (20) Warehousing. — An industry in warehousing and storage subsector 493 as defined by NAICS.
- (21) Wholesale trade. — An industry in wholesale trade sector 42 as defined by NAICS. (1996, 2nd Ex. Sess., c. 13, s. 3.3; 1997-277, s. 1; 1998-55, s. 1; 1999-360, ss. 1, 2; 2000-56, ss. 5(a), 5(b); 2000-173, s. 1(a); 2001-476, s. 1(a), (b); 2002-172, s. 1.5; 2003-416, s. 2; 2003-435, 2nd Ex. Sess., s. 3.1; 2004-170, s. 9; 2006-66, s. 24.16(b).)

### Editor's Note. —

Session Laws 2006-66, s. 1.2, provides: "This act shall be known as 'The Current Operations and Capital Improvements Appropriations Act of 2006'."

Session Laws 2006-66, s. 28.6 is a severability clause.

### Effect of Amendments. —

Session Laws 2006-66, s. 24.16(b), effective for taxable years beginning on or after January 1, 2006, and applicable to business activities occurring on or after that date, added present subdivision (1); and redesignated former subdivision (1) as present subdivision (1)(a).

## § 105-129.2A. Sunset; studies.

(a) Sunset. — This Article is repealed effective for business activities that occur on or after January 1, 2007.

(a1) Sunset for Interstate Air Couriers. — Notwithstanding subsection (a) of this section, in the case of an interstate air courier that enters into a real estate lease on or before January 1, 2006, with an airport authority that provides for the lease of at least 100 acres of real property with a lease term in excess of 15 years, this Article is repealed effective for business activities that occur on or after January 1, 2010.

(a2) Sunset for Eligible Major Industries. — Notwithstanding subsection (a) of this section, in the case of a taxpayer that qualifies as an eligible major industry on or before January 1, 2008, this Article is repealed effective for business activities that occur on or after January 1, 2010.

(a3) Sunset for Certain Taxpayers Located in Development Zones. — Notwithstanding subsection (a) of this section, in the case of a taxpayer that satisfies all of the conditions of this subsection, this Article is repealed effective for business activities that occur on or after January 1, 2010.

**Article 3A has a delayed repeal date. See notes.**

- (1) Before January 1, 2006, the taxpayer signs a letter of commitment with the Department of Commerce describing a proposed new or expanding project and specifying the amount to be invested in real property and machinery and equipment, the number of new jobs to be created, and a proposed timetable for making the investment and creating the jobs.
- (2) Before January 1, 2006, the Secretary of Commerce makes a written determination that the taxpayer is expected to purchase, lease, or construct and place in service in an eligible business at a location within a development zone within a three-year period at least ten million dollars (\$10,000,000) of real property and machinery and equipment and that the taxpayer will create at least 300 new jobs at the location within a three-year period beginning when the property is first placed in service in an eligible business.
- (3) Before January 1, 2006, the taxpayer places at least four million dollars (\$4,000,000) of real property and machinery and equipment in service at the location and creates at least 20 new jobs at the location.
- (a4) Sunset for Taxpayers That Sign a Letter of Commitment. — Notwithstanding subsection (a) of this section, in the case of a taxpayer that signs a letter of commitment with the Department of Commerce on or before December 31, 2006, stating the taxpayer's intent to create new jobs or make new investments with respect to machinery and equipment, central office or aircraft facility property, or substantial investments in other real property at a specific site in this State, this Article is repealed effective for business activities that occur on or after January 1, 2008. If a taxpayer elects to take any credit under the provisions of this subsection for activities occurring in the 2007 taxable year, the taxpayer may not take any credit under Article 3I of this Chapter with respect to the same establishment for activities occurring in the 2007 taxable year.
- (b) Equity Study. — The Department of Commerce shall study the effect of the tax incentives provided in this Article on tax equity. This study shall include the following:
  - (1) Reexamining the formula in G.S. 105-129.3(b) used to define enterprise tiers, to include consideration of alternative measures for more equitable treatment of counties in similar economic circumstances.
  - (2) Considering whether the assignment of tiers and the applicable thresholds are equitable for smaller counties, for example those under 50,000 in population.
  - (3) Compiling any available data on whether expanding North Carolina businesses receive fewer benefits than out-of-State businesses that locate to North Carolina.
- (c) Impact Study. — The Department of Commerce shall study the effectiveness of the tax incentives provided in this Article. This study shall include:
  - (1) Study of the distribution of tax incentives across new and expanding industries.
  - (2) Examination of data on economic recruitment for the period from 1994 through the most recent year for which data are available by county, by industry type, by size of investment, and by number of jobs, and other relevant information to determine the pattern of business locations and expansions before and after the enactment of the William S. Lee Act incentives.
  - (3) Measuring the direct costs and benefits of the tax incentives.
  - (4) Compiling available information on the current use of incentives by other states and whether that use is increasing or declining.



## Article 3A has a delayed repeal date. See notes.

(d) Report. — The Department of Commerce shall report the results of these studies and its recommendations to the General Assembly biennially with the first report due by April 1, 2001. (1997-277, s. 4; 1999-360, s. 18.1; 2000-173, ss. 1(b), 1(c); 2001-476, s. 2(a); 2002-146, s. 2; 2003-435, 2nd Ex. Sess., s. 3.2; 2005-241, ss. 1(a), 1(b); 2006-168, s. 2.1; 2006-252, s. 1.3.)

### Editor's Note. —

Session Laws 2006-252, s. 1.4, provides: "The Department of Commerce shall, in consultation with the North Carolina Rural Center, Inc. and lower-tiered counties, develop additional strategies to enhance economic growth and development in economically distressed areas. The Department shall report on the results of this study to the Joint Legislation Economic Development Oversight Committee by January 1, 2007. For the purposes of this section, 'econom-

ically distressed areas' means enterprise tier one areas as defined in G.S. 105-129.3."

### Effect of Amendments. —

Session Laws 2006-168, s. 2.1, effective July 27, 2006, substituted "January 1, 2008" for "January 1, 2006" in the middle of subsection (a2).

Session Laws 2006-252, s. 1.3, effective August 17, 2006, substituted "2007" for "2008" in subsection (a) and added subsection (a4).

## § 105-129.3A. (See note for repeal) Development zone designation.

(a) Development Zone Defined. — A development zone is an area comprised of either an economic development and training district as defined by G.S. 153A-317.12 or one or more contiguous census tracts, census block groups, or both in the most recent federal decennial census that meets all of the following conditions:

- (1) Every census tract and census block group in the zone is located in whole or in part within the primary corporate limits of a city with a population of more than 5,000 according to the most recent annual population estimates certified by the State Budget Officer.
- (2) It has a population of 1,000 or more according to the most recent annual population estimates certified by the State Budget Officer.
- (3) More than twenty percent (20%) of its population is below the poverty level according to the most recent federal decennial census.
- (4) Every census tract and census block group in the zone meets at least one of the following conditions:
  - a. More than ten percent (10%) of its population is below the poverty level according to the most recent federal decennial census.
  - b. It is immediately adjacent to another census tract or census block group that is in the same zone and has more than twenty percent (20%) of its population below the poverty level according to the most recent federal decennial census.
- (5) None of the census tracts or census block groups in the zone is located in another development zone designated by the Secretary of Commerce.

(b) Designation. — Upon request of a taxpayer or a local government, the Secretary of Commerce shall designate whether an area is a development zone that meets the conditions of subsection (a) of this section. If the applicant is a taxpayer, it must notify each city in which part of the zone is located. A development zone designation is effective for 24 months following the designation. The Department of Commerce must publish annually a list of all development zones with a description of their boundaries.

(c) Relationship With Enterprise Tiers. — For the purpose of the wage standard requirement of G.S. 105-129.4, the credit for investing in machinery and equipment allowed in G.S. 105-129.9, and the credit for worker training



**Article 3A has a delayed repealed date. See notes.**

allowed in G.S. 105-129.11, a development zone is considered an enterprise tier one area. For all other purposes, a development zone has the same enterprise tier designation as the county in which it is located.

(d) Parcel of Property Partially in a Development Zone. — For the purposes of this section, a parcel of property that is located partially within a development zone is considered entirely within the development zone if all of the following conditions are satisfied:

- (1) At least fifty percent (50%) of the parcel is located within the development zone.
- (2) The parcel was in existence and under common ownership prior to the most recent federal decennial census.
- (3) The parcel is a portion of land made up of one or more tracts or tax parcels of land that is surrounded by a continuous perimeter boundary. (1998-55, s. 1; 1999-360, ss. 1, 2; 2001-414, s. 6; 2001-476, s. 4(a); 2002-172, s. 1.4; 2003-416, s. 2; 2004-203, s. 5(f); 2006-66, s. 24.5(a).)

**Editor’s Note. —**

Session Laws 2006-66, s. 1.2, provides: “This act shall be known as ‘The Current Operations and Capital Improvements Appropriations Act of 2006.’”

Session Laws 2006-66, s. 28.6 is a severability clause.

**Effect of Amendments. —**

Session Laws 2006-66, s. 24.5(a), effective for taxable years beginning on or after January 1, 2004, inserted “either an economic development and training district as defined by G.S. 153A-317.12 or” in the introductory paragraph of subsection (a).

**§ 105-129.3B. Agrarian growth zone designation.**

(a) Agrarian Growth Zone Defined. — An agrarian growth zone is an area comprised of one or more contiguous census tracts, census block groups, or both, in the most recent federal decennial census that meets all conditions in this subsection. A county may have no more than one agrarian growth zone.

- (1) All land within the zone is located in whole within a county that has no municipality with a population in excess of 10,000.
- (2) Every census tract and census block group that composes part of the zone has more than twenty percent (20%) of its population below the poverty level according to the most recent federal decennial census.
- (3) The area of the zone less the smallest census tract included in the zone does not exceed five percent (5%) of the total area of the county in which the zone is located.

(b) Designation. — Upon request of a local government, the Secretary of Commerce shall make a written determination whether an area is an agrarian growth zone that meets the conditions of subsection (a) of this section. A determination under this section is effective until December 31 of the year following the year in which the determination is made. The Department of Commerce shall publish annually a list of all agrarian growth zones with a description of their boundaries.

(c) Parcel of Property Partially in Agrarian Growth Zone. — For the purposes of this section, a parcel of property that is located partially within an agrarian growth zone is considered entirely within the zone if all of the following conditions are satisfied:

- (1) At least fifty percent (50%) of the parcel is located within the zone.
- (2) The parcel was in existence and under common ownership prior to the most recent federal decennial census.
- (3) The parcel is a portion of land made up of one or more tracts or tax parcels of land that is surrounded by a continuous perimeter boundary.

**Article 3A has a delayed repealed date. See notes.**

(d) Relationship With Enterprise Tiers. — For the purpose of the wage standard requirement of G.S. 105-129.4, the credit for investing in machinery and equipment allowed in G.S. 105-129.9, and the credit for worker training allowed in G.S. 105-129.11, an agrarian growth zone is considered an enterprise tier one area. For all other purposes, an agrarian growth zone has the same enterprise tier designation as the county in which it is located. (2006-66, s. 24.16(a).)

**Editor's Note.** — Session Laws 2006-66, s. 1.2, provides: "This act shall be known as 'The Current Operations and Capital Improvements Appropriations Act of 2006'."

Session Laws 2006-66, s. 24.16(g), makes this

section effective for taxable years beginning on or after January 1, 2006, and applies to business activities occurring on or after that date.

Session Laws 2006-66, s. 28.6 is a severability clause.

**§ 105-129.4. (See note for repeal) Eligibility; forfeiture.**

(a) Type of Business. — The following conditions apply in determining a taxpayer's eligibility for the credits in this Article:

- (1) Central office or aircraft facility. — A taxpayer is eligible for the credits allowed by this Article if it operates a central office or aircraft facility that creates at least 40 new jobs and the jobs, investment, and activity with respect to which a credit is claimed are used in that office or facility.
- (2) Single business. — A taxpayer is eligible for the credits allowed by this Article other than by G.S. 105-129.12 if the primary business of the taxpayer is one of the following types of businesses and the jobs, investment, and activity with respect to which a credit is claimed are used in that business:
  - a. Air courier services.
  - b. Data processing.
- (3) Multiple business. — A taxpayer is eligible for the credits allowed by this Article other than by G.S. 105-129.12 if the primary business of the taxpayer is one of the following types of businesses and the jobs, investment, and activity with respect to which a credit is claimed are used in any of the following types of businesses:
  - a. Manufacturing.
  - b. Warehousing.
  - c. Wholesale trade.
- (4) Single establishment. — A taxpayer is eligible for the credits allowed by this Article other than by G.S. 105-129.12 if the primary business of the taxpayer or the primary activity of an establishment of the taxpayer is one of the following types of businesses and the jobs, investment, and activity with respect to which a credit is claimed are used in that business:
  - a. Computer services.
  - b. An electronic mail order house that creates at least 250 new jobs and is located in an enterprise tier one, two, or three area.
- (5) Customer service center. — A taxpayer is eligible for the credits allowed by this Article other than by G.S. 105-129.12 if all of the following conditions are met:
  - a. The taxpayer's primary business is as a telecommunications or financial services company, as defined by NAICS.
  - b. The primary activity of an establishment of the taxpayer is a customer service center located in an enterprise tier one, two, or three area.



**Article 3A has a delayed repeal date. See notes.**

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- c. The jobs, investment, and activity with respect to which a credit is claimed are used in that activity.
- (6) Warehousing. — A taxpayer is eligible for the credits allowed by this Article other than by G.S. 105-129.12 if all of the following conditions are met:
- a. The primary activity of an establishment of the taxpayer is in warehousing.
  - b. The warehousing establishment is located in an enterprise tier one, two, or three area and serves 25 or more establishments of the taxpayer in at least five different counties in one or more states.
  - c. The jobs, investment, and activity with respect to which a credit is claimed are used in the warehousing establishment.
- (7) Research and development. — For the purpose of determining eligibility under this subsection for the credit for research and development in G.S. 105-129.10, the following special rules apply:
- a. If the primary activity of an establishment of the taxpayer in this State is computer services, the taxpayer's qualified research expenditures in this State are considered to be used in computer services.
  - b. For all other taxpayers, the taxpayer's qualified research expenditures in this State are considered to be used in the primary business of the taxpayer.
- (a1) New Jobs Defined. — A central office or aircraft facility creates at least 40 new jobs if the taxpayer hires at least 40 additional full-time employees to fill new positions at the office either (i) within 12 months immediately following the date the taxpayer first uses the property as a central office or aircraft facility or (ii) within a 36-month period that includes the 24 months that immediately precede and the 12 months that immediately follow the first use of the property as a central office or aircraft facility property when the taxpayer uses temporary space for the central office or aircraft facility functions during completion of the central office or aircraft facility property. Other property creates at least 200 new jobs if the taxpayer hires at least 200 additional full-time employees to fill new positions at the location in a two-year period beginning when the property is first used in an eligible business. An electronic mail order house creates at least 250 new jobs if the taxpayer hires at least 250 additional full-time employees to fill new positions at the house in the two-year period ending on the last day of the taxable year the taxpayer first claims a credit under this Article. Jobs transferred from one area in the State to another area in the State are not considered new jobs for purposes of this subsection.
- (a2) Expiration. — If, during the period that installments of a credit under this Article accrue, the taxpayer is no longer engaged in one of the types of business described in subsection (a) of this section, the credit expires. If, during the period that installments of a credit under this Article accrue, the number of jobs of an eligible business falls below the minimum number required under subsection (a) of this section, any credit associated with that business expires. When a credit expires, the taxpayer may not take any remaining installments of the credit. The taxpayer may, however, take the portion of an installment that accrued in a previous year and was carried forward to the extent permitted under G.S. 105-129.5. A change in the enterprise tier designation of the location of an establishment does not result in expiration of a credit under this Article.
- (b) Wage Standard. — A taxpayer is eligible for the credit for creating jobs in an enterprise tier three, four, or five area if, for the calendar year the jobs



**Article 3A has a delayed repeal date. See notes.**

are created, the average wage of the jobs for which the credit is claimed meets the wage standard and the average wage of all jobs at the location with respect to which the credit is claimed meets the wage standard. No credit is allowed for jobs not included in the wage calculation. A taxpayer is eligible for the credit for investing in machinery and equipment, the credit for research and development, or the credit for investing in real property for a central office or aircraft facility in a tier three, four, or five area if, for the calendar year the taxpayer engages in the activity that qualifies for the credit, the average wage of all jobs at the location with respect to which the credit is claimed meets the wage standard. In making the wage calculation, the taxpayer must include any positions that were filled for at least 1,600 hours during the calendar year the taxpayer engages in the activity that qualifies for the credit even if those positions are not filled at the time the taxpayer claims the credit. For a taxpayer with a taxable year other than a calendar year, the taxpayer must use the wage standard for the calendar year in which the taxable year begins. No wage standard applies to credits for activities in an enterprise tier one or two area. For the purposes of this subsection, for a fiber, yarn, or thread mill that uses a sequential manufacturing process in which separate parts of the sequential manufacturing process are performed in different facilities within the same county, the term "location" may mean either the specific establishment or all facilities in the county in which parts of the process are performed.

Part-time jobs for which the taxpayer provides health insurance as provided in subsection (b2) of this section are considered to have an average weekly wage at least equal to the applicable percentage times the applicable average weekly wage for the county in which the jobs will be located. There may be a period of up to 100 days between the time at which an employee begins a part-time job and the time at which the taxpayer begins to provide health insurance for that employee.

Jobs meet the wage standard if they pay an average weekly wage that is at least equal to one hundred ten percent (110%) of the applicable average weekly wage for the county in which the jobs will be located, as computed by the Secretary of Commerce from data compiled by the Employment Security Commission for the most recent period for which data are available. The applicable average weekly wage is the lowest of the following: (i) the average wage for all insured private employers in the county, (ii) the average wage for all insured private employers in the State, and (iii) the average wage for all insured private employers in the county multiplied by the county income/wage adjustment factor. The county income/wage adjustment factor is the county income/wage ratio divided by the State income/wage ratio. The county income/wage ratio is average per capita income in the county divided by the annualized average wage for all insured private employers in the county. The State income/wage ratio is the average per capita income in the State divided by the annualized average wage for all insured private employers in the State. The Department of Commerce must annually publish the wage standard for each county.

(b1) Large Investment. — A taxpayer who is otherwise eligible for a tax credit under this Article becomes eligible for the large investment enhancements provided for credits under this Article if the Secretary of Commerce makes a written determination that the taxpayer is expected to purchase or lease, and place in service in connection with the eligible business within a two-year period, at least one hundred fifty million dollars (\$150,000,000) worth of one or more of the following: real property, machinery and equipment, or central office or aircraft facility property. In the case of an interstate air courier that has or is constructing a hub in this State and in the case of an eligible

**Article 3A has a delayed repeal date. See notes.**

major industry, this investment may be placed in service in connection with the eligible business within a seven-year period. If the taxpayer fails to make the required level of investment within the applicable period, the taxpayer forfeits the large investment enhancements as provided in subsection (d) of this section.

(b2) Health Insurance. — A taxpayer is eligible for a credit for creating jobs or for worker training under this Article if the taxpayer provides health insurance for the positions for which the credit is claimed when the jobs are created and each year it claims an installment or carryforward of the credit. A taxpayer is eligible for the other credits under this Article if the taxpayer provides health insurance for all of the full-time positions at the location with respect to which the credit is claimed when the taxpayer engages in the activity that qualifies for the credit and each year it claims an installment or carryforward of the credit. For the purposes of this subsection, a taxpayer provides health insurance if it pays at least fifty percent (50%) of the premiums for health care coverage that equals or exceeds the minimum provisions of the basic health care plan of coverage recommended by the Small Employer Carrier Committee pursuant to G.S. 58-50-125.

Each year that a taxpayer claims a credit or an installment or carryforward of a credit allowed under this Article, the taxpayer must provide with the tax return the taxpayer's certification that the taxpayer continues to provide health insurance for the jobs for which the credit was claimed or the full-time jobs at the location with respect to which the credit was claimed. If the taxpayer ceases to provide health insurance for the jobs during a taxable year, the credit expires and the taxpayer may not take any remaining installment or carryforward of the credit.

(b3) Environmental Impact. — A taxpayer is eligible for a credit allowed under this Article only if the taxpayer certifies that, at the time the taxpayer first claims the credit, the taxpayer has no pending administrative, civil, or criminal enforcement action based on alleged significant violations of any program implemented by an agency of the Department of Environment and Natural Resources, and has had no final determination of responsibility for any significant administrative, civil, or criminal violation of any program implemented by an agency of the Department of Environment and Natural Resources within the last five years. A significant violation is a violation or alleged violation that does not satisfy any of the conditions of G.S. 143-215.6B(d). The Secretary of Environment and Natural Resources must notify the Department of Revenue annually of every person that currently has any of these pending actions and every person that has had any of these final determinations within the last five years.

(b4) Safety and Health Programs. — A taxpayer is eligible for a credit allowed under this Article only if the taxpayer certifies that, as of the time the taxpayer first claims the credit, at the business location with respect to which the credit is claimed, the taxpayer has no citations under the Occupational Safety and Health Act that have become a final order within the past three years for willful serious violations or for failing to abate serious violations. For the purposes of this subsection, "serious violation" has the same meaning as in G.S. 95-127. The Secretary of Labor must notify the Department of Revenue annually of all employers who have had these citations become final orders within the past three years.

(b5) Substantial Investment in Other Property. — A taxpayer is eligible for the credit for substantial investment in other property under G.S. 105-129.12A with respect to a location only if the Secretary of Commerce makes a written determination that the taxpayer is expected to purchase or lease and use in an



**Article 3A has a delayed repeal date. See notes.**

eligible business at that location within a three-year period at least ten million dollars (\$10,000,000) of real property and that the location that is the subject of the credit will create at least 200 new jobs within two years of the time that the property is first used in an eligible business. If the taxpayer fails to timely make the required level of investment or fails to timely create the required number of new jobs, the taxpayer forfeits the credit as provided in subsection (d) of this section.

(b6) **Overdue Tax Debts.** — A taxpayer is not eligible for a credit allowed under this Article if, at the time the taxpayer claims the credit or an installment or carryforward of the credit, the taxpayer has received a notice of an overdue tax debt and that overdue tax debt has not been satisfied or otherwise resolved.

(b7) **Major Computer Facilities.** — A taxpayer that is otherwise eligible for a tax credit under this Article and who satisfies the conditions of G.S. 105-129.62 is eligible for the major computer facility enhancements provided for credits under this Article. The major computer facility enhancements are the following:

- (1) The wage standard requirement does not apply to the activities of the taxpayer at the major computer facility.
- (2) For the credit for creating jobs under G.S. 105-129.8, the amount of the credit is increased by four thousand dollars (\$4,000) per job for jobs at the major computer facility.
- (3) For the credit for investment in machinery and equipment under G.S. 105-129.9, the applicable percentage is seven percent (7%) and the applicable threshold is zero dollars (\$0.00) regardless of the enterprise tier designation of the county in which the major computer facility is located.
- (4) For the credit for worker training under G.S. 105-129.11, the maximum amount of the credit per worker trained is one thousand dollars (\$1,000) regardless of the enterprise tier designation of the county in which the major computer facility is located.
- (5) For the credit for substantial investment in other property under G.S. 105-129.12A, the taxpayer is eligible for the credit regardless of the enterprise tier designation of the county in which the major computer facility is located.

(c) **Repealed by Session Laws 1998-55, s. 1, effective for taxable years beginning on or after January 1, 1999.**

(d) **Forfeiture.** — A taxpayer forfeits a credit allowed under this Article if the taxpayer was not eligible for the credit for the calendar year in which the taxpayer engaged in the activity for which the credit was claimed. In addition, a taxpayer forfeits a large investment enhancement of a tax credit if the taxpayer fails to timely make the required level of investment under subsection (b1) of this section. If an eligible major industry fails to timely make the required level of investment under G.S. 105-129.2(8a), the taxpayer forfeits all credits allowed under this Article that it would not otherwise have been eligible for if it were not an eligible major industry. If a taxpayer that is subject to the later repeal date of this Article under G.S. 105-129.2A(a3) fails to timely make the required level of investment or to timely create the required number of new jobs, the taxpayer forfeits all credits allowed under this Article that it would not otherwise have been eligible for if it were not subject to the later repeal date under G.S. 105-129.2A(a3). A taxpayer forfeits the credit for substantial investment in other property allowed under G.S. 105-129.12A if the taxpayer fails to timely create the number of required new jobs or to timely make the required level of investment under subsection (b5) of this section. A



**Article 3A has a delayed repeal date. See notes.**

taxpayer forfeits the technology commercialization credit allowed under G.S. 105-129.9A if the taxpayer fails to make the level of investment required by subsection (e) of that section within the required period or if the taxpayer fails to meet the terms of its licensing agreement with a research university. If a taxpayer claimed a twenty percent (20%) technology commercialization credit under G.S. 105-129.9A(d) and fails to make the level of investment required under that subsection within the required period, but does make the level of investment required under subsection (e) of that section within the required period, the taxpayer forfeits one-fourth of the twenty percent (20%) credit.

A taxpayer that forfeits a credit under this Article is liable for all past taxes avoided as a result of the credit plus interest at the rate established under G.S. 105-241.1(i), computed from the date the taxes would have been due if the credit had not been allowed. The past taxes and interest are due 30 days after the date the credit is forfeited; a taxpayer that fails to pay the past taxes and interest by the due date is subject to the penalties provided in G.S. 105-236. If a taxpayer forfeits the credit for creating jobs, the technology commercialization credit, or the credit for investing in machinery and equipment, the taxpayer also forfeits any credit for worker training claimed for the jobs for which the credit for creating jobs was claimed or the jobs at the location with respect to which the technology commercialization credit or the credit for investing in machinery and equipment was claimed.

(e) Change in Ownership of Business. — As used in this subsection, the term “business” means a taxpayer or an establishment. The sale, merger, consolidation, conversion, acquisition, or bankruptcy of a business, or any transaction by which an existing business reformulates itself as another business, does not create new eligibility in a succeeding business with respect to credits for which the predecessor was not eligible under this Article. A successor business may, however, take any installment of or carried-over portion of a credit that its predecessor could have taken if it had a tax liability. The acquisition of a business is a new investment that creates new eligibility in the acquiring taxpayer under this Article if any of the following conditions are met:

- (1) The business closed before it was acquired.
- (2) The business was required to file a notice of plant closing or mass layoff under the federal Worker Adjustment and Retraining Notification Act, 29 U.S.C. § 2102, before it was acquired.
- (3) The business was acquired by its employees directly or indirectly through an acquisition company under an employee stock option transaction or another similar mechanism. For the purpose of this subdivision, “acquired” means that as part of the initial purchase of a business by the employees, the purchase included an agreement for the employees through the employee stock option transaction or another similar mechanism to obtain one of the following:
  - a. Ownership of more than fifty percent (50%) of the business.
  - b. Ownership of not less than forty percent (40%) of the business within seven years if the business has tangible assets with a net book value in excess of one hundred million dollars (\$100,000,000) and has the majority of its operations located in an enterprise tier one, two, or three area.

(f) Development Zone Project Credit. — Subsections (a) through (b4) of this section do not apply to the credit for development zone projects provided in G.S. 105-129.13.

(g) Advisory Ruling. — A taxpayer may request in writing from the Secretary of Revenue specific advice regarding eligibility for a credit under this

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Article. G.S. 105-264 governs the effect of this advice. (1996, 2nd Ex. Sess., c. 13, s. 3.3; 1997-277, ss. 1, 2; 1998-55, s. 1; 1999-305, s. 3; 1999-360, ss. 1, 2; 1999-369, s. 5.2; 2000-56, ss. 5(c), 6, 8(c); 2000-140, ss. 92.A(a),(b); 2001-414, s. 7; 2001-476, ss. 5(a), 6(a); 2002-72, s. 12; 2002-146, ss. 3, 4; 2002-172, ss. 1.2, 1.3(b); 2003-349, s. 8.1; 2003-416, s. 2; 2003-435, 2nd Ex. Sess., ss. 3.3, 3.4; 2004-170, ss. 10, 11; 2004-204, 1st Ex. Sess., s. 2; 2005-241, s. 2; 2006-66, s. 24.14(a).)

### Editor's Note. —

Session Laws 2006-66, s. 1.2, provides: "This act shall be known as 'The Current Operations and Capital Improvements Appropriations Act of 2006'."

Session Laws 2006-66, s. 28.6 is a severability clause.

### Effect of Amendments. —

Session Laws 2006-66, s. 24.14(a), effective for taxable years beginning on or after January 1, 1996, added the last sentence in the first paragraph of subsection (b).

## § 105-129.6. (See note for repeal) Fees and reports.

(a) Repealed by Session Laws 2001-476, s. 8(a), effective November 29, 2001.

(a1) Fee. — When filing a return for a taxable year in which the taxpayer engaged in activity for which the taxpayer is eligible for a credit under this Article, the taxpayer must pay the Department of Revenue a fee of five hundred dollars (\$500.00) for each credit the taxpayer claims or intends to claim with respect to a location that is in an enterprise tier three, four, or five area, subject to a maximum fee of one thousand five hundred dollars (\$1,500) per taxpayer per taxable year. This fee does not apply to any credit the taxpayer claims or intends to claim with respect to a location that is in a development zone or agrarian growth zone. If the taxpayer claims or intends to claim a credit that relates to locations in more than one enterprise tier area, the fee is based on the highest-numbered enterprise tier area.

The fee is due at the time the return is due for the taxable year in which the taxpayer engaged in the activity for which the taxpayer is eligible for a credit. No credit is allowed under this Article for a taxable year until all outstanding fees have been paid.

The Secretary of Revenue shall retain three-fourths of the proceeds of the fee imposed in this section for the costs of administering and auditing the credits allowed in this Article. The Secretary of Revenue shall credit the remaining proceeds of the fee imposed in this section to the Department of Commerce for the costs of administering this Article. The proceeds of the fee are receipts of the Department to which they are credited.

(b) Reports. — The Department of Revenue shall publish by May 1 of each year the following information itemized by credit and by taxpayer for the 12-month period ending the preceding December 31:

- (1) The number of credits taken for each credit allowed in this Article.
- (2) The number and enterprise tier area of new jobs with respect to which credits were generated and to which credits were taken.
- (3) The cost and enterprise tier area of machinery and equipment with respect to which credits were generated and to which credits were taken.
- (4) The number of new jobs created by businesses located in development zones, and the percentage of jobs at those locations that were filled by residents of the zones.



**Article 3A has a delayed repeal date. See notes.**

- (5) The amount and enterprise tier area of worker training expenditures with respect to which credits were generated and to which credits were taken.
- (6) The amount and enterprise tier area of new research and development expenditures with respect to which credits were generated and to which credits were taken.
- (7) The cost and enterprise tier area of real property investment with respect to which credits were generated and to which credits were taken. (1996, 2nd Ex. Sess., c. 13, s. 3.3; 1997-277, s. 1; 1998-55, s. 1; 1999-360, ss. 1, 2; 2000-56, s. 1(a); 2001-476, s. 8(a); 2001-487, s. 123; 2004-170, s. 12; 2004-203, s. 40; 2005-429, s. 2.2; 2006-66, s. 24.16(c).)

**Editor's Note. —**

Session Laws 2006-66, s. 1.2, provides: "This act shall be known as 'The Current Operations and Capital Improvements Appropriations Act of 2006'."

Session Laws 2006-66, s. 28.6 is a severability clause.

**Effect of Amendments. —**

Session Laws 2006-66, s. 24.16(c), effective for taxable years beginning on or after January 1, 2006, and applicable to business activities occurring on or after that date, substituted "or agrarian growth zone" for "as defined in G.S. 105-129.3A" at the end of the second sentence in subsection (a1).

**§ 105-129.7. (See note for repeal) Substantiation.**

(a) To claim a credit allowed by this Article, the taxpayer must provide any information required by the Secretary of Revenue. Every taxpayer claiming a credit under this Article shall maintain and make available for inspection by the Secretary of Revenue any records the Secretary considers necessary to determine and verify the amount of the credit to which the taxpayer is entitled. The burden of proving eligibility for the credit and the amount of the credit shall rest upon the taxpayer, and no credit shall be allowed to a taxpayer that fails to maintain adequate records or to make them available for inspection.

(b) Each taxpayer must provide with the tax return qualifying information for each credit claimed under this Article for the first taxable year the credit is claimed and for every year in which a subsequent installment or a carryforward of that credit is claimed. The qualifying information must be in the form prescribed by the Secretary, must cover each taxable year beginning with the first taxable year the credit is claimed, and must be signed and affirmed by the individual who signs the taxpayer's tax return. The information required by this subsection is information demonstrating that the taxpayer has met the conditions for qualifying for an initial credit and any installments and carryforwards, and includes the following:

- (1) The physical location of the jobs and investment with respect to which the credit is claimed, including the enterprise tier designation of the location and whether it is in a development zone or agrarian growth zone. In addition, for each individual who fills a job at a location with respect to which a credit is claimed, the place where the individual resided before taking the job, including any enterprise tier designation of that place. In addition, for jobs that are located in a development zone, the number of those jobs that are filled by residents of the development zone.
- (2) The type of business with respect to which the credit is claimed, as required by G.S. 105-129.4(a), and wage information described in G.S. 105-129.4(b).
- (3) If the credit is claimed with respect to a large investment under G.S. 105-129.4(b1), is a credit with a carryforward period of 10 years under



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G.S. 105-129.5(c), or is a credit claimed under G.S. 105-129.12A, the amount of the investment requirement under those subsections that has been met to date.

- (4) Qualifying information required for the credit for creating jobs allowed under G.S. 105-129.8, the credit for investing in machinery and equipment allowed under G.S. 105-129.9, the credit for worker training allowed under G.S. 105-129.11, the credit for investing in central office or aircraft facility property allowed in G.S. 105-129.12, the credit for substantial investment in other property under G.S. 105-129.12A, and any other credits allowed under this Article. (1996, 2nd Ex. Sess., c. 13, s. 3.3; 1997-277, s. 1; 1999-360, ss. 1, 2; 2000-56, s. 5(d); 2001-476, s. 9(a); 2006-66, s. 24.16(d).)

Editor’s Note. —

Session Laws 2006-66, s. 1.2, provides: “This act shall be known as ‘The Current Operations and Capital Improvements Appropriations Act of 2006.’”

Session Laws 2006-66, s. 28.6 is a severability clause.

Effect of Amendments. —

Session Laws 2006-66, s. 24.16(d), effective for taxable years beginning on or after January 1, 2006, and applicable to business activities occurring on or after that date, inserted “zone or agrarian growth” at the end of the first sentence of subdivision (b)(1).

§ 105-129.8. (See note for repeal) Credit for creating jobs.

(a) Credit. — A taxpayer that meets the eligibility requirements set out in G.S. 105-129.4, has five or more full-time employees, and hires an additional full-time employee during the taxable year to fill a new position located in this State is allowed a credit for creating a new full-time job. The amount of the credit for each new full-time job created is set out in the table below and is based on the enterprise tier of the area in which the position is located. In addition, if the position is located in a development zone or agrarian growth zone, the amount of the credit is increased by four thousand dollars (\$4,000) per job.

<i>Area Enterprise Tier</i>	<i>Amount of Credit</i>
Tier One	\$12,500
Tier Two	4,000
Tier Three	3,000
Tier Four	1,000
Tier Five	500

(a1) Positions. — A position is located in an area if more than fifty percent (50%) of the employee’s duties are performed in the area. The number of new positions a taxpayer fills during the taxable year is determined by subtracting the highest number of full-time employees the taxpayer had in this State at any time during the 12-month period preceding the beginning of the taxable year from the number of full-time employees the taxpayer has in this State at the end of the taxable year.

(a2) Installments. — The credit may not be taken in the taxable year in which the additional employee is hired. Instead, the credit must be taken in equal installments over the four years following the taxable year in which the additional employee was hired and is conditioned on the taxpayer’s continued employment in this State of the number of full-time employees the taxpayer had upon hiring the employee that caused the taxpayer to qualify for the credit.

If, in one of the four years in which the installment of a credit accrues, the number of the taxpayer’s full-time employees in this State falls below the number of full-time employees the taxpayer had in this State in the year in

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which the taxpayer qualified for the credit, the credit expires and the taxpayer may not take any remaining installment of the credit. The taxpayer may, however, take the portion of an installment that accrued in a previous year and was carried forward to the extent permitted under G.S. 105-129.5.

(a3) Transferred Jobs. — Jobs transferred from one area in the State to another area in the State are not considered new jobs for purposes of this section. If, in one of the four years in which the installment of a credit accrues, the position filled by the employee is moved to an area in a higher- or lower-numbered enterprise tier, or is moved from a development zone or agrarian growth zone to an area that is not a development zone or agrarian growth zone, the remaining installments of the credit must be calculated as if the position had been created initially in the area to which it was moved.

(b) Repealed by Session Laws 1989, c. 111, s. 1.

(b1), (c) Repealed by Session Laws 1996, Second Extra Session, c. 13, s. 3.3.

(d) Planned Expansion. — A taxpayer that signs a letter of commitment with the Department of Commerce to create at least twenty new full-time jobs in a specific area within two years of the date the letter is signed qualifies for the credit in the amount allowed by this section based on the area's enterprise tier and development zone or agrarian growth zone designation for that year even though the employees are not hired that year. In the case of an interstate air courier that has or is constructing a hub in this State and in the case of an eligible major industry, the applicable time period is seven years. The credit shall be available in the taxable year after at least twenty employees have been hired if the hirings are within the applicable commitment period. The conditions outlined in subsection (a) apply to a credit taken under this subsection except that if the area is redesignated to a higher-numbered enterprise tier or loses its development zone or agrarian growth zone designation after the year the letter of commitment was signed, the credit is allowed based on the area's enterprise tier and development zone or agrarian growth zone designation for the year the letter was signed. If the taxpayer does not hire the employees within the applicable period, the taxpayer does not qualify for the credit. However, if the taxpayer qualifies for a credit under subsection (a) in the year any new employees are hired, the taxpayer may take the credit under that subsection.

(e), (f) Repealed by Session Laws 1996, Second Extra Session, c. 13, s. 3.3. (1987, c. 568, ss. 1, 2; 1989, c. 111, ss. 1, 2; c. 751, ss. 7(6), 7(7), 8(10), 8(11); c. 753, s. 4.1(a)-(d); 1989 (Reg. Sess., 1990), c. 814, s. 14; 1991, c. 517, ss. 1-3; 1991 (Reg. Sess., 1992), c. 959, ss. 20, 21; 1993, c. 45, ss. 1, 2; c. 485, ss. 7, 11; 1995, c. 370, ss. 5, 6; 1996, 2nd Ex. Sess., c. 13, ss. 3.2-3.4; 1997-277, s. 1; 1998-55, s. 1; 1999-360, s. 1; 2000-56, s. 8(a); 2000-140, s. 92.A(b); 2001-414, s. 8; 2002-146, s. 6; 2003-435, 2nd Ex. Sess., s. 3.6; 2004-170, s. 43(a); 2005-435, s. 28; 2006-66, s. 24.16(e).)

### Editor's Note. —

Session Laws 2006-66, s. 1.2, provides: "This act shall be known as 'The Current Operations and Capital Improvements Appropriations Act of 2006'."

Session Laws 2006-66, s. 28.6 is a severability clause.

### Effect of Amendments. —

Session Laws 2006-66, s. 24.16(e), effective for taxable years beginning on or after January 1, 2006, and applicable to business activities occurring on or after that date, inserted "or agrarian growth zone" following "development zone" throughout subsections (a), (a3) and (d).

## § 105-129.9. (See note for repeal) Credit for investing in machinery and equipment.

(a) General Credit. — If a taxpayer that has purchased or leased eligible



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machinery and equipment places them in service in this State during the taxable year, the taxpayer is allowed a credit equal to the applicable percentage of the excess of the eligible investment amount over the applicable threshold. Machinery and equipment are eligible if they are capitalized by the taxpayer for tax purposes under the Code and not leased to another party. In addition, in the case of a large investment, machinery and equipment that are not capitalized by the taxpayer are eligible if the taxpayer leases them from another party. The credit may not be taken for the taxable year in which the machinery and equipment are placed in service but shall be taken in equal installments over the seven years following the taxable year in which they are placed in service. The applicable percentage is as follows:

<i>Area Enterprise Tier</i>	<i>Applicable Percentage</i>
Tier One	7%
Tier Two	7%
Tier Three	6%
Tier Four	5%
Tier Five	4%

(a1) Technology Commercialization Credit. — If a taxpayer is eligible for the credit allowed in this section with respect to eligible machinery and equipment and qualifies for one of the credits allowed in G.S. 105-129.9A with respect to the same machinery and equipment, the taxpayer may choose to take one of those credits instead of the credit allowed in this section. A taxpayer may take the credit allowed in this section or one of the credits allowed in G.S. 105-129.9A during a taxable year with respect to eligible machinery and equipment, but may not take more than one of these credits with respect to the same machinery and equipment.

(b) Eligible Investment Amount. — The eligible investment amount is the lesser of (i) the cost of the eligible machinery and equipment and (ii) the amount by which the cost of all of the taxpayer’s eligible machinery and equipment that are in service in this State on the last day of the taxable year exceeds the cost of all of the taxpayer’s eligible machinery and equipment that were in service in this State on the last day of the base year. The base year is that year, of the three immediately preceding taxable years, in which the taxpayer had the most eligible machinery and equipment in service in this State.

(c) Threshold. — The applicable threshold is the appropriate amount set out in the following table based on the enterprise tier where the eligible machinery and equipment are placed in service during the taxable year. If the taxpayer places eligible machinery and equipment in service at more than one establishment in an enterprise tier during the taxable year, the threshold applies separately to the eligible machinery and equipment placed in service at each establishment. If the taxpayer places eligible machinery and equipment in service at an establishment over the course of a two-year period, the applicable threshold for the second taxable year is reduced by the eligible investment amount for the previous taxable year.

<i>Area Enterprise Tier</i>	<i>Threshold</i>
Tier One	\$ -0-
Tier Two	100,000
Tier Three	200,000
Tier Four	1,000,000
Tier Five	2,000,000

(d) Expiration. — As used in this subsection, the term “disposed of” means disposed of, taken out of service, or moved out of State.

If, in one of the seven years in which the installment of a credit accrues, the machinery and equipment with respect to which the credit was claimed are



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disposed of, the credit expires and the taxpayer may not take any remaining installment of the credit for that machinery and equipment unless the cost of that machinery and equipment is offset in the same taxable year by the taxpayer's new investment in eligible machinery and equipment placed in service in the same enterprise tier, as provided in this subsection. If, during the taxable year the taxpayer disposed of the machinery and equipment for which installments remain, there has been a net reduction in the cost of all the taxpayer's eligible machinery and equipment that are in service in the same enterprise tier as the machinery and equipment that were disposed of, and the amount of this reduction is greater than twenty percent (20%) of the cost of the machinery and equipment that were disposed of, then the taxpayer forfeits the remaining installments of the credit for the machinery and equipment that were disposed of. If the amount of the net reduction is equal to twenty percent (20%) or less of the cost of the machinery and equipment that were disposed of, or if there is no net reduction, then the taxpayer does not forfeit the remaining installments of the expired credit. In determining the amount of any net reduction during the taxable year, the cost of machinery and equipment the taxpayer placed in service during the taxable year and for which the taxpayer claims a credit under Article 3B of this Chapter may not be included in the cost of all the taxpayer's eligible machinery and equipment that are in service. If in a single taxable year machinery and equipment with respect to two or more credits in the same tier are disposed of, the net reduction in the cost of all the taxpayer's eligible machinery and equipment that are in service in the same tier is compared to the total cost of all the machinery and equipment for which credits expired in order to determine whether the remaining installments of the credits are forfeited.

The expiration of a credit does not prevent the taxpayer from taking the portion of an installment that accrued in a previous year and was carried forward to the extent permitted under G.S. 105-129.5.

If, in one of the seven years in which the installment of a credit accrues, the machinery and equipment with respect to which the credit was claimed are moved to an area in a higher-numbered enterprise tier, or are moved from a development zone or agrarian growth zone to an area that is not a development zone or agrarian growth zone, the remaining installments of the credit are allowed only to the extent they would have been allowed if the machinery and equipment had been placed in service initially in the area to which they were moved.

(e) **Planned Expansion.** — A taxpayer that signs a letter of commitment with the Department of Commerce to place specific eligible machinery and equipment in service in an area within two years after the date the letter is signed may, in the year the eligible machinery and equipment are placed in service in that area, calculate the credit for which the taxpayer qualifies based on the area's enterprise tier and development zone or agrarian growth zone designation for the year the letter was signed. In the case of an interstate air courier that has or is constructing a hub in this State and in the case of an eligible major industry, the applicable time period is seven years. All other conditions apply to the credit, but if the area has been redesignated to a higher-numbered enterprise tier or has lost its development zone or agrarian growth zone designation after the year the letter of commitment was signed, the credit is allowed based on the area's enterprise tier and development zone or agrarian growth zone designation for the year the letter was signed. If the taxpayer does not place part or all of the specified eligible machinery and equipment in service within the applicable period, the taxpayer does not qualify for the benefit of this subsection with respect to the machinery and equipment not placed in service within the applicable period. However, if the taxpayer qualifies for a credit in the year the eligible machinery and equip-

## Article 3A has a delayed repeal date. See notes.

ment are placed in service, the taxpayer may take the credit for that year as if no letter of commitment had been signed pursuant to this subsection. (1996, 2nd Ex. Sess., c. 13, s. 3.3; 1997-277, s. 1; 1998-55, s. 1; 1999-305, s. 1; 1999-360, ss. 1, 2; 2000-56, s. 8(b); 2000-140, s. 92.A(b); 2000-173, s. 1(a); 2001-476, s. 10(a); 2002-146, s. 7; 2002-172, s. 1.1; 2003-416, s. 2; 2003-435, 2nd Ex. Sess., s. 3.7; 2004-170, s. 13; 2006-66, s. 24.16(f).)

### Editor's Note. —

Session Laws 2006-66, s. 1.2, provides: "This act shall be known as 'The Current Operations and Capital Improvements Appropriations Act of 2006'."

Session Laws 2006-66, s. 28.6 is a severability clause.

### Effect of Amendments. —

Session Laws 2006-66, s. 24.16(f), effective for taxable years beginning on or after January 1, 2006, and applicable to business activities occurring on or after that date, inserted "or agrarian growth zone" following "development zone" in the third paragraph of subsection (d) and throughout subsection (e).

## ARTICLE 3B.

### *Business And Energy Tax Credits.*

## § 105-129.15. Definitions.

The following definitions apply in this Article:

- (1) Business property. — Tangible personal property that is used by the taxpayer in connection with a business or for the production of income and is capitalized by the taxpayer for tax purposes under the Code. The term does not include, however, a luxury passenger automobile taxable under section 4001 of the Code or a watercraft used principally for entertainment and pleasure outings for which no admission is charged.
- (2) Cost. — In the case of property owned by the taxpayer, cost is determined pursuant to regulations adopted under section 1012 of the Code, subject to the limitation on cost provided in section 179 of the Code. In the case of property the taxpayer leases from another, cost is value as determined pursuant to G.S. 105-130.4(j)(2).
- (3) Recodified as § 105-129.15(5).
- (4) Hydroelectric generator. — A machine that produces electricity by water power or by the friction of water or steam.
- (4a) Repealed by Session Laws 2002-87, s. 3, effective August 22, 2002.
- (5) Purchase. — Defined in section 179 of the Code.
- (6) Renewable biomass resources. — Organic matter produced by terrestrial and aquatic plants and animals, such as standing vegetation, aquatic crops, forestry and agricultural residues, spent pulping liquor, landfill wastes, and animal wastes.
- (7) Renewable energy property. — Any of the following machinery and equipment or real property:
  - a. Biomass equipment that uses renewable biomass resources for biofuel production of ethanol, methanol, and biodiesel; anaerobic biogas production of methane utilizing agricultural and animal waste or garbage; or commercial thermal or electrical generation. The term also includes related devices for converting, conditioning, and storing the liquid fuels, gas, and electricity produced with biomass equipment.
  - b. Hydroelectric generators located at existing dams or in free-flowing waterways, and related devices for water supply and control, and converting, conditioning, and storing the electricity generated.



- c. Solar energy equipment that uses solar radiation as a substitute for traditional energy for water heating, active space heating and cooling, passive heating, daylighting, generating electricity, distillation, desalination, detoxification, or the production of industrial or commercial process heat. The term also includes related devices necessary for collecting, storing, exchanging, conditioning, or converting solar energy to other useful forms of energy.
  - d. Wind equipment required to capture and convert wind energy into electricity or mechanical power, and related devices for converting, conditioning, and storing the electricity produced.
- (8) Renewable fuel. — Either of the following:
- a. Biodiesel, as defined in G.S. 105-449.60.
  - b. Ethanol either unmixed or in mixtures with gasoline that are seventy percent (70%) or more ethanol by volume. (1996, 2nd Ex. Sess., c. 13, s. 3.12; 1997-277, s. 3; 1998-55, s. 2; 1999-342, s. 2; 1999-360, s. 1; 2000-173, s. 1(a); 2001-431, s. 1; 2002-87, s. 3; 2004-153, s. 1; 2005-413, s. 4; 2006-162, s. 23.)

**Effect of Amendments. —**

Session Laws 2005-413, s. 4, as amended by Session Laws 2006-162, s. 23, effective for taxable years beginning on or after January 1, 2006, inserted “spent pulping liquor” preceding

“landfill wastes” in subdivision (6); and deleted “from renewable energy crops or wood waste materials” from the end of the first sentence in subdivision (7)a.

**§ 105-129.16D. (Repealed effective for facilities placed in service on or after January 1, 2011) Credit for constructing renewable fuel facilities.**

(a) Dispensing Credit. — A taxpayer that constructs and installs and places in service in this State a qualified commercial facility for dispensing renewable fuel is allowed a credit equal to fifteen percent (15%) of the cost to the taxpayer of constructing and installing the part of the dispensing facility, including pumps, storage tanks, and related equipment, that is directly and exclusively used for dispensing or storing renewable fuel. A facility is qualified if the equipment used to store or dispense renewable fuel is labeled for this purpose and clearly identified as associated with renewable fuel.

The entire credit may not be taken for the taxable year in which the facility is placed in service but must be taken in three equal annual installments beginning with the taxable year in which the facility is placed in service. If, in one of the years in which the installment of a credit accrues, the portion of the facility directly and exclusively used for dispensing or storing renewable fuel is disposed of or taken out of service, the credit expires and the taxpayer may not take any remaining installment of the credit. The taxpayer may, however, take the portion of an installment that accrued in a previous year and was carried forward to the extent permitted under G.S. 105-129.17.

(b) Production Credit. — A taxpayer that constructs and places in service in this State a commercial facility for processing renewable fuel is allowed a credit equal to twenty-five percent (25%) of the cost to the taxpayer of constructing and equipping the facility. The entire credit may not be taken for the taxable year in which the facility is placed in service but must be taken in seven equal annual installments beginning with the taxable year in which the facility is placed in service. If, in one of the years in which the installment of a credit accrues, the facility with respect to which the credit was claimed is disposed of or taken out of service, the credit expires and the taxpayer may not take any remaining installment of the credit. The taxpayer may, however, take the portion of an installment that accrued in a previous year and was carried forward to the extent permitted under G.S. 105-129.17.



(b1) **Alternative Production Credit.** — In lieu of the credit allowed under subsection (b) of this section, a taxpayer that constructs and places in service in this State three or more commercial facilities for processing renewable fuel and that invests a total amount of at least four hundred million dollars (\$400,000,000) in the facilities is allowed a credit equal to thirty-five percent (35%) of the cost to the taxpayer of constructing and equipping the facilities. In order to claim the credit, the taxpayer must obtain a written determination from the Secretary of Commerce that the taxpayer is expected to invest within a five-year period a total amount of at least four hundred million dollars (\$400,000,000) in three or more facilities. The credit must be taken in seven equal annual installments beginning with the taxable year in which the first facility is placed in service. If, in one of the years in which the installment of credit accrues, a facility with respect to which the credit was claimed is disposed of or taken out of service and the investment requirements of this subsection are no longer satisfied, the credit expires and the taxpayer may not take any remaining installment of the credit. The taxpayer may, however, take the portion of an installment that accrued in a previous year and was carried forward to the extent permitted under G.S. 105-129.17. If a credit allowed under this subsection expires, a taxpayer is not eligible for a credit under subsection (b) of this section with respect to the same property. Notwithstanding the provisions of G.S. 105-129.17, a taxpayer may claim the credit allowed under this subsection against the income tax imposed under Article 4 of this Chapter only and the taxpayer may carry forward unused portions of the credit allowed under this subsection for the succeeding 10 years.

(c) **No Double Credit.** — A taxpayer may not claim the credits allowed under subsections (b) and (b1) of this section with respect to the same facility. A taxpayer that claims any other credit allowed under this Chapter with respect to the costs of constructing and installing a facility may not take the credit allowed in this section with respect to the same costs.

(d) **Sunset.** — This section is repealed effective for facilities placed in service on or after January 1, 2011. (2004-153, s. 2; 2006-66, s. 24.7(a); 2006-259, s. 19.5(a).)

**Editor's Note.** —

Session Laws 2006-66, s. 1.2, provides: "This act shall be known as 'The Current Operations and Capital Improvements Appropriations Act of 2006'."

Session Laws 2006-66, s. 28.6 is a severability clause.

**Effect of Amendments.** — Session Laws 2006-66, s. 24.7(a), effective for taxable years beginning on or after January 1, 2006, added

subsection (b1); added the first sentence in subsection (c); and substituted "January 1, 2011" for "January 1, 2008" in subsection (d).

Session Laws 2006-259, s. 19.5(a), effective for taxable years beginning on or after January 1, 2006, in the last sentence of subsection (b1), deleted "(a)" following "105-129.17" and added "only and the taxpayer may carry forward unused portions of the credit allowed under this subsection for the succeeding 10 years."

**§ 105-129.16E. (Effective for taxable years beginning on or after January 1, 2007, and expires for taxable years beginning on or after January 1, 2009)  
Credit for small business employee health benefits.**

(a) **Credit.** — A small business that provides health benefits for all of its eligible employees during the taxable year is allowed a credit to offset its costs in providing health benefits for its eligible employees. For the purposes of this subsection, a taxpayer provides health benefits if it pays at least fifty percent (50%) of the premiums for health care coverage that equals or exceeds the minimum provisions of the basic health care plan of coverage recommended by the Small Employer Carrier Committee pursuant to G.S. 58-50-125 or if its employees have qualifying existing coverage.

The credit is equal to a dollar amount per eligible employee whose total wages or salary received from the business does not exceed forty thousand dollars (\$40,000) on an annual basis. The dollar amount is two hundred fifty dollars (\$250.00), not to exceed the taxpayer's costs of providing health benefits for the employee during the taxable year.

(b) Allocation. — If the taxpayer is an individual who is a nonresident or a part-year resident, the taxpayer must reduce the amount of the credit by multiplying it by the fraction calculated under G.S. 105-134.5(b) or (c), as appropriate. If the taxpayer is not an individual and is required to apportion its multistate business income to this State, the taxpayer must reduce the amount of the credit by multiplying it by the apportionment fraction used to apportion its business income to this State.

(c) Definitions. — The following definitions apply in this section:

(1) Eligible employee. — Defined in G.S. 58-50-110.

(2) Qualifying existing coverage. — Defined in G.S. 58-50-130(a)(4a).

(3) Small business. — A taxpayer that employs no more than 25 eligible employees throughout the taxable year.

(d) Sunset. — This section expires for taxable years beginning on or after January 1, 2009. (2006-66, s. 24.4(a).)

**Editor's Note.** — Session Laws 2006-66, s. 1.2, provides: "This act shall be known as 'The Current Operations and Capital Improvements Appropriations Act of 2006'."

Session Laws 2006-66, s. 24.4(b), makes this

section effective for taxable years beginning on or after January 1, 2007.

Session Laws 2006-66, s. 28.6 is a severability clause.

## **§ 105-129.16F. (Effective for taxable years beginning on or after January 1, 2008, and repealed for taxable years beginning on or after January 1, 2010) Credit for biodiesel producers.**

(a) Credit. — A biodiesel provider that produces at least 100,000 gallons of biodiesel during the taxable year is allowed a credit equal to the per gallon excise tax the producer paid under Article 36C of this Chapter on the biodiesel. For the purposes of this section, "biodiesel" is liquid fuel derived in whole from agricultural products, animal fats, or wastes from agricultural products or animal fats. The credit does not apply to tax paid on diesel fuel included in a biodiesel blend. The credit may not exceed five hundred thousand dollars (\$500,000) and is subject to the limitations of G.S. 105-129.17.

(b) Sunset. — This section is repealed for taxable years beginning on or after January 1, 2010. (2006-66, s. 24.8(a).)

**Editor's Note.** — Session Laws 2006-66, s. 1.2, provides: "This act shall be known as 'The Current Operations and Capital Improvements Appropriations Act of 2006'."

Session Laws 2006-66, s. 24.8(b), makes this

section effective for taxable years beginning on or after January 1, 2008.

Session Laws 2006-66, s. 28.6 is a severability clause.

## **ARTICLE 3D.**

### *Historic Rehabilitation Tax Credits.*

## **§ 105-129.35. Credit for rehabilitating income-producing historic structure.**

(a) Credit. — A taxpayer who is allowed a federal income tax credit under



### **G.S. 105-129.35(b) has a delayed repeal date.**

section 47 of the Code for making qualified rehabilitation expenditures for a certified historic structure located in this State is allowed a credit equal to twenty percent (20%) of the expenditures that qualify for the federal credit. If the certified historic structure is a facility that at one time served as a State training school for juvenile offenders, the amount of the credit is equal to forty percent (40%) of the expenditures that qualify for the federal credit. To claim the credit allowed by this subsection, the taxpayer must provide a copy of the certification obtained from the State Historic Preservation Officer verifying that the historic structure has been rehabilitated in accordance with this subsection.

(b) **(Repealed January 1, 2008, for property placed in service on or after January 1, 2008)** Allocation. — Notwithstanding the provisions of G.S. 105-131.8 and G.S. 105-269.15, a pass-through entity that qualifies for the credit provided in this section may allocate the credit among any of its owners in its discretion as long as an owner's adjusted basis in the pass-through entity, as determined under the Code, at the end of the taxable year in which the certified historic structure is placed in service, is at least forty percent (40%) of the amount of credit allocated to that owner. Owners to whom a credit is allocated are allowed the credit as if they had qualified for the credit directly. A pass-through entity and its owners must include with their tax returns for every taxable year in which an allocated credit is claimed a statement of the allocation made by the pass-through entity and the allocation that would have been required under G.S. 105-131.8 or G.S. 105-269.15.

(c) Definitions. — The following definitions apply in this section:

- (1) Certified historic structure. — Defined in section 47 of the Code.
- (2) Pass-through entity. — Defined in G.S. 105-228.90.
- (3) Qualified rehabilitation expenditures. — Defined in section 47 of the Code.
- (4) State Historic Preservation Officer. — Defined in G.S. 105-129.36. (1993, c. 527, ss. 1, 2; 1997-139, ss. 1, 2; 1998-98, ss. 36, 69; 1999-389, ss. 2, 5, 6; 2001-476, s. 19(a); 2003-284, s. 35A.1; 2003-415, ss. 1, 2; 2003-416, s. 4(c); 2004-170, s. 14; 2006-40, s. 2.)

#### **Effect of Amendments. —**

Session Laws 2006-40, s. 2, effective for taxable years beginning on or after January 1,

2006, and applicable to eligible sites placed into service on or after July 1, 2006, added the second sentence in subsection (a).

### **§ 105-129.36. Credit for rehabilitating nonincome-producing historic structure.**

(a) Credit. — A taxpayer who is not allowed a federal income tax credit under section 47 of the Code and who makes rehabilitation expenses for a State-certified historic structure located in this State is allowed a credit equal to thirty percent (30%) of the rehabilitation expenses. If the certified historic structure is a facility that at one time served as a State training school for juvenile offenders, the amount of the credit is equal to forty percent (40%) of the expenditures that qualify for the federal credit. To qualify for the credit, the taxpayer's rehabilitation expenses must exceed twenty-five thousand dollars (\$25,000) within a 24-month period. To claim the credit allowed by this subsection, the taxpayer must provide a copy of the certification obtained from the State Historic Preservation Officer verifying that the historic structure has been rehabilitated in accordance with this subsection.

(b) Definitions. — The following definitions apply in this section:



- (1) Certified rehabilitation. — Repairs or alterations consistent with the Secretary of the Interior's Standards for Rehabilitation and certified as such by the State Historic Preservation Officer.
  - (2) Rehabilitation expenses. — Expenses incurred in the certified rehabilitation of a certified historic structure and added to the property's basis. The term does not include the cost of acquiring the property, the cost attributable to the enlargement of an existing building, the cost of sitework expenditures, or the cost of personal property.
  - (3) State-certified historic structure. — A structure that is individually listed in the National Register of Historic Places or is certified by the State Historic Preservation Officer as contributing to the historic significance of a National Register Historic District or a locally designated historic district certified by the United States Department of the Interior.
  - (4) State Historic Preservation Officer. — The Deputy Secretary of Archives and History or the Deputy Secretary's designee who acts to administer the historic preservation programs within the State.
- (c) Recodified as G.S. 105-129.36A by Session Laws 2003-284, s. 35A.2, effective July 15, 2003. (1993, c. 527, ss. 1, 2; 1997-139, ss. 1, 2; 1998-98, ss. 36, 69; 1999-389, ss. 3, 5, 6; 2002-159, s. 35(e); 2003-284, ss. 35A.2, 35A.3; 2006-40, ss. 3, 4.)

**Effect of Amendments. —**

Session Laws 2006-40, ss. 3 and 4, effective for taxable years beginning on or after January 1, 2006, and applicable to eligible sites placed

into service on or after July 1, 2006, added the second sentence in subsection (a) and substituted "Officer" for "Officer prior to the commencement of the work" in subdivision (b)(1).

## ARTICLE 3F.

### *Research and Development.*

(See note for effective date and repeal of Article)

#### § 105-129.51. (See notes) Administration; sunset.

(a) A taxpayer is eligible for the credit allowed in this Article if it satisfies the requirements of G.S. 105-129.83(c), (d), (e), and (f) relating to wage standard, health insurance, environmental impact, and safety and health programs, respectively.

(b) This Article is repealed for taxable years beginning on or after January 1, 2009.

(c) Repealed by Session Laws 2004-124, s. 32D.4, effective for taxable years beginning on or after January 1, 2006. (2004-124, ss. 32D.2, s. 32D.4; 2006-252, s. 2.20.)

**Effect of Amendments. —**

Session Laws 2006-252, s. 2.20, effective January 1, 2007, substituted "G.S. 105-129.83(c),

(d), (e), and (f)" for "G.S. 105-129.4(b), (b2), (b3), and (b4)" in subsection (a).

#### § 105-129.55. (See notes) Credit for North Carolina research and development.

(a) Qualified North Carolina Research Expenses. — A taxpayer that has qualified North Carolina research expenses for the taxable year is allowed a credit equal to a percentage of the expenses, determined as provided in this subsection. Only one credit is allowed under this subsection with respect to the same expenses. If more than one subdivision of this subsection applies to the

**Article 3F has a delayed repeal date. See notes.**

same expenses, then the credit is equal to the higher percentage, not both percentages combined. If part of the taxpayer's qualified North Carolina research expenses qualifies under subdivision (2) of this subsection and the remainder qualifies under subdivision (3) of this subsection, the applicable percentages apply separately to each part of the expenses.

- (1) Small business. — If the taxpayer was a small business as of the last day of the taxable year, the applicable percentage is three percent (3%).
- (2) Low-tier research. — For expenses with respect to research performed in a development tier one area, the applicable percentage is three percent (3%).
- (3) Other research. — For expenses not covered under subdivision (1) or (2) of this subsection, the percentages provided in the table below apply to the taxpayer's qualified North Carolina research expenses during the taxable year at the following levels:

Expenses Over	Up To	Rate
-0-	\$50 million	1%
\$50 million	\$200 million	2%
\$200 million	—	3%

(b) North Carolina University Research Expenses. — A taxpayer that has North Carolina university research expenses for the taxable year is allowed a credit equal to fifteen percent (15%) of the expenses. (2004-124, s. 32D.2; 2006-252, s. 2.1.)

**Effect of Amendments.** — Session Laws 2006-252, s. 2.1, effective January 1, 2007, substituted “a development tier one” for “an enterprise tier one, two, or three” in subdivision (a)(2).

ARTICLE 3H.

*Mill Rehabilitation Tax Credit.*

**(See G.S. 105-129.75 for repeal of the Article.)**

**§ 105-129.70. Definitions.**

The following definitions apply in this Article:

- (1) Certified historic structure. — Defined in section 47 of the Code.
- (2) Certified rehabilitation. — Defined in G.S. 105-129.36.
- (3) Cost certification. — The certification obtained by the State Historic Preservation Officer from the taxpayer of the amount of the qualified rehabilitation expenditures or the rehabilitation expenses incurred with respect to an eligible site.
- (3a) Development tier area. — Defined in G.S. 143B-437.08.
- (4) Eligibility certification. — The certification obtained from the State Historic Preservation Officer that the applicable facility comprises an eligible site and that the rehabilitation is a certified rehabilitation.
- (5) Eligible site. — A site located in this State that satisfies all of the following conditions:
  - a. It was used as a manufacturing facility or for purposes ancillary to manufacturing, as a warehouse for selling agricultural products, or as a public or private utility.
  - b. It is a certified historic structure or a State-certified historic structure.



- c. It has been at least eighty percent (80%) vacant for a period of at least two years immediately preceding the date the eligibility certification is made.
  - d. The cost certification documents that the qualified rehabilitation expenditures for a site for which a taxpayer is allowed a credit under section 47 of the Code or the rehabilitation expenses for a site for which the taxpayer is not allowed a credit under section 47 of the Code exceed three million dollars (\$3,000,000) for the site as a whole.
- (6) Repealed by Session Laws 2006-252, s. 2.22, effective January 1, 2007.
  - (7) Pass-through entity. — Defined in G.S. 105-228.90.
  - (8) Qualified rehabilitation expenditures. — Defined in section 47 of the Code.
  - (9) Rehabilitation expenses. — Defined in G.S. 105-129.36.
  - (10) State-certified historic structure. — Defined in G.S. 105-129.36.
  - (11) State Historic Preservation Officer. — Defined in G.S. 105-129.36. (2006-40, s. 1; 2006-252, s. 2.22.)

**Article has Delayed Repeal Date.** — For repeal of this Article, see G.S. 105-129.75.

**Editor's Note.** — Session Laws 2006-40, s. 5, made this Article effective for taxable years beginning on or after January 1, 2006, and applicable to eligible sites placed into service on or after July 1, 2006.

**Effect of Amendments.** — Session Laws 2006-252, s. 2.22, effective January 1, 2007, added subdivision (3a) and deleted subdivision (6), which read: "Enterprise tier area. — Defined in G.S. 105-129.3."

## § 105-129.71. Credit for income-producing rehabilitated mill property.

(a) Credit. — A taxpayer who is allowed a credit under section 47 of the Code for making qualified rehabilitation expenditures with respect to an eligible site is allowed a credit equal to a percentage of the expenditures that qualify for the federal credit. The credit may be claimed in the year in which the eligible site is placed into service. When the eligible site is placed into service in two or more phases in different years, the amount of credit that may be claimed in a year is the amount based on the qualified rehabilitation expenditures associated with the phase placed into service during that year. In order to be eligible for a credit allowed by this Article, the taxpayer must provide to the Secretary a copy of the eligibility certification and the cost certification. The amount of the credit is as follows:

- (1) For an eligible site located in a development tier one or two area, determined as of the date of certification, the amount of the credit is equal to forty percent (40%) of the qualified rehabilitation expenditures.
- (2) For an eligible site located in a development tier three area, determined as of the date of certification, the amount of the credit is equal to thirty percent (30%) of the qualified rehabilitation expenditures.

(b) Allocation. — Notwithstanding the provisions of G.S. 105-131.8 and G.S. 105-269.15, a pass-through entity that qualifies for the credit provided in this section may allocate the credit among any of its owners in its discretion as long as an owner's adjusted basis in the pass-through entity, as determined under the Code, at the end of the taxable year in which the eligible site is placed in service, is at least forty percent (40%) of the amount of credit allocated to that owner. Owners to whom a credit is allocated are allowed the credit as if they had qualified for the credit directly. A pass-through entity and its owners must include with their tax returns for every taxable year in which an allocated credit is claimed a statement of the allocation made by the pass-through entity



and the allocation that would have been required under G.S. 105-131.8 or G.S. 105-269.15.

(c) **Forfeiture for Change in Ownership.** — If an owner of a pass-through entity that has qualified for the credit allowed under this section disposes of all or a portion of the owner's interest in the pass-through entity within five years from the date the eligible site is placed in service and the owner's interest in the pass-through entity is reduced to less than two-thirds of the owner's interest in the pass-through entity at the time the eligible site was placed in service, the owner forfeits a portion of the credit. The amount forfeited is determined by multiplying the amount of credit by the percentage reduction in ownership and then multiplying that product by the forfeiture percentage. The forfeiture percentage equals the recapture percentage found in the table in section 50(a)(1)(B) of the Code.

(d) **Exceptions to Forfeiture.** — Forfeiture as provided in subsection (c) of this section is not required if the change in ownership is the result of any of the following:

(1) The death of the owner.

(2) A merger, consolidation, or similar transaction requiring approval by the shareholders, partners, or members of the taxpayer under applicable State law, to the extent the taxpayer does not receive cash or tangible property in the merger, consolidation, or other similar transaction.

(e) **Liability from Forfeiture.** — A taxpayer or an owner of a pass-through entity that forfeits a credit under this section is liable for all past taxes avoided as a result of the credit plus interest at the rate established under G.S. 105-241.1(i), computed from the date the taxes would have been due if the credit had not been allowed. The past taxes and interest are due 30 days after the date the credit is forfeited. A taxpayer or owner of a pass-through entity that fails to pay the taxes and interest by the due date is subject to the penalties provided in G.S. 105-236. (2006-40, s. 1; 2006-252, s. 2.23; 2006-259, s. 47.5.)

**Cross References.** — For delayed repeal of Article 3H, see G.S. 105-129.75.

**Editor's Note.** — Session Laws 2006-40, s. 5, made this Article effective for taxable years beginning on or after January 1, 2006, and applicable to eligible sites placed into service on or after July 1, 2006.

**Effect of Amendments.** — Session Laws

2006-252, s. 2.23, as amended by Session Laws 2006-259, s. 47.5, effective January 1, 2007, substituted "a development tier one or two" for "an enterprise tier one, two, or three" in subdivision (a)(1) and "a development tier three" for "an enterprise tier four or five" in subdivision (a)(2).

## § 105-129.72. Credit for nonincome-producing rehabilitated mill property.

(a) **Credit.** — A taxpayer who is not allowed a federal income tax credit under section 47 of the Code and who makes rehabilitation expenses with respect to an eligible site is allowed a credit equal to a percentage of the rehabilitation expenses. The entire credit may not be taken for the taxable year in which the property is placed in service, but must be taken in five equal installments beginning with the taxable year in which the property is placed in service. When the eligible site is placed into service in two or more phases in different years, the amount of credit that may be claimed in a year is the amount based on the rehabilitation expenses associated with the phase placed into service during that year. In order to be eligible for a credit allowed by this Article, the taxpayer must provide to the Secretary a copy of the eligibility certification and the cost certification. For an eligible site located in a development tier one or two area, determined as of the date of certification, the

amount of the credit is equal to forty percent (40%) of the rehabilitation expenses. No credit is allowed for a site located in a development tier three area.

(b) Allocation. — Notwithstanding the provisions of G.S. 105-131.8 and G.S. 105-269.15, a pass-through entity that qualifies for the credit provided in this section may allocate the credit among any of its owners in its discretion as long as an owner's adjusted basis in the pass-through entity, as determined under the Code, at the end of the taxable year in which the eligible site is placed in service, is at least forty percent (40%) of the amount of credit allocated to that owner. Owners to whom a credit is allocated are allowed the credit as if they had qualified for the credit directly. A pass-through entity and its owners must include with their tax returns for every taxable year in which an allocated credit is claimed a statement of the allocation made by the pass-through entity and the allocation that would have been required under G.S. 105-131.8 or G.S. 105-269.15.

(c) Forfeiture for Change in Ownership. — If an owner of a pass-through entity that has qualified for the credit allowed under this section disposes of all or a portion of the owner's interest in the pass-through entity within five years from the date the eligible site is placed in service and the owner's interest in the pass-through entity is reduced to less than two-thirds of the owner's interest in the pass-through entity at the time the eligible site was placed in service, the owner forfeits a portion of the credit. The amount forfeited is determined by multiplying the amount of credit by the percentage reduction in ownership and then multiplying that product by the forfeiture percentage. The forfeiture percentage equals the recapture percentage found in the table in section 50(a)(1)(B) of the Code. The remaining allocable credit is allocated equally among the five years in which the credit is claimed.

(d) Exceptions to Forfeiture. — Forfeiture as provided in subsection (c) of this section is not required if the change in ownership is the result of any of the following:

(1) The death of the owner.

(2) A merger, consolidation, or similar transaction requiring approval by the shareholders, partners, or members of the taxpayer under applicable State law, to the extent the taxpayer does not receive cash or tangible property in the merger, consolidation, or other similar transaction.

(e) Liability from Forfeiture. — A taxpayer or an owner of a pass-through entity that forfeits a credit under this section is liable for all past taxes avoided as a result of the credit plus interest at the rate established under G.S. 105-241.1(i), computed from the date the taxes would have been due if the credit had not been allowed. The past taxes and interest are due 30 days after the date the credit is forfeited. A taxpayer or owner of a pass-through entity that fails to pay the taxes and interest by the due date is subject to the penalties provided in G.S. 105-236. (2006-40, s. 1; 2006-252, s. 2.24.)

**Cross References.** — For delayed repeal of Article 3H, see G.S. 105-129.75.

**Editor's Note.** — Session Laws 2006-40, s. 5, made this Article effective for taxable years beginning on or after January 1, 2006, and applicable to eligible sites placed into service on or after July 1, 2006.

**Effect of Amendments.** — Session Laws 2006-252, s. 2.24, effective January 1, 2007, in subsection (a), substituted "a development tier one or two" for "an enterprise tier one, two, or three" in the next-to-last sentence and "a development tier three" for "an enterprise tier four or five" in the last sentence.

## § 105-129.73. Tax credited; cap.

(a) Taxes Credited. — The credits allowed by this Article may be claimed against the franchise tax imposed under Article 3 of this Chapter, the income



taxes imposed under Article 4 of this Chapter, or the gross premiums tax imposed under Article 8B of this Chapter. The taxpayer may take the credits allowed by this Article against only one of the taxes against which it is allowed. The taxpayer must elect the tax against which a credit will be claimed when filing the return on which it is claimed. This election is binding. Any carryforwards of the credit must be claimed against the same tax.

(b) Cap. — A credit allowed under this Article may not exceed the amount of the tax against which it is claimed for the taxable year reduced by the sum of all credits allowed, except payment of tax made by or on behalf of the taxpayer. Any unused portion of the credit may be carried forward for the succeeding nine years. (2006-40, s. 1.)

**Cross References.** — For delayed repeal of Article 3H, see G.S. 105-129.75.

**Editor's Note.** — Session Laws 2006-40, s. 5, made this Article effective for taxable years

beginning on or after January 1, 2006, and applicable to eligible sites placed into service on or after July 1, 2006.

## § 105-129.74. Coordination with Article 3D of this Chapter.

A taxpayer that claims a credit under this Article may not also claim a credit under Article 3D of this Chapter with respect to the same activity. The rules and fee schedule adopted under G.S. 105-129.36A apply to this Article. (2006-40, s. 1.)

**Cross References.** — For delayed repeal of Article 3H, see G.S. 105-129.75.

**Editor's Note.** — Session Laws 2006-40, s. 5, made this Article effective for taxable years

beginning on or after January 1, 2006, and applicable to eligible sites placed into service on or after July 1, 2006.

## § 105-129.75. Sunset.

This Article expires for qualified rehabilitation expenditures and rehabilitation expenses incurred on or after January 1, 2011. (2006-40, s. 1.)

**Editor's Note.** — Session Laws 2006-40, s. 5, made this Article effective for taxable years beginning on or after January 1, 2006, and

applicable to eligible sites placed into service on or after July 1, 2006.

## ARTICLE 3I.

§§ 105-129.78, 105-129.79: Reserved for future codification purposes.

## ARTICLE 3J.

### *Tax Credits for Growing Businesses.*

**(Effective for taxable years beginning on or after January 1, 2007. See G.S. 105-129.82(a) for repeal of Article.)**

## § 105-129.80. (Effective for taxable years beginning on or after January 1, 2007) Legislative findings.

The General Assembly finds that:

- (1) It is the policy of the State of North Carolina to stimulate economic activity and to create new jobs for the citizens of the State by



encouraging and promoting the expansion of existing business and industry within the State and by recruiting and attracting new business and industry to the State.

- (2) Both short-term and long-term economic trends at the State, national, and international levels have made the successful implementation of the State's economic development policy and programs both more critical and more challenging, and the decline in the State's traditional industries, and the resulting adverse impact upon the State and its citizens, have been exacerbated in recent years by adverse national and State economic trends that contribute to the reduction in the State's industrial base and that inhibit the State's ability to sustain or attract new and expanding businesses.
- (3) The economic condition of the State is not static, and recent changes in the State's economic condition have created economic distress that requires a reevaluation of certain existing State programs and the enactment of a new program as provided in this Article that is designed to stimulate new economic activity and to create new jobs within the State.
- (4) The enactment of this Article is necessary to stimulate the economy and create new jobs in North Carolina, and this Article will promote the general welfare and confer, as its primary purpose and effect, benefits on citizens throughout the State through the creation of new jobs, an enlargement of the overall tax base, an expansion and diversification of the State's industrial base, and an increase in revenue to the State and its political subdivisions.
- (5) The purpose of this Article is to stimulate economic activity and to create new jobs within the State.
- (6) The State is in need of a focused tax credit program that encourages and facilitates economic growth and development within the State.
- (7) The resources of the State are not evenly distributed throughout the State and different communities have different abilities and needs in attracting and maintaining new and expanding business and industry. (2006-252, s. 1.1.)

**Article has Delayed Repeal Date.** — For repeal of this Article, see G.S. 105-129.82(a).

**Editor's Note.** — Session Laws 2006-252, s. 1.5, made this Article effective for taxable years beginning on or after January 1, 2007.

Session Laws 2006-252, s. 1.4, provides: "The Department of Commerce shall, in consultation with the North Carolina Rural Center, Inc. and lower-tiered counties, develop additional strat-

egies to enhance economic growth and development in economically distressed areas. The Department shall report on the results of this study to the Joint Legislation Economic Development Oversight Committee by January 1, 2007. For the purposes of this section, 'economically distressed areas' means enterprise tier one areas as defined in G.S. 105-129.3."

## § 105-129.81. (Effective for taxable years beginning on or after January 1, 2007) Definitions.

The following definitions apply in this Article:

- (1) Agrarian growth zone. — Defined in G.S. 143B-437.10.
- (2) Air courier services. — The furnishing of air delivery of individually addressed letters and packages for compensation, in interstate commerce, except by the United States Postal Service.
- (3) Aircraft maintenance and repair. — The provision of specialized maintenance or repair services for commercial aircraft or the rebuilding of commercial aircraft.
- (4) Business property. — Tangible personal property that is used in a business and capitalized under the Code.

- (5) Company headquarters. — A corporate, subsidiary, or regional managing office, as defined by NAICS in United States industry 551114, that is responsible for strategic or organizational planning and decision making for the business on an international, national, or multistate regional basis.
- (6) Cost. — In the case of property owned by the taxpayer, cost is determined pursuant to regulations adopted under section 1012 of the Code. In the case of property the taxpayer leases from another, cost is value as determined pursuant to G.S. 105-130.4(j)(2).
- (7) Customer service call center. — The provision of support service by a business to its customers by telephone or other electronic means to support products or services of the business. For the purposes of this definition, an establishment is primarily engaged in providing support services by telephone or other electronic means only if at least sixty percent (60%) of its calls are incoming or at least sixty percent (60%) of its other electronic communications are initiated by its customers.
- (8) Development tier. — The classification assigned to an area pursuant to G.S. 143B-437.08.
- (9) Electronic shopping and mail order houses. — An industry in electronic shopping and mail order houses industry group 4541 as defined by NAICS.
- (10) Establishment. — Defined in 29 C.F.R. § 1904.46, as it existed on January 1, 2002.
- (11) Full-time job. — A position that requires at least 1,600 hours of work per year and is intended to be held by one employee during the entire year. A full-time employee is an employee who holds a full-time job.
- (12) Hub. — Defined in G.S. 105-164.3.
- (13) Information technology and services. — An industry in one of the following:
  - a. Internet service providers, Web search portals, and data processing subsector 518 as defined by NAICS.
  - b. Software publishers industry group 5112 as defined by NAICS.
  - c. Computer systems design and related services industry group 5415 as defined by NAICS.
- (14) Long-term unemployed worker. — An individual that has been totally unemployed for at least the preceding 26 consecutive weeks as evidenced by records maintained by the Employment Security Commission.
- (15) Manufacturing. — An industry in manufacturing sectors 31 through 33, as defined by NAICS, but not including quick printing or retail bakeries.
- (16) Motorsports facility. — A motorsports racetrack classified in the United States racetrack national industry 711212, as defined by NAICS.
- (17) Motorsports racing team. — A professional racing team primarily engaged in the research and development, design, manufacture, repair, maintenance, and operation of motor vehicles used in live motorsports racing events before a paying audience.
- (18) NAICS. — The North American Industry Classification System adopted by the United States Office of Management and Budget as of December 31, 2002.
- (19) New job. — A full-time job that represents a net increase in the number of the taxpayer's employees statewide. A new employee is an employee who holds a new job. The term does not include a job currently located in this State that is transferred to the business from a related member of the business.



- (20) Overdue tax debt. — Defined in G.S. 105-243.1.
- (21) Purchase. — Defined in section 179 of the Code.
- (22) Related member. — Defined in G.S. 105-130.7A.
- (23) Research and development. — An industry in scientific research and development services industry group 5417 as defined by NAICS.
- (24) Urban progress zone. — The classification assigned to an area pursuant to G.S. 143B-437.09.
- (25) Warehousing. — An industry in warehousing and storage subsector 493 as defined by NAICS.
- (26) Wholesale trade. — An industry in wholesale trade sector 42 as defined by NAICS. (2006-252, s. 1.1.)

**Cross References.** — For delayed repeal of Article 3J, see G.S. 105-129.82(a).

**Editor's Note.** — Session Laws 2006-252, s. 1.1, enacted subdivisions (2) and (3) as subdivisions (3) and (2), respectively. They were

redesignated at the direction of the Revisor of Statutes to preserve alphabetical order.

Session Laws 2006-252, s. 1.5, made this Article effective for taxable years beginning on or after January 1, 2007.

## § 105-129.82. (Effective for taxable years beginning on or after January 1, 2007) Sunset; studies.

(a) Sunset. — This Article is repealed effective for business activities that occur on or after January 1, 2011.

(b) Equity Study. — The Department of Commerce shall study the effect of the tax incentives provided in this Article on tax equity. This study shall include the following:

- (1) Reexamining the formula in G.S. 143B-437.08 used to define development tiers, to include consideration of alternative measures for more equitable treatment of counties in similar economic circumstances.
- (2) Considering whether the assignment of tiers and the applicable thresholds are equitable for smaller counties.
- (3) Compiling any available data on whether expanding North Carolina businesses receive fewer benefits than out-of-State businesses that locate to North Carolina.

(c) Impact Study. — The Department of Commerce shall study the effectiveness of the tax incentives provided in this Article. This study shall include:

- (1) Studying the distribution of tax incentives across new and expanding businesses and industries.
- (2) Examining data on economic recruitment for the period from 2005 through the most recent year for which data are available by county, by industry type, by size of investment, and by number of jobs, and other relevant information to determine the pattern of business locations and expansions before and after the enactment of this Article.
- (3) Measuring the direct costs and benefits of the tax incentives.
- (4) Compiling available information on the current use of incentives by other states and whether that use is increasing or declining.

(d) Report. — The Department of Commerce shall report the results of these studies and its recommendations to the General Assembly biennially with the first report due by June 1, 2009. (2006-252, s. 1.1.)

**Editor's Note.** — Session Laws 2006-252, s. 1.5, made this Article effective for taxable years beginning on or after January 1, 2007.



**§ 105-129.83. (Effective for taxable years beginning on or after January 1, 2007) Eligibility; forfeiture.**

(a) **Eligible Business.** — A taxpayer is eligible for a credit under this Article only with respect to activities occurring at an establishment whose primary activity is listed in this subsection. The primary activity of an establishment is determined based on the establishment's principal product or group of products produced or distributed, or services rendered.

- (1) Air courier services hub.
- (2) Aircraft maintenance and repair.
- (3) Company headquarters, but only if the additional eligibility requirements of subsection (b) of this section are satisfied.
- (4) Customer service call centers.
- (5) Electronic shopping and mail order houses.
- (6) Information technology and services.
- (7) Manufacturing.
- (8) Motorsports facility.
- (9) Motorsports racing team.
- (10) Research and development.
- (11) Warehousing.
- (12) Wholesale trade.

(b) **Company Headquarters Eligibility.** — A taxpayer is eligible for a credit under this Article with respect to a company headquarters only if the taxpayer creates at least 75 new jobs at the company headquarters within a 24-month period. A taxpayer that meets this job creation requirement is eligible for credits under this Article with respect to the company headquarters for three taxable years beginning with the year in which the job creation requirement is satisfied. A taxpayer that creates an additional 75 new jobs at the company headquarters in a 24-month period during a three-year eligibility period does not qualify for any extended eligibility period. However, a taxpayer that creates an additional 75 new jobs at the company headquarters in a 24-month period after the completion of a three-year eligibility period is eligible for credits with respect to the company headquarters for an additional three taxable years beginning in the year in which the additional job creation requirement is satisfied.

(c) **Wage Standard.** — A taxpayer is eligible for a credit under this Article in a development tier two or three area only if the taxpayer satisfies a wage standard. The taxpayer is not required to satisfy a wage standard if the activity occurs in a development tier one area. Jobs that are located within an urban progress zone or an agrarian growth zone but not in a development tier one area satisfy the wage standard if they pay an average weekly wage that is at least equal to ninety percent (90%) of the lesser of the average wage for all insured private employers in the State and the average wage for all insured private employers in the county. All other jobs satisfy the wage standard if they pay an average weekly wage that is at least equal to the lesser of one hundred ten percent (110%) of the average wage for all insured private employers in the State and ninety percent (90%) of the average wage for all insured private employers in the county. The Department of Commerce shall annually publish the wage standard for each county.

In making the wage calculation, the taxpayer shall include any jobs that were filled for at least 1,600 hours during the calendar year the taxpayer engages in the activity that qualifies for the credit even if those jobs are not filled at the time the taxpayer claims the credit. For a taxpayer with a taxable year other than a calendar year, the taxpayer shall use the wage standard for the calendar year in which the taxable year begins. Only full-time jobs are included when making the wage calculation.

(d) **Health Insurance.** — A taxpayer is eligible for a credit under this Article only if the taxpayer provides health insurance for all of the full-time jobs at the establishment with respect to which the credit is claimed when the taxpayer engages in the activity that qualifies for the credit. For the purposes of this subsection, a taxpayer provides health insurance if it pays at least fifty percent (50%) of the premiums for health care coverage that equals or exceeds the minimum provisions of the basic health care plan of coverage recommended by the Small Employer Carrier Committee pursuant to G.S. 58-50-125.

Each year that a taxpayer claims a credit or carryforward of a credit allowed under this Article, the taxpayer shall provide with the tax return the taxpayer's certification that the taxpayer continues to provide health insurance for all the jobs at the establishment with respect to which the credit was claimed. If the taxpayer ceases to provide health insurance for the jobs during a taxable year, the credit expires, and the taxpayer may not take any remaining installment or carryforward of the credit.

(e) **Environmental Impact.** — A taxpayer is eligible for a credit allowed under this Article only if the taxpayer certifies that, at the time the taxpayer claims the credit, the taxpayer has no pending administrative, civil, or criminal enforcement action based on alleged significant violations of any program implemented by an agency of the Department of Environment and Natural Resources and has had no final determination of responsibility for any significant administrative, civil, or criminal violation of any program implemented by an agency of the Department of Environment and Natural Resources within the last five years. A significant violation is a violation or alleged violation that does not satisfy any of the conditions of G.S. 143-215.6B(d). The Secretary of Environment and Natural Resources shall notify the Department of Revenue annually of every person that currently has any of these pending actions and every person that has had any of these final determinations within the last five years.

(f) **Safety and Health Programs.** — A taxpayer is eligible for a credit allowed under this Article only if the taxpayer certifies that, as of the time the taxpayer claims the credit, at the establishment with respect to which the credit is claimed, the taxpayer has no citations under the Occupational Safety and Health Act that have become a final order within the past three years for willful serious violations or for failing to abate serious violations. For the purposes of this subsection, 'serious violation' has the same meaning as in G.S. 95-127. The Commissioner of Labor shall notify the Department of Revenue annually of all employers who have had these citations become final orders within the past three years.

(g) **Overdue Tax Debts.** — A taxpayer is not eligible for a credit allowed under this Article if, at the time the taxpayer claims the credit or an installment or carryforward of the credit, the taxpayer has received a notice of an overdue tax debt and that overdue tax debt has not been satisfied or otherwise resolved.

(h) **Expiration.** — If, during the period that installments of a credit under this Article accrue, the taxpayer is no longer engaged in one of the types of business described in subsection (a) of this section at the establishment for which the credit was claimed, the credit expires. If, during the period that installments of a credit under this Article accrue, the number of jobs of an eligible company headquarters falls below the minimum number required under subsection (b) of this section, any credit associated with that company headquarters expires. When a credit expires, the taxpayer may not take any remaining installments of the credit. The taxpayer may, however, take the portion of an installment that accrued in a previous year and was carried forward to the extent permitted under G.S. 105-129.84. A change in the development tier designation of the location of an establishment does not result in expiration of a credit under this Article.



(i) **Forfeiture.** — A taxpayer forfeits a credit allowed under this Article if the taxpayer was not eligible for the credit for the calendar year in which the taxpayer engaged in the activity for which the credit was claimed. In addition, a taxpayer forfeits a credit for investment in real property under G.S. 105-129.89 if the taxpayer fails to timely create the number of required new jobs or to timely make the required level of investment under G.S. 105-129.89(b). A taxpayer that forfeits a credit under this Article is liable for all past taxes avoided as a result of the credit plus interest at the rate established under G.S. 105-241.1(i), computed from the date the taxes would have been due if the credit had not been allowed. The past taxes and interest are due 30 days after the date the credit is forfeited; a taxpayer that fails to pay the past taxes and interest by the due date is subject to the penalties provided in G.S. 105-236.

(j) **Change in Ownership of Business.** — As used in this subsection, the term “business” means a taxpayer or an establishment. The sale, merger, consolidation, conversion, acquisition, or bankruptcy of a business, or any transaction by which an existing business reformulates itself as another business, does not create new eligibility in a succeeding business with respect to credits for which the predecessor was not eligible under this Article. A successor business may, however, take any credit or carried-over portion of a credit that its predecessor could have taken if it had a tax liability. The acquisition of a business is a new investment that creates new eligibility in the acquiring taxpayer under this Article if any of the following conditions are met:

- (1) The business closed before it was acquired.
- (2) The business was required to file a notice of plant closing or mass layoff under the federal Worker Adjustment and Retraining Notification Act, 29 U.S.C. § 2101, before it was acquired.
- (3) The business was acquired by its employees directly or indirectly through an acquisition company under an employee stock option transaction or another similar mechanism. For the purpose of this subdivision, “acquired” means that as part of the initial purchase of a business by the employees, the purchase included an agreement for the employees through the employee stock option transaction or another similar mechanism to obtain one of the following:
  - a. Ownership of more than fifty percent (50%) of the business.
  - b. Ownership of not less than forty percent (40%) of the business within seven years if the business has tangible assets with a net book value in excess of one hundred million dollars (\$100,000,000) and has the majority of its operations located in a development tier one area.

(k) **Advisory Ruling.** — A taxpayer may request in writing from the Secretary of Revenue specific advice regarding eligibility for a credit under this Article. G.S. 105-264 governs the effect of this advice. A taxpayer may not legally rely upon advice offered by any other State or local government official or employee acting in an official capacity regarding eligibility for a credit under this Article.

(l) **Planned Expansion.** — A taxpayer that signs a letter of commitment with the Department of Commerce, after the Department has calculated the development tier designations for the next year but before the beginning of that year, to undertake specific activities at a specific site within the next two years may calculate the credit for which it qualifies based on the establishment's development tier designation and urban progress zone or agrarian growth zone designation in the year in which the letter of commitment was signed by the taxpayer. If the taxpayer does not engage in the activities within the two-year period, the taxpayer does not qualify for the credit; however, if the taxpayer later engages in the activities, the taxpayer qualifies for the credit



based on the development tier and urban progress zone or agrarian growth zone designations in effect at that time. (2006-252, s. 1.1.)

**Cross References.** — For delayed repeal of Article 3J, see G.S. 105-129.82(a).

**Editor's Note.** — Session Laws 2006-252, s. 1.1, enacted subdivisions (a)(1) and (a)(2) as subdivisions (a)(2) and (a)(1), respectively. They

were redesignated at the direction of the Revisor of Statutes to preserve alphabetical order.

Session Laws 2006-252, s. 1.5, made this Article effective for taxable years beginning on or after January 1, 2007.

### **§ 105-129.84. (Effective for taxable years beginning on or after January 1, 2007) Tax election; cap; carryforwards; limitations.**

(a) Tax Election. — The credits provided in this Article are allowed against the franchise tax levied in Article 3 of this Chapter, the income taxes levied in Article 4 of this Chapter, and the gross premiums tax levied in Article 8B of this Chapter. The taxpayer may divide a credit between the taxes against which it is allowed. Carryforwards of a credit may be divided between the taxes against which it is allowed without regard to the original election regarding the division of the credit.

(b) Cap. — The credits allowed under this Article may not exceed fifty percent (50%) of the cumulative amount of taxes against which they may be claimed for the taxable year, reduced by the sum of all other credits allowed against those taxes, except tax payments made by or on behalf of the taxpayer. This limitation applies to the cumulative amount of credit, including carryforwards, claimed by the taxpayer under this Article for the taxable year.

(c) Carryforward. — Unless a longer carryforward period applies, any unused portion of a credit allowed under G.S. 105-129.87 or G.S. 105-129.88 may be carried forward for the succeeding five years, and any unused portion of a credit allowed under G.S. 105-129.89 may be carried forward for the succeeding 15 years. If the Secretary of Commerce makes a written determination that the taxpayer is expected to purchase or lease, and place in service in connection with an eligible business within a two-year period, at least one hundred fifty million dollars (\$150,000,000) worth of business and real property, any unused portion of a credit under this Article with respect to the establishment that satisfies that condition may be carried forward for the succeeding 20 years. If the taxpayer does not make the required level of investment, the taxpayer shall apply the five-year carryforward period rather than the 20-year carryforward period.

(d) Statute of Limitations. — Notwithstanding Article 9 of this Chapter, a taxpayer shall claim a credit under this Article within six months after the date set by statute for the filing of the return, including any extensions of that date. (2006-252, s. 1.1.)

**Cross References.** — For delayed repeal of Article 3J, see G.S. 105-129.82(a).

1.5, made this Article effective for taxable years beginning on or after January 1, 2007.

**Editor's Note.** — Session Laws 2006-252, s.

### **§ 105-129.85. (Effective for taxable years beginning on or after January 1, 2007) Fees and reports.**

(a) Fee. — When filing a return for a taxable year in which the taxpayer engaged in activity for which the taxpayer is eligible for a credit under this Article, the taxpayer shall pay the Department of Revenue a fee of five hundred dollars (\$500.00) for each type of credit the taxpayer claims or intends to claim with respect to an establishment. The fee is due at the time the return

is due for the taxable year in which the taxpayer engaged in the activity for which the taxpayer is eligible for a credit. No credit is allowed under this Article for a taxable year until all outstanding fees have been paid. Fees collected under this section shall be credited to the General Fund.

(b) Reports. — The Department of Revenue shall publish by May 1 of each year the following information itemized by credit and by taxpayer for the 12-month period ending the preceding December 31:

- (1) The number and amount of credits generated and taken for each credit allowed in this Article.
- (2) The number and development tier area of new jobs with respect to which credits were generated and to which credits were taken.
- (3) The cost and development tier area of business property with respect to which credits were generated and to which credits were taken.
- (4) The cost and development tier area of real property investment with respect to which credits were generated and to which credits were taken. (2006-252, s. 1.1.)

**Cross References.** — For delayed repeal of Article 3J, see G.S. 105-129.82(a).

1.5, made this Article effective for taxable years beginning on or after January 1, 2007.

**Editor's Note.** — Session Laws 2006-252, s.

## § 105-129.86. (Effective for taxable years beginning on or after January 1, 2007) Substantiation.

(a) Records. — To claim a credit allowed by this Article, the taxpayer shall provide any information required by the Secretary of Revenue. Every taxpayer claiming a credit under this Article shall maintain and make available for inspection by the Secretary of Revenue any records the Secretary considers necessary to determine and verify the amount of the credit to which the taxpayer is entitled. The burden of proving eligibility for the credit and the amount of the credit shall rest upon the taxpayer, and no credit shall be allowed to a taxpayer that fails to maintain adequate records or to make them available for inspection.

(b) Documentation. — Each taxpayer shall provide with the tax return qualifying information for each credit claimed under this Article. The qualifying information shall be in the form prescribed by the Secretary and shall be signed and affirmed by the individual who signs the taxpayer's tax return. The information required by this subsection is information demonstrating that the taxpayer has met the conditions for qualifying for a credit and any carryforwards and includes the following:

- (1) The physical location of the jobs and investment with respect to which the credit is claimed, including the street address and the development tier designation of the establishment.
- (2) The type of business with respect to which the credit is claimed and the average weekly wage at the establishment with respect to which the credit is claimed.
- (3) Any other qualifying information related to a specific credit allowed under this Article. (2006-252, s. 1.1.)

**Cross References.** — For delayed repeal of Article 3J, see G.S. 105-129.82(a).

1.5, made this Article effective for taxable years beginning on or after January 1, 2007.

**Editor's Note.** — Session Laws 2006-252, s.



§ 105-129.87. (Effective for taxable years beginning on or after January 1, 2007) Credit for creating jobs.

(a) Credit. — A taxpayer that meets the eligibility requirements set out in G.S. 105-129.83 and satisfies the threshold requirement for new job creation in this State under subsection (b) of this section during the taxable year is allowed a credit for creating jobs. The amount of the credit for each new job created is set out in the table below and is based on the development tier designation of the county in which the job is located. If the job is located in an urban progress zone or an agrarian growth zone, the amount of the credit is increased by one thousand dollars (\$1,000) per job. In addition, if a job located in an urban progress zone or an agrarian growth zone is filled by a resident of that zone or by a long-term unemployed worker, the amount of the credit is increased by an additional two thousand dollars (\$2,000) per job.

Area Development Tier	Amount of Credit
Tier One	\$12,500
Tier Two	5,000
Tier Three	750

(b) Threshold. — The applicable threshold is the appropriate amount set out in the following table based on the development tier designation of the county where the new jobs are created during the taxable year. If the taxpayer creates new jobs at more than one eligible establishment in a county during the taxable year, the threshold applies to the aggregate number of new jobs created at all eligible establishments within the county during that year. If the taxpayer creates new jobs at eligible establishments in different counties during the taxable year, the threshold applies separately to the aggregate number of new jobs created at eligible establishments in each county. If the taxpayer creates new jobs in an urban progress zone or an agrarian growth zone, the applicable threshold is the one for a development tier one area.

Area Development Tier	Threshold
Tier One	5
Tier Two	10
Tier Three	15

(c) Calculation. — A job is located in a county, an urban progress zone, or an agrarian growth zone if more than fifty percent (50%) of the employee's duties are performed in the county or the zone. The number of new jobs a taxpayer creates during the taxable year is determined by subtracting the average number of full-time employees the taxpayer had in this State during the 12-month period preceding the beginning of the taxable year from the average number of full-time employees the taxpayer has in this State during the taxable year.

(d) Installments. — The credit may not be taken in the taxable year in which the new jobs are created. Instead, the credit shall be taken in equal installments over the four years following the taxable year in which the new jobs were created and is conditional upon the continued maintenance of those jobs by the taxpayer. If, in one of the four years in which the installment of a credit accrues, a job is no longer filled, the credit with respect to that job expires, and the taxpayer may not take any remaining installment of the credit with respect to that job. If, in one of the years in which the installment of a credit accrues, the number of the taxpayer's full-time employees falls below the sum of the applicable threshold and the number of full-time employees the taxpayer had in the year before the year in which the taxpayer qualified for the credit, the credits with respect to all of the new jobs expire, and the taxpayer may not take any remaining installments of the credits. When a credit expires under this subsection, the taxpayer may, however, take the portion of an installment that accrued in a previous year and was carried forward to the extent permitted under G.S. 105-129.84.



(e) **Transferred Jobs.** — Jobs transferred from one area in the State to another area in the State are not considered new jobs for purposes of this section. Jobs that were located in this State and that are transferred to the taxpayer from a related member of the taxpayer are not considered new jobs for purposes of this section. If, in one of the four years in which the installment of a credit accrues, the job with respect to which the credit was claimed is moved to an area in a higher-numbered development tier or out of an urban progress zone or an agrarian growth zone, the remaining installments of the credit are allowed only to the extent they would have been allowed if the job was initially created in the area to which it was moved. If, in one of the years in which the installment of a credit accrues, the job with respect to which the credit was claimed is moved to an area in a lower-numbered development tier or an urban progress zone or an agrarian growth zone, the remaining installments of the credit shall be calculated as if the job had been created initially in the area to which it was moved.

(f) **Wage Standard.** — For the purposes of this section, a taxpayer satisfies the wage standard requirement of G.S. 105-129.83 only if the taxpayer satisfies the requirement with respect to both the new jobs, considered collectively, for which a credit is claimed and all of the jobs at the establishment, considered collectively, with respect to which a credit is claimed.

(g) **No Double Credit.** — A taxpayer may not claim a credit under this section with respect to jobs for which a taxpayer claims a credit under G.S. 105-129.8. (2006-252, s. 1.1.)

**Cross References.** — For delayed repeal of Article 3J, see G.S. 105-129.82(a).

1.5, made this Article effective for taxable years beginning on or after January 1, 2007.

**Editor's Note.** — Session Laws 2006-252, s.

## § 105-129.88. (Effective for taxable years beginning on or after January 1, 2007) Credit for investing in business property.

(a) **General Credit.** — A taxpayer that meets the eligibility requirements set out in G.S. 105-129.83 and that has purchased or leased business property and placed it in service in this State during the taxable year and that has satisfied the threshold requirements of subsection (c) of this section is allowed a credit equal to the applicable percentage of the excess of the eligible investment amount over the applicable threshold. If the taxpayer places business property in service in an urban progress zone or an agrarian growth zone, the applicable percentage is the one for a development tier one area. Business property is eligible if it is not leased to another party. The credit may not be taken for the taxable year in which the business property is placed in service but shall be taken in equal installments over the four years following the taxable year in which it is placed in service. The applicable percentage is as follows:

Area Development Tier	Applicable Percentage
Tier One	7%
Tier Two	5%
Tier Three	3.5%

(b) **Eligible Investment Amount.** — The eligible investment amount is the lesser of (i) the cost of the eligible business property and (ii) the amount by which the cost of all of the taxpayer's eligible business property that is in service in this State on the last day of the taxable year exceeds the cost of all of the taxpayer's eligible business property that was in service in this State on the last day of the base year. The base year is that year, of the three immediately preceding taxable years, in which the taxpayer had the most eligible business property in service in this State.

(c) Threshold. — The applicable threshold is the appropriate amount set out in the following table based on the development tier where the eligible business property is placed in service during the taxable year. If the taxpayer places business property in service in an urban progress zone or an agrarian growth zone, the applicable threshold is the one for a development tier one area. If the taxpayer places eligible business property in service at more than one establishment in a county during the taxable year, the threshold applies to the aggregate amount of eligible business property placed in service during the taxable year at all establishments in the county. If the taxpayer places eligible business property in service at establishments in different counties, the threshold applies separately to the aggregate amount of eligible business property placed in service in each county. If the taxpayer places eligible machinery and equipment in service at an establishment over the course of a two-year period, the applicable threshold for the second taxable year is reduced by the eligible investment amount for the previous taxable year.

Area Development Tier	Threshold
Tier One	\$ -0-
Tier Two	1,000,000
Tier Three	2,000,000

(d) Expiration. — As used in this subsection, the term “disposed of” means disposed of, taken out of service, or moved out of State. If, in one of the four years in which the installment of a credit accrues, the business property with respect to which the credit was claimed is disposed of, the credit expires, and the taxpayer may not take any remaining installment of the credit for that business property unless the cost of that business property is offset in the same taxable year by the taxpayer’s new investment in eligible business property placed in service in the same county, as provided in this subsection. If, during the taxable year, the taxpayer disposed of the business property for which installments remain, there has been a net reduction in the cost of all the taxpayer’s eligible business property that are in service in the same county as the business property that was disposed of, and the amount of this reduction is greater than twenty percent (20%) of the cost of the business property that was disposed of, then the credit for the business property that was disposed of expires. If the amount of the net reduction is equal to twenty percent (20%) or less of the cost of the business property that was disposed of, or if there is no net reduction, then the credit does not expire. In determining the amount of any net reduction during the taxable year, the cost of business property the taxpayer placed in service during the taxable year and for which the taxpayer claims a credit under Article 3A or Article 3B of this Chapter may not be included in the cost of all the taxpayer’s eligible business property that is in service. If in a single taxable year business property with respect to two or more credits in the same county are disposed of, the net reduction in the cost of all the taxpayer’s eligible business property that is in service in the same county is compared to the total cost of all the business property for which credits expired in order to determine whether the remaining installments of the credits are forfeited.

The expiration of a credit does not prevent the taxpayer from taking the portion of an installment that accrued in a previous year and was carried forward to the extent permitted under G.S. 105-129.84.

(e) Transferred Property. — If, in one of the four years in which the installment of a credit accrues, the business property with respect to which the credit was claimed is moved to a county in a higher-numbered development tier or to an urban progress zone or an agrarian growth zone, the remaining installments of the credit are allowed only to the extent they would have been allowed if the business property had been placed in service initially in the area to which it was moved. If, in one of the four years in which the installment of



a credit accrues, the business property with respect to which a credit was claimed is moved to a county in a lower-numbered development tier or an urban progress zone or an agrarian growth zone, the remaining installments of the credit shall be calculated as if the business property had been placed in service initially in the area to which it was moved.

(f) **Wage Standard.** — For the purposes of this section, a taxpayer satisfies the wage standard requirement of G.S. 105-129.83 only if the taxpayer satisfies the requirement with respect to all of the jobs at the establishment, considered collectively, with respect to which a credit is claimed.

(g) **No Double Credit.** — A taxpayer may not claim a credit under this section with respect to business property for which the taxpayer claims a credit under G.S. 105-129.9 or G.S. 105-129.9A. (2006-252, s. 1.1.)

**Cross References.** — For delayed repeal of Article 3J, see G.S. 105-129.82(a).

1.5, made this Article effective for taxable years beginning on or after January 1, 2007.

**Editor's Note.** — Session Laws 2006-252, s.

### **§ 105-129.89. (Effective for taxable years beginning on or after January 1, 2007) Credit for investment in real property.**

(a) **Credit.** — If a taxpayer that has purchased or leased real property in a development tier one area begins to use the property in an eligible business during the taxable year, the taxpayer is allowed a credit equal to thirty percent (30%) of the eligible investment amount if all of the eligibility requirements of G.S. 105-129.83 and of subsection (b) of this section are met. For the purposes of this section, property is located in a development tier one area if the area the property is located in was a development tier one area at the time the taxpayer made a written application for the determination required under subsection (b) of this section. The eligible investment amount is the lesser of (i) the cost of the property and (ii) the amount by which the cost of all of the real property the taxpayer is using in this State in an eligible business on the last day of the taxable year exceeds the cost of all of the real property the taxpayer was using in this State in an eligible business on the last day of the base year. The base year is that year, of the three immediately preceding taxable years, in which the taxpayer was using the most real property in this State in an eligible business. In the case of property that is leased, the cost of the property is not determined as provided in G.S. 105-129.81 but is considered to be the taxpayer's lease payments over a seven-year period, plus any expenditures made by the taxpayer to improve the property before it is used by the taxpayer if the expenditures are not reimbursed or credited by the lessor. The entire credit may not be taken for the taxable year in which the property is first used in an eligible business but shall be taken in equal installments over the seven years following the taxable year in which the property is first used in an eligible business. When part of the property is first used in an eligible business in one year and part is first used in an eligible business in a later year, separate credits may be claimed for the amount of property first used in an eligible business in each year. The basis in any real property for which a credit is allowed under this section shall be reduced by the amount of credit allowable.

(b) **Determination by the Secretary of Commerce.** — A taxpayer is eligible for the credit allowed under this section with respect to an establishment only if the Secretary of Commerce makes a written determination that the taxpayer is expected to purchase or lease and use in an eligible business at that establishment within a three-year period at least ten million dollars (\$10,000,000) of real property and that the establishment that is the subject of the credit will create at least 200 new jobs within two years of the time that the



property is first used in an eligible business. If the taxpayer fails to timely make the required level of investment or fails to timely create the required number of new jobs, the taxpayer forfeits the credit as provided in G.S. 105-129.83.

(c) **Mixed Use Property.** — If the taxpayer uses only part of the property in an eligible business, the amount of the credit allowed under this section is reduced by multiplying it by a fraction, the numerator of which is the square footage of the property used in an eligible business and the denominator of which is the total square footage of the property.

(d) **Expiration.** — If, in one of the seven years in which the installment of a credit accrues, the property with respect to which the credit was claimed is no longer used in an eligible business, the credit expires, and the taxpayer may not take any remaining installment of the credit. If, in one of the seven years in which the installment of a credit accrues, part of the property with respect to which the credit was claimed is no longer used in an eligible business, the remaining installments of the credit shall be reduced by multiplying it by the fraction described in subsection (c) of this section. If, in one of the years in which the installment of a credit accrues and by which the taxpayer is required to have created 200 new jobs at the property, the total number of employees the taxpayer employs at the property with respect to which the credit is claimed is less than 200, the credit expires, and the taxpayer may not take any remaining installment of the credit.

In each of these cases, the taxpayer may nonetheless take the portion of an installment that accrued in a previous year and was carried forward to the extent permitted under G.S. 105-129.84.

(e) **No Double Credit.** — A taxpayer may not claim a credit under this section with respect to real property for which a credit is claimed under G.S. 105-129.12 or G.S. 105-129.12A. (2006-252, s. 1.1.)

**Cross References.** — For delayed repeal of Article 3J, see G.S. 105-129.82(a). 1.5, made this Article effective for taxable years beginning on or after January 1, 2007.

**Editor's Note.** — Session Laws 2006-252, s.

## ARTICLE 4.

### *Income Tax.*

#### Part 1. Corporation Income Tax.

### § 105-130.2. Definitions.

The following definitions apply in this Part:

(1) **Code.** — Defined in G.S. 105-228.90.

(1a) **Corporation.** — A joint-stock company or association, an insurance company, a domestic corporation, a foreign corporation, or a limited liability company.

(1b) **C Corporation.** — A corporation that is not an S Corporation.

(1c) **Department.** — The Department of Revenue.

(2) **Domestic corporation.** — A corporation organized under the laws of this State.

(3) **Fiscal year.** — An income year, ending on the last day of any month other than December. A corporation that pursuant to the provisions of the Code has elected to compute its federal income tax liability on the basis of an annual period varying from 52 to 53 weeks shall compute its taxable income under this Part on the basis of the same period

used by the corporation in computing its federal income tax liability for the income year.

- (4) Foreign corporation. — Any corporation other than a domestic corporation.
- (4a) Gross income. — Defined in section 61 of the Code.
- (4b) Income year. — The calendar year or the fiscal year upon the basis of which the net income is computed under this Part. If no fiscal year has been established, the income year is the calendar year. In the case of a return made for a fractional part of a year under the provisions of this Part or under rules adopted by the Secretary, the income year is the period for which the return is made.
- (5) Limited liability company. — Either a domestic limited liability company organized under Chapter 57C of the General Statutes or a foreign limited liability company authorized by that Chapter to transact business in this State that is classified for federal income tax purposes as a corporation. As applied to a limited liability company that is a corporation under this Part, the term “shareholder” means a member of the limited liability company and the term “corporate officer” means a member or manager of the limited liability company.
- (5a) S Corporation. — Defined in G.S. 105-131(b).
- (5b) Secretary. — The Secretary of Revenue.
- (5c) State net income. — The taxpayer’s federal taxable income as determined under the Code, adjusted as provided in G.S. 105-130.5 and, in the case of a corporation that has income from business activity that is taxable both within and without this State, allocated and apportioned to this State as provided in G.S. 105-130.4.
- (5d) Taxable year. — Income year.
- (6) Taxpayer. — A corporation subject to the tax imposed by this Part. (1939, c. 158, s. 302; 1941, c. 50, s. 5; 1955, c. 1331, s. 2; 1957, c. 1340, s. 4; 1963, c. 1169, s. 2; 1967, c. 1110, s. 3; 1973, c. 476, s. 193; 1983, c. 713, ss. 68, 82; 1985, c. 656, s. 7; 1985 (Reg. Sess., 1986), c. 853, s. 1; 1987, c. 778, s. 1; 1987 (Reg. Sess., 1988), c. 1015, s. 3; 1989, c. 36, s. 3; 1989 (Reg. Sess., 1990), c. 981, s. 3; 1991, c. 689, s. 257; 1991 (Reg. Sess., 1992), c. 922, s. 4; 1993, c. 12, s. 5; c. 354, s. 12; 1995, c. 17, s. 3; 1998-98, s. 69; 2006-162, s. 3(a).)

**Effect of Amendments.** — Session Laws 2006-162, s. 3(a), effective July 24, 2006, added

subdivision (4a) and redesignated former subdivision (4a) as present subdivision (4b).

## § 105-130.4. Allocation and apportionment of income for corporations.

### CASE NOTES

**Taxpayer Barred From Challenging Constitutionality of Augmented North Carolina Tax Review Board’s Actions.** — As a taxpayer sought, received, and benefitted from a variance from G.S. 105-130.4(t)’s tax allocation formula, it could not challenge, on separation-of-powers grounds, orders of the augmented North Carolina Tax Review Board that granted the variance. *Philip Morris USA Inc. v. Tolson*, — N.C. App. —, 626 S.E.2d 853, 2006 N.C. App. LEXIS 536 (2006).

**Jurisdiction of Tax Review Board.** — As an administrative tribunal, the North Carolina

Tax Review Board lacks the authority or jurisdiction to make a determination regarding the constitutionality of the tax resulting from the application of G.S. 105-130.4. *Cent. Tel. Co. v. Tolson*, — N.C. App. —, 621 S.E.2d 186, 2005 N.C. App. LEXIS 2488 (2005).

**Authority of Augmented North Carolina Tax Review Board to Create Special income Tax Allocation Formula for Corporate Tax Payer.** — As a special income tax allocation formula set forth in two North Carolina Tax Review Board orders was independent from and substituted G.S. 105-130.4(i)’s other-



wise applicable allocation formula for multi-state corporations, a taxpayer was not entitled to determine its tax liability by using the amended statutory formula. *Philip Morris USA Inc. v. Tolson*, — N.C. App. —, 626 S.E.2d 853, 2006 N.C. App. LEXIS 536 (2006).

Augmented North Carolina Tax Review Board did not violate the separation of powers

doctrine by creating a special tax allocation formula for a multi-state corporation, because in so doing, it only exercised the powers expressly reserved for it by the general assembly under G.S. 105-130.4(t). *Philip Morris USA Inc. v. Tolson*, — N.C. App. —, 626 S.E.2d 853, 2006 N.C. App. LEXIS 536 (2006).

## § 105-130.5. Adjustments to federal taxable income in determining State net income.

(a) The following additions to federal taxable income shall be made in determining State net income:

- (1) Taxes based on or measured by net income by whatever name called and excess profits taxes;
- (2) Interest paid in connection with income exempt from taxation under this Part;
- (3) The contributions deduction allowed by the Code;
- (4) Interest income earned on bonds and other obligations of other states or their political subdivisions, less allowable amortization on any bond acquired on or after January 1, 1963;
- (5) The amount by which gains have been offset by the capital loss carryover allowed under the Code. All gains recognized on the sale or other disposition of assets must be included in determining State net income or loss in the year of disposition;
- (6) The net operating loss deduction allowed by the Code; and
- (7) Repealed by Session Laws 2001-327, s. 3(a), effective for taxable years beginning on or after January 1, 2001.
- (8) Repealed by Session Laws 1987, c. 778, s. 2.
- (9) Payments to or charges by a parent, subsidiary or affiliated corporation in excess of fair compensation in all intercompany transactions of any kind whatsoever pursuant to the Revenue Laws of this State.
- (10) The total amounts allowed under this Chapter during the taxable year as a credit against the taxpayer's income tax. A corporation that apportions part of its income to this State shall make the addition required by this subdivision after it determines the amount of its income that is apportioned and allocated to this State and shall not apply to a credit taken under this Chapter the apportionment factor used by it in determining the amount of its apportioned income.
- (11) The amount by which the percentage depletion allowance allowed by sections 613 and 613A of the Code for mines, oil and gas wells, and other natural deposits exceeds the cost depletion allowance for these items under the Code, except as otherwise provided herein. This subdivision does not apply to depletion deductions for clay, gravel, phosphate rock, lime, shells, stone, sand, feldspar, gemstones, mica, talc, lithium compounds, tungsten, coal, peat, olivine, pyrophyllite, and other solid minerals or rare earths extracted from the soil or waters of this State. Corporations required to apportion income to North Carolina shall first add to federal taxable income the amount of all percentage depletion in excess of cost depletion that was subtracted from the corporation's gross income in computing its federal income taxes and shall then subtract from the taxable income apportioned to North Carolina the amount by which the percentage depletion allowance allowed by sections 613 and 613A of the Code for solid minerals or rare earths extracted from the soil or waters of this State exceeds the cost depletion allowance for these items.



- (12) The amount allowed under the Code for depreciation or as an expense in lieu of depreciation for a utility plant acquired by a natural gas local distribution company, to the extent the plant is included in the company's rate base at zero cost in accordance with G.S. 62-158.
- (13) Repealed by Session Laws 2001-427, s. 4(b), effective for taxable years beginning on or after January 1, 2002.
- (14) Royalty payments required to be added by G.S. 105-130.7A, to the extent deducted in calculating federal taxable income.
- (15) The applicable percentage of the amount allowed as a special accelerated depreciation deduction under section 168(k) or section 1400L of the Code, as set out in the table below. In addition, a taxpayer who was allowed a special accelerated depreciation deduction under section 168(k) or section 1400L of the Code in a taxable year beginning before January 1, 2002, and whose North Carolina taxable income in that earlier year reflected that accelerated depreciation deduction must add to federal taxable income in the taxpayer's first taxable year beginning on or after January 1, 2002, an amount equal to the amount of the deduction allowed in the earlier taxable year. These adjustments do not result in a difference in basis of the affected assets for State and federal income tax purposes. The applicable percentage is as follows:

Taxable Year	Percentage
2002	100%
2003	70%
2004	70%
2005 and thereafter	0%

- (16) The amount excluded from gross income under Subchapter R of Chapter 1 of the Code.
  - (17) The amount excluded from gross income under section 199 of the Code.
  - (18) **(Repealed effective for taxable years beginning on and after January 1, 2007)** To the extent not included in federal taxable income, the amount of qualifying expenses for which the taxpayer claims a credit under G.S. 105-130.47.
- (b) The following deductions from federal taxable income shall be made in determining State net income:
- (1) Interest upon the obligations of the United States or its possessions, to the extent included in federal taxable income: Provided, interest upon the obligations of the United States shall not be an allowable deduction unless interest upon obligations of the State of North Carolina or any of its political subdivisions is exempt from income taxes imposed by the United States.
  - (1a) Interest upon the obligations of any of the following, net of related expenses, to the extent included in federal taxable income:
    - a. This State, a political subdivision of this State, or a commission, an authority, or another agency of this State or of a political subdivision of this State.
    - b. A nonprofit educational institution organized or chartered under the laws of this State.
  - (2) Payments received from a parent, subsidiary or affiliated corporation in excess of fair compensation in intercompany transactions which in the determination of the net income or net loss of such corporation were not allowed as a deduction under the Revenue Laws of this State.

- (3) Repealed by Session Laws 2003-349, s. 1.1, effective January 1, 2003.
- (3a) Dividends treated as received from sources outside the United States as determined under section 862 of the Code, net of related expenses, to the extent included in federal taxable income. Notwithstanding the proviso in subdivision (c)(3) of this section, the netting of related expenses shall be calculated in accordance with subdivision (c)(3) of this section and G.S. 105-130.6A.
- (3b) Any amount included in federal taxable income under section 78 or section 951 of the Code, net of related expenses.
- (4) Losses in the nature of net economic losses sustained by the corporation in any or all of the 15 preceding years pursuant to the provisions of G.S. 105-130.8. A corporation required to allocate and apportion its net income under the provisions of G.S. 105-130.4 shall deduct its allocable net economic loss only from total income allocable to this State pursuant to the provisions of G.S. 105-130.8.
- (5) Contributions or gifts made by any corporation within the income year to the extent provided under G.S. 105-130.9.
- (6) Amortization in excess of depreciation allowed under the Code on the cost of any sewage or waste treatment plant, and facilities or equipment used for purposes of recycling or resource recovery of or from solid waste, or for purposes of reducing the volume of hazardous waste generated as provided in G.S. 105-130.10.
- (7) Depreciation of emergency facilities acquired prior to January 1, 1955. Any corporation shall be permitted to depreciate any emergency facility, as such is defined in section 168 of the Code, over its useful life, provided such facility was acquired prior to January 1, 1955, and no amortization has been claimed on such facility for State income tax purposes.
- (8) The amount of losses realized on the sale or other disposition of assets not allowed under section 1211(a) of the Code. All losses recognized on the sale or other disposition of assets must be included in determining State net income or loss in the year of disposition.
- (9) With respect to a shareholder of a regulated investment company, the portion of undistributed capital gains of such regulated investment company included in such shareholder's federal taxable income and on which the federal tax paid by the regulated investment company is allowed as a credit or refund to the shareholder under section 852 of the Code.
- (10) Repealed by Session Laws 1987, c. 778, s. 2.
- (11) If a deduction for an ordinary and necessary business expense was required to be reduced or was not allowed under the Code because the corporation claimed a federal tax credit against its federal income tax liability for the income year in lieu of a deduction, the amount by which the deduction was reduced and the amount of the deduction that was disallowed.
- (12) Reasonable expenses, in excess of deductions allowed under the Code, paid for reforestation and cultivation of commercially grown trees; provided, that this deduction shall be allowed only to those corporations in which the real owners of all the shares of such corporation are natural persons actively engaged in the commercial growing of trees, or the spouse, siblings, or parents of such persons. Provided, further, that in no case shall a corporation be allowed a deduction for the same reforestation or cultivation expenditure more than once.
- (13) The eligible income of an international banking facility to the extent included in determining federal taxable income, determined as follows:



- a. "International banking facility" shall have the same meaning as is set forth in the laws of the United States or regulations of the board of governors of the federal reserve system.
  - b. The eligible income of an international banking facility for the taxable year shall be an amount obtained by multiplying State taxable income as determined under G.S. 105-130.3 (determined without regard to eligible income of an international banking facility and allocation and apportionment, if applicable) for such year by a fraction, the denominator of which shall be the gross receipts for such year derived by the bank from all sources, and the numerator of which shall be the adjusted gross receipts for such year derived by the international banking facility from:
    1. Making, arranging for, placing or servicing loans to foreign persons substantially all the proceeds of which are for use outside the United States;
    2. Making or placing deposits with foreign persons which are banks or foreign branches of banks (including foreign subsidiaries or foreign branches of the taxpayer) or with other international banking facilities; or
    3. Entering into foreign exchange trading or hedging transactions related to any of the transactions described in this paragraph.
  - c. The adjusted gross receipts shall be determined by multiplying the gross receipts of the international banking facility by a fraction the numerator of which is the average amount for the taxable year of all assets of the international banking facility which are employed outside the United States and the denominator of which is the average amount for the taxable year of all assets of the international banking facility.
  - d. For the purposes of this subsection the term "foreign person" means:
    1. An individual who is not a resident of the United States;
    2. A foreign corporation, a foreign partnership or a foreign trust, as defined in section 7701 of the Code, other than a domestic branch thereof;
    3. A foreign branch of a domestic corporation (including the taxpayer);
    4. A foreign government or an international organization or an agency of either, or
    5. An international banking facility.

For purposes of this paragraph, the terms "foreign" and "domestic" shall have the same meaning as set forth in section 7701 of the Code.
- (14) The amount by which the basis of a depreciable asset is required to be reduced under the Code for federal tax purposes because of a tax credit allowed against the corporation's federal income tax liability. This deduction may be claimed only in the year in which the Code requires that the asset's basis be reduced. In computing gain or loss on the asset's disposition, this deduction shall be considered as depreciation.
  - (15) The amount paid during the income year, pursuant to 7 U.S.C. § 1445-2, as marketing assessments on tobacco grown by the corporation in North Carolina.
  - (16) The amount of natural gas expansion surcharges collected by a natural gas local distribution company under G.S. 62-158.
  - (17) To the extent included in federal taxable income, the following:



- a. The amount of 911 charges collected under G.S. 62A-5 and remitted to a local government under G.S. 62A-6.
  - b. The amount of wireless Enhanced 911 service charges collected under G.S. 62A-23 and remitted to the Wireless Fund under G.S. 62A-24.
- (18) Interest, investment earnings, and gains of a trust, the settlors of which are two or more manufacturers that signed a settlement agreement with this State to settle existing and potential claims of the State against the manufacturers for damages attributable to a product of the manufacturers, if the trust meets all of the following conditions:
- a. The purpose of the trust is to address adverse economic consequences resulting from a decline in demand of the manufactured product potentially expected to occur because of market restrictions and other provisions in the settlement agreement.
  - b. A court of this State approves and retains jurisdiction over the trust.
  - c. Certain portions of the distributions from the trust are made in accordance with certifications that meet the criteria in the agreement creating the trust and are provided by a nonprofit entity, the governing board of which includes State officials.
- (19) To the extent included in federal taxable income, the amount paid to the taxpayer during the taxable year from the Hurricane Floyd Reserve Fund in the Office of State Budget and Management for hurricane relief or assistance, but not including payments for goods or services provided by the taxpayer.
- (20) Royalty payments received from a related member who added the payments to income under G.S. 105-130.7A for the same taxable year.
- (21) In each of the taxpayer's first five taxable years beginning on or after January 1, 2005, an amount equal to twenty percent (20%) of the amount added to taxable income in a previous year as accelerated depreciation under subdivision (a)(15) of this section.
- (22) To the extent included in federal taxable income, the amount paid to the taxpayer during the taxable year from the Disaster Relief Reserve Fund in the Office of State Budget and Management for hurricane relief or assistance, but not including payments for goods or services provided by the taxpayer.
- (c) The following other adjustments to federal taxable income shall be made in determining State net income:
- (1) In determining State net income, no deduction shall be allowed for annual amortization of bond premiums applicable to any bond acquired prior to January 1, 1963. The amount of premium paid on any such bond shall be deductible only in the year of sale or other disposition.
  - (2) Federal taxable income must be increased or decreased to account for any difference in the amount of depreciation, amortization, or gains or losses applicable to property which has been depreciated or amortized by use of a different basis or rate for State income tax purposes than used for federal income tax purposes prior to the effective date of this Part.
  - (3) No deduction is allowed for any direct or indirect expenses related to income not taxed under this Part; provided, no adjustment shall be made under this subsection for adjustments addressed in G.S. 105-130.5(a) and (b). G.S. 105-130.6A applies to the adjustment for expenses related to dividends received that are not taxed under this Part.

- (4) The taxpayer shall add to federal taxable income the amount of any recovery during the taxable year not included in federal taxable income, to the extent the taxpayer's deduction of the recovered amount in a prior taxable year reduced the taxpayer's tax imposed by this Part but, due to differences between the Code and this Part, did not reduce the amount of the taxpayer's tax imposed by the Code. The taxpayer may deduct from federal taxable income the amount of any recovery during the taxable year included in federal taxable income under section 111 of the Code, to the extent the taxpayer's deduction of the recovered amount in a prior taxable year reduced the taxpayer's tax imposed by the Code but, due to differences between the Code and this Part, did not reduce the amount of the taxpayer's tax imposed by this Part.
- (5) A savings and loan association may deduct interest earned on deposits at the Federal Home Loan Bank of Atlanta, or its successor, to the extent included in federal taxable income.

(d) Repealed by Session Laws 1987, c. 778, s. 3.

(e) Notwithstanding any other provision of this section, any recapture of depreciation required under the Code must be included in a corporation's State net income to the extent required for federal income tax purposes.

(f) Expired. (1967, c. 1110, s. 3; 1969, cc. 1113, 1124; 1971, c. 820, s. 1; c. 1206, s. 1; 1973, c. 1287, s. 4; 1975, c. 764, s. 4; 1977, 2nd Sess., c. 1200, s. 1; 1979, c. 179, s. 2; c. 801, s. 32; 1981, c. 704, s. 20; c. 855, s. 1; 1983, c. 61; c. 713, ss. 70-73, 82, 83; 1985, c. 720, s. 1; c. 791, s. 43; 1985 (Reg. Sess., 1986), c. 825; 1987, c. 89; c. 637, s. 1; c. 778, ss. 2, 3; c. 804, s. 3; 1991, c. 598, ss. 3, 10; 1991 (Reg. Sess., 1992), c. 857, s. 1; 1993 (Reg. Sess., 1994), c. 745, ss. 4, 5; 1995, c. 509, s. 50; 1996, 2nd Ex. Sess., c. 14, ss. 4, 10; 1997-439, s. 1; 1998-98, ss. 1(c), 4, 69; 1998-158, s. 5; 1998-171, s. 7; 1999-333, s. 2; 1999-337, s. 1; 1999-463, Ex. Sess., s. 4.6(b); 2000-140, s. 93.1(a); 2000-173, s. 19(c); 2001-327, ss. 1(d), (e), 3(a), (b); 2001-424, s. 12.2(b); 2001-427, ss. 4(b), 10(a); 2002-72, s. 14; 2002-126, ss. 30C.2(a), 30C.2(c); 2002-136, ss. 1, 4; 2003-284, s. 37A.3; 2003-349, s. 1.1; 2005-1, s. 5.7(b); 2005-276, ss. 35.1(b), 39.1(e); 2006-220, s. 1.)

**Effect of Amendments. —**

Session Laws 2006-220, s. 1, effective for taxable years beginning on and after January 1, 2007, repealed subdivision (a)(18), which

read: "To the extent not included in federal taxable income, the amount of qualifying expenses for which the taxpayer claims a credit under G.S. 105-130.47."

## § 105-130.7A. Royalty income reporting option.

(a) Purpose. — Royalty payments received for the use of intangible property in this State are income derived from doing business in this State. This section provides taxpayers with an option concerning the method by which these royalties can be reported for taxation when the recipient and the payer are related members. As provided in this section, these royalty payments can be either (i) deducted by the payer and included in the income of the recipient, or (ii) added back to the income of the payer and excluded from the income of the recipient.

(b) Definitions. — The following definitions apply in this section:

(1) Component member. — Defined in section 1563(b) of the Code.

(1a) Intangible property. — Copyrights, patents, and trademarks.

(2) North Carolina royalty. — An amount charged that is for, related to, or in connection with the use in this State of intangible property. The term includes royalty and technical fees, licensing fees, and other similar charges.



- (3) Own. — To own directly, indirectly, beneficially, or constructively. The attribution rules of section 318 of the Code apply in determining ownership under this section.
- (4) Related entity. — Any of the following:
  - a. A stockholder who is an individual, or a member of the stockholder's family enumerated in section 318 of the Code, if the stockholder and the members of the stockholder's family own in the aggregate at least eighty percent (80%) of the value of the taxpayer's outstanding stock.
  - b. A stockholder, or a stockholder's partnership, limited liability company, estate, trust, or corporation, if the stockholder and the stockholder's partnerships, limited liability companies, estates, trusts, and corporations own in the aggregate at least fifty percent (50%) of the value of the taxpayer's outstanding stock.
  - c. A corporation, or a party related to the corporation in a manner that would require an attribution of stock from the corporation to the party or from the party to the corporation under the attribution rules of section 318 of the Code, if the taxpayer owns at least eighty percent (80%) of the value of the corporation's outstanding stock.
- (5) Related member. — A person that, with respect to the taxpayer during any part of the taxable year, is one or more of the following:
  - a. A related entity.
  - b. A component member.
  - c. A person to or from whom there would be attribution of stock ownership in accordance with section 1563(e) of the Code if the phrase "5 percent or more" were replaced by "twenty percent (20%) or more" each place it appears in that section.
- (6) Royalty payment. — Either of the following:
  - a. Expenses, losses, and costs paid, accrued, or incurred for North Carolina royalties, to the extent the amounts are allowed as deductions or costs in determining taxable income before operating loss deduction and special deductions for the taxable year under the Code.
  - b. Amounts directly or indirectly allowed as deductions under section 163 of the Code, to the extent the amounts are paid, accrued, or incurred for a time price differential charged for the late payment of any expenses, losses, or costs described in this subdivision.
- (7) Trademark. — A trademark, trade name, service mark, or other similar type of intangible asset.
- (8) Use. — Use of intangible property includes direct or indirect maintenance, management, ownership, sale, exchange, or disposition of the intangible property.
- (c) Election. — For the purpose of computing its State net income, a taxpayer must add royalty payments made to, or in connection with transactions with, a related member during the taxable year. This addition is not required for an amount of royalty payments that meets any of the following conditions:
  - (1) The related member includes the amount as income on a return filed under this Part for the same taxable year that the amount is deducted by the taxpayer, and the related member does not elect to deduct the amount pursuant to G.S. 105-130.5(b)(20).
  - (2) The taxpayer can establish that the related member during the same taxable year directly or indirectly paid, accrued, or incurred the amount to a person who is not a related member.
  - (3) The taxpayer can establish that the related member to whom the amount was paid is organized under the laws of a country other than



the United States, the country has a comprehensive income tax treaty with the United States, and the country imposes a tax on the royalty income of the related member at a rate that equals or exceeds the rate set in G.S. 105-130.3.

(d) Indirect Transactions. — For the purpose of this section, an indirect transaction or relationship has the same effect as if it were direct. (2001-327, s. 1(b); 2003-416, s. 15; 2006-66, s. 24A.3(a); 2006-196, s. 10.)

**Editor's Note. —**

Session Laws 2006-66, s. 1.2, provides: "This act shall be known as 'The Current Operations and Capital Improvements Appropriations Act of 2006'."

Session Laws 2006-66, s. 28.6 is a severability clause.

Session Laws 2006-196, s. 13, provides: "The Revenue Laws Study Committee shall study the following issues:

"(1) The simplification of the additional tax imposed on insurance contracts on property coverage, as enacted in Section 3 of this act, and the distribution of the revenue generated by the tax. The study of this issue may include a recommendation on the percentage of revenue to be distributed to the firemen's local relief funds and the formula for making this distribution. The study may also consider the increasing difference between the amount of revenue available in the Volunteer Fire Department Fund for matching grants to purchase equipment and make capital improvements and the amount of grant requests received.

"(2) The authority of the Secretary of Revenue to require taxpayers to file consolidated returns. The study of this issue may include consideration of whether the State should require some corporations or all corporations to file a consolidated return.

"(3) The feasibility of replacing the State's current corporate income and franchise tax laws with a commercial activity tax based upon business gross receipts.

"(4) The administrative process for the review of disputed tax matters."

**Effect of Amendments. —**

Session Laws 2006-66, s. 24A.3(a), effective for taxable years beginning on or after January 1, 2006, substituted "intangible property" for "trademarks" throughout the section; and added new subdivision (b)(1a).

Session Laws 2006-196, s. 10, effective for taxable years beginning on or after January 1, 2006, in subsection (c), substituted "any" for "either" at the end of the introductory paragraph and added paragraph (c)(3).

## § 105-130.9. Contributions.

Contributions shall be allowed as a deduction to the extent and in the manner provided as follows:

- (1) Charitable contributions as defined in section 170(c) of the Code, exclusive of contributions allowed in subdivision (2) of this section, shall be allowed as a deduction to the extent provided herein. The amount allowed as a deduction hereunder shall be limited to an amount not in excess of five percent (5%) of the corporation's net income as computed without the benefit of this subdivision or subdivision (2) of this section. Provided, that a carryover of contributions shall not be allowed and that contributions made to North Carolina donees by corporations allocating a part of their total net income outside this State shall not be allowed under this subdivision, but shall be allowed under subdivision (3) of this section.
- (2) Contributions by any corporation to the State of North Carolina, any of its institutions, instrumentalities, or agencies, any county of this State, its institutions, instrumentalities, or agencies, any municipality of this State, its institutions, instrumentalities, or agencies, and contributions or gifts by any corporation to educational institutions located within North Carolina, no part of the net earnings of which inures to the benefit of any private stockholders or dividend. For the purpose of this subdivision, the words "educational institution" shall mean only an educational institution which normally maintains a regular faculty and curriculum and normally has a regularly orga-

**G.S. 105-130.9(4) is set out twice. See note.**

nized body of students in attendance at the place where the educational activities are carried on. The words “educational institution” shall be deemed to include all of such institution’s departments, schools and colleges, a group of “educational institutions” and an organization (corporation, trust, foundation, association or other entity) organized and operated exclusively to receive, hold, invest and administer property and to make expenditures to or for the sole benefit of an “educational institution” or group of “educational institutions.”

- (3) Corporations allocating a part of their total net income outside North Carolina under the provisions of G.S. 105-130.4 shall deduct from total income allocable to North Carolina contributions made to North Carolina donees qualified under subdivisions (1) and (2) of this section or made through North Carolina offices or branches of other donees qualified under the above-mentioned subdivisions of this section; provided, such deduction for contributions made to North Carolina donees qualified under subdivision (1) of this section shall be limited in amount to five percent (5%) of the total income allocated to North Carolina as computed without the benefit of this deduction for contributions.
- (4) **(Effective for taxable years beginning before January 1, 2011)** The amount of a contribution for which the taxpayer claimed a tax credit pursuant to G.S. 105-130.34 or G.S. 105-130.48 shall not be eligible for a deduction under this section. The amount of the credit claimed with respect to the contribution is not, however, required to be added to income under G.S. 105-130.5(a)(10).
- (4) **(Effective for taxable years beginning on or after January 1, 2011)** The amount of a contribution for which the taxpayer claimed a tax credit pursuant to G.S. 105-130.34 shall not be eligible for a deduction under this section. The amount of the credit claimed with respect to the contribution is not, however, required to be added to income under G.S. 105-130.5(a)(10). (1939, c. 158, s. 322; 1941, c. 50, s. 5; 1943, c. 400, s. 4; c. 668; 1945, c. 708, s. 4; c. 752, s. 3; 1947, c. 501, s. 4; c. 894; 1949, c. 392, s. 3; 1951, c. 643, s. 4; c. 937, s. 4; 1953, c. 1031, s. 1; c. 1302, s. 4; 1955, c. 1100, s. 1; c. 1331, s. 1; cc. 1332, 1342; c. 1343, s. 1; 1957, c. 1340, ss. 4, 8; 1959, c. 1259, s. 4; 1961, c. 201, s. 1; c. 1148; 1963, c. 1169, s. 2; 1965, c. 1048; 1967, c. 1110, s. 3; 1969, c. 1175, s. 1; 1973, c. 1287, s. 4; 1983, c. 713, s. 82; c. 793, s. 2; 1995, c. 370, s. 4; 2006-66, s. 24.18(b).)

**Subdivision (4) is set out twice.** — The first version of subdivision (4) set out above is effective for taxable years beginning before January 1, 2011. The second version of subdivision (4) set out above is effective for taxable years beginning on or after January 1, 2011.

**Editor’s Note.** — Session Laws 2006-66, s. 1.2, provides: “This act shall be known as ‘The Current Operations and Capital Improvements Appropriations Act of 2006.’”

Session Laws 2006-66, s. 28.6 is a severability clause.

**Effect of Amendments.** — Session Laws 2006-66, s. 24.18(b), effective for taxable years beginning on or after January 1, 2006, and expires for taxable years beginning on or after January 1, 2011, added “or G.S. 105-130.48” following “G.S. 105-130.34” in subdivision (4).

**§ 105-130.17. Time and place of filing returns.**

- (a) Returns must be filed as prescribed by the Secretary at the place



prescribed by the Secretary. Returns must be in the form prescribed by the Secretary. The Secretary shall furnish forms in accordance with G.S. 105-254.

(b) Except as otherwise provided in this section, the return of a corporation shall be filed on or before the fifteenth day of the third month following the close of its income year. An income year ending on any day other than the last day of the month shall be deemed to end on the last day of the calendar month ending nearest to the last day of a taxpayer's actual income year.

(c) In the case of mutual associations formed under G.S. 54-111 through 54-128 to conduct agricultural business on the mutual plan and marketing associations organized under G.S. 54-129 through 54-158, which are required to file under subsection (a)(9) of G.S. 105-130.11, a return made on the basis of a calendar year shall be filed on or before the fifteenth day of the September following the close of the calendar year, and a return made on the basis of a fiscal year shall be filed on or before the fifteenth day of the ninth month following the close of the fiscal year.

(d) A taxpayer may ask the Secretary for an extension of time to file a return under G.S. 105-263.

(d1) Organizations described in G.S. 105-130.11(a)(1), (3), (4), (5), (6), (7) and (8) that are required to file a return under G.S. 105-130.11(b) shall file a return made on the basis of a calendar year on or before the fifteenth day of May following the close of the calendar year and a return made on the basis of a fiscal year on or before the fifteenth day of the fifth month following the close of the fiscal year.

(e) Any corporation that ceases its operations in this State before the end of its income year because of its intention to dissolve or to withdraw from this State, or because of a merger, conversion, or consolidation or for any other reason whatsoever shall file its return for the then current income year within 75 days after the date it terminates its business in this State.

(f) Repealed by Session Laws 1998-217, s. 42, effective October 31, 1998.

(g) A corporation that files a federal return pursuant to section 6072(c) of the Code shall file its return on or before the fifteenth day of the sixth month following the close of its income year. (1939, c. 158, s. 329; 1943, c. 400, s. 4; 1951, c. 643, s. 4; 1953, c. 1302, s. 4; 1955, c. 17, s. 1; 1957, c. 1340, s. 4; 1963, c. 1169, s. 2; 1967, c. 1110, s. 3; 1973, c. 476, s. 193; c. 1287, s. 4; 1981, c. 56; 1989 (Reg. Sess., 1990), c. 984, s. 8; 1997-300, s. 3; 1998-217, s. 42; 1999-369, s. 5.5; 2000-140, s. 64(b); 2006-18, s. 7.)

**Effect of Amendments.** — Session Laws 2006-18, s. 7, effective for taxable years beginning on or after January 1, 2006, added subsection (g).

## § 105-130.20. Federal corrections.

If a taxpayer's federal taxable income is corrected or otherwise determined by the federal government, the taxpayer must, within six months after being notified of the correction or final determination by the federal government, file an income tax return with the Secretary reflecting the corrected or determined taxable income. The Secretary shall determine from all available evidence the taxpayer's correct tax liability for the income year. As used in this section, the term "all available evidence" means evidence of any kind that becomes available to the Secretary from any source, whether or not the evidence was considered in the federal correction or determination.

The Secretary shall assess and collect any additional tax due from the taxpayer as provided in Article 9 of this Chapter. The Secretary shall refund any overpayment of tax as provided in Article 9 of this Chapter. A taxpayer that fails to comply with this section is subject to the penalties in G.S. 105-236 and forfeits its rights to any refund due by reason of the determination. (1939, c. 158, s. 334; 1947, c. 501, s. 4; 1949, c. 392, s. 3; 1957, c. 1340, s. 14; 1963, c.



1169, s. 2; 1967, c. 1110, s. 3; 1973, c. 476, s. 193; 1993 (Reg. Sess., 1994), c. 582, s. 2; 2006-18, s. 4.)

**Effect of Amendments.** — Session Laws 2006-18, s. 4, effective July 1, 2006, and applicable to federal determinations made on or after that date, substituted “six months” for “two years” in the first sentence of the first undesignated paragraph.

## **§ 105-130.47. Credit for qualifying expenses of a production company.**

(a) Definitions. — The following definitions apply in this section:

- (1) Highly compensated individual. — An individual who directly or indirectly receives compensation in excess of one million dollars (\$1,000,000) for personal services with respect to a single production. An individual receives compensation indirectly when a production company pays a personal service company or an employee leasing company that pays the individual.
- (2) Live sporting event. — A scheduled sporting competition, game, or race that is not originated by a production company, but originated solely by an amateur, collegiate, or professional organization, institution, or association for live or tape-delayed television or satellite broadcast. A live sporting event does not include commercial advertising, an episodic television series, a television pilot, a music video, a motion picture, or a documentary production in which sporting events are presented through archived historical footage or similar footage taken at least 30 days before it is used.
- (3) Production company. — Defined in G.S. 105-164.3.
- (4) Qualifying expenses. — The sum of the following amounts spent in this State by a production company in connection with a production, less the amount paid to a highly compensated individual:
  - a. Goods and services leased or purchased. For goods with a purchase price of twenty-five thousand dollars (\$25,000) or more, the amount included in qualifying expenses is the purchase price less the fair market value of the good at the time the production is completed.
  - b. Compensation and wages on which withholding payments are remitted to the Department of Revenue under Article 4A of this Chapter.

(b) Credit. — A taxpayer that is a production company and has qualifying expenses of at least two hundred fifty thousand dollars (\$250,000) with respect to a production is allowed a credit against the taxes imposed by this Part equal to fifteen percent (15%) of the production company’s qualifying expenses. For the purposes of this section, in the case of an episodic television series, an entire season of episodes is one production. The credit is computed based on all of the taxpayer’s qualifying expenses incurred with respect to the production, not just the qualifying expenses incurred during the taxable year.

(c) Pass-Through Entity. — Notwithstanding the provisions of G.S. 105-131.8 and G.S. 105-269.15, a pass-through entity that qualifies for the credit provided in this section does not distribute the credit among any of its owners. The pass-through entity is considered the taxpayer for purposes of claiming the credit allowed by this section. If a return filed by a pass-through entity indicates that the entity is paying tax on behalf of the owners of the entity, the credit allowed under this section does not affect the entity’s payment of tax on behalf of its owners.

(d) Return. — A taxpayer may claim the credit allowed by this section on a return filed for the taxable year in which the production activities are

completed. The return must state the name of the production, a description of the production, and a detailed accounting of the qualifying expenses with respect to which a credit is claimed.

(e) Credit Refundable. — If the credit allowed by this section exceeds the amount of tax imposed by this Part for the taxable year reduced by the sum of all credits allowable, the Secretary must refund the excess to the taxpayer. The refundable excess is governed by the provisions governing a refund of an overpayment by the taxpayer of the tax imposed in this Part. In computing the amount of tax against which multiple credits are allowed, nonrefundable credits are subtracted before refundable credits.

(f) Limitations. — The amount of credit allowed under this section with respect to a production that is a feature film may not exceed seven million five hundred thousand dollars (\$7,500,000). No credit is allowed under this section for any production that satisfies one of the following conditions:

- (1) It is political advertising.
- (2) It is a television production of a news program or live sporting event.
- (3) It contains material that is obscene, as defined in G.S. 14-190.1.
- (4) It is a radio production.

(g) Substantiation. — A taxpayer allowed a credit under this section must maintain and make available for inspection any information or records required by the Secretary of Revenue. The taxpayer has the burden of proving eligibility for a credit and the amount of the credit. The Secretary may consult with the North Carolina Film Office of the Department of Commerce and the regional film commissions in order to determine the amount of qualifying expenses.

(h) Report. — The Department of Revenue must publish by May 1 of each year the following information, itemized by taxpayer for the 12-month period ending the preceding December 31:

- (1) The location of sites used in a production for which a credit was claimed.
- (2) The qualifying expenses for which a credit was claimed, classified by whether the expenses were for goods, services, or compensation paid by the production company.
- (3) The number of people employed in the State with respect to credits claimed.
- (4) The total cost to the General Fund of the credits claimed.

(i) **(Repealed effective for taxable years beginning on and after January 1, 2007)** No Double Benefit. — A taxpayer may not claim a credit under this section for qualifying expenses for which it claimed a deduction under the Code. A taxpayer that claims a credit provided under this section must adjust taxable income as provided in G.S. 105-130.5(a)(18).

(j) Sunset. — This section is repealed for qualifying expenses occurring on or after January 1, 2010. (2005-276, s. 39.1(a); 2005-345, ss. 47(a), 47(b); 2006-162, s. 4(a); 2006-220, s. 2.)

#### **Effect of Amendments. —**

Session Law 2006-162, s. 4, effective July 24, 2006, and applicable for taxable years beginning on or after January 1, 2006, in subdivision (a)(1), in the first sentence, inserted “directly or indirectly” near the beginning and inserted “for personal services” near the middle, and added the second sentence; in the second sentence of subdivision (a)(2), substituted “does not” for “shall not”, inserted “a” in three places, substituted “in which” for “where any”, and substituted “taken at least 30 days before it is used” for “depicting earlier live sporting events that

originated more than thirty days before the time of such usage” at the end; in subdivision (a)(4), substituted “following amounts spent in this State” for “total mount spent in this State for the following”, added “, less the amount paid to a highly compensated individual” at the end of the introductory paragraph, deleted “by the production company” following “purchased” at the end of the first sentence in subdivision (a)(4)(a), and substituted “wages on which withholding payments are remitted” for “wages paid by the production company, other than amounts paid to a highly compensated individ-



ual, wages on which the production company remitted withholding payments” in the middle of subdivision (a)(4)(b).

Session Laws 2006-220, s. 2, effective for taxable years beginning on and after January 1, 2007, repealed subsection (i), which read:

“No Double Benefit. — A taxpayer may not claim a credit under this section for qualifying expenses for which it claimed a deduction under the Code. A taxpayer that claims a credit provided under this section must adjust taxable income as provided in G.S. 105-130.5(a)(18).”

## **§ 105-130.48. (Repealed for taxable years beginning on or after January 1, 2011) Credit for recycling oyster shells.**

(a) Credit. — A taxpayer who donates oyster shells to the Division of Marine Fisheries of the Department of Environment and Natural Resources is eligible for a credit against the tax imposed by this Part. The amount of the credit is equal to one dollar (\$1.00) per bushel of oyster shells donated.

(b) Limitation. — The credit allowed under this section may not exceed the amount of tax imposed by this Part for the taxable year reduced by the sum of all credits allowable, except tax payment made by or on behalf of the taxpayer.

(c) Carryforward. — Any unused portion of a credit allowed in this section may be carried forward for the succeeding five years. A successor in business may take the carryforwards of a predecessor corporation as if they were carryforwards of a credit allowed to the successor in business.

(d) No Double Benefit. — No deduction is allowed under G.S. 105-130.5(b)(5) or G.S. 105-130.9 for the donation of oyster shells for which a credit is claimed under this section.

(e) Documentation of Credit. — To support the credit allowed by this section, the taxpayer must file with its income tax return, for the taxable year in which the credit is claimed, a certification by the Department of Environment and Natural Resources stating the number of bushels of oyster shells donated by the taxpayer.

(f) Sunset. — This section is repealed effective for taxable years beginning on or after January 1, 2011. (2006-66, s. 24.18(a).)

**Editor’s Note.** — Session Laws 2006-66, s. 1.2, provides: “This act shall be known as ‘The Current Operations and Capital Improvements Appropriations Act of 2006.’”

Session Laws 2006-66, s. 24.18(g), makes this section effective for taxable years beginning on

or after January 1, 2006, and expires for taxable years beginning on or after January 1, 2011.

Session Laws 2006-66, s. 28.6 is a severability clause.

## **Part 1A. S Corporation Income Tax.**

### **§ 105-131.2. Adjustment and characterization of income.**

(a) Adjustment. — Each shareholder’s pro rata share of an S Corporation’s income is subject to the adjustments provided in G.S. 105-134.6.

(b) Repealed by Session Laws 1989, c. 728, s. 1.35.

(c) Characterization of Income. — S Corporation items of income, loss, deduction, and credit taken into account by a shareholder pursuant to G.S. 105-131.1(b) are characterized as though received or incurred by the S Corporation and not its shareholder. (1987 (Reg. Sess., 1988), c. 1089, s. 1; 1989, c. 728, ss. 1.33, 1.35; 1993, c. 485, s. 8; 2006-17, s. 1.)

**Effect of Amendments.** — Session Laws 2006-17, s. 1, effective for taxable years beginning on or after January 1, 2006, rewrote

subsection (a); in subsection (c) substituted “are” for “shall be.”



§ 105-131.8. Tax credits.

**Cross References.** — As to credits for rehabilitated mill property, see G.S. 105-129.71 and 105-129.72.

Part 2. Individual Income Tax.

§ 105-133. Short title.

CASE NOTES

I. General Consideration.

I. GENERAL CONSIDERATION.

**Cited** in *Coley v. State*, 360 N.C. 493, 631 S.E.2d 121, 2006 N.C. LEXIS 594 (2006).

§ 105-134. Purpose.

The general purpose of this Part is to impose a tax for the use of the State government upon the taxable income collectible annually:

- (1) Of every resident of this State.
- (2) Of every nonresident individual deriving income from North Carolina sources attributable to the ownership of any interest in real or tangible personal property in this State, deriving income from a business, trade, profession, or occupation carried on in this State, or deriving income from gambling activities in this State. (1939, c. 158, s. 301; 1967, c. 1110, s. 3; 1989, c. 728, s. 1.2; 1998-98, s. 69; 2005-276, s. 31.1(dd), (jj); 2005-344, s. 10.3; 2006-259, s. 8(j); 2006-264, s. 91(a).)

**Effect of Amendments.** — Session Laws 2005-344, s. 10.3, as added by Session Laws 2005-276, s. 31.1(dd), and as amended by Session Laws 2005-276, s. 31.1(jj), as added by Session Laws 2006-259, s. 8(j), and 2006-264, s. 91(a), effective for taxable years beginning on or after January 1, 2005, inserted “or deriving income from gambling activities in this state” at the end of subdivision (2), and made related, stylistic changes.

§ 105-134.1. Definitions.

CASE NOTES

**Applied** in *Coley v. State*, 360 N.C. 493, 631 S.E.2d 121, 2006 N.C. LEXIS 594 (2006).

§ 105-134.2. Individual income tax imposed.

(a) **(Effective for taxable years beginning before January 1, 2007)** A tax is imposed upon the North Carolina taxable income of every individual. The tax shall be levied, collected, and paid annually and shall be computed at the following percentages of the taxpayer’s North Carolina taxable income.

- (1) For married individuals who file a joint return under G.S. 105-152 and for surviving spouses, as defined in section 2(a) of the Code:

Over	Up To	Rate
-0-	\$21,250	6%

105-134.2(a) is set out three times. See note.

Over	Up To	Rate
\$21,250	\$100,000	7%
\$100,000	\$200,000	7.75%
\$200,000	NA	8.25%

(2) For heads of households, as defined in section 2(b) of the Code:

Over	Up To	Rate
-0-	\$17,000	6%
\$17,000	\$80,000	7%
\$80,000	\$160,000	7.75%
\$160,000	NA	8.25%

(3) For unmarried individuals other than surviving spouses and heads of households:

Over	Up To	Rate
-0-	\$12,750	6%
\$12,750	\$60,000	7%
\$60,000	\$120,000	7.75%
\$120,000	NA	8.25%

(4) For married individuals who do not file a joint return under G.S. 105-152:

Over	Up To	Rate
-0-	\$10,625	6%
\$10,625	\$50,000	7%
\$50,000	\$100,000	7.75%
\$100,000	NA	8.25%

(a) **(Effective for taxable years beginning on or after January 1, 2007)** A tax is imposed upon the North Carolina taxable income of every individual. The tax shall be levied, collected, and paid annually and shall be computed at the following percentages of the taxpayer's North Carolina taxable income.

(1) For married individuals who file a joint return under G.S. 105-152 and for surviving spouses, as defined in section 2(a) of the Code:

Over	Up To	Rate
-0-	\$21,250	6%
\$21,250	\$100,000	7%
\$100,000	\$200,000	7.75%
\$200,000	NA	8%

(2) For heads of households, as defined in section 2(b) of the Code:

Over	Up To	Rate
-0-	\$17,000	6%
\$17,000	\$80,000	7%
\$80,000	\$160,000	7.75%
\$160,000	NA	8%

**105-134.2(a) is set out three times. See note.**

- (3) For unmarried individuals other than surviving spouses and heads of households:

Over	Up To	Rate
-0-	\$12,750	6%
\$12,750	\$60,000	7%
\$60,000	\$120,000	7.75%
\$120,000	NA	8%

- (4) For married individuals who do not file a joint return under G.S. 105-152:

Over	Up To	Rate
-0-	\$10,625	6%
\$10,625	\$50,000	7%
\$50,000	\$100,000	7.75%
\$100,000	NA	8%

(a) **(Effective for taxable years beginning on or after January 1, 2008)** A tax is imposed upon the North Carolina taxable income of every individual. The tax shall be levied, collected, and paid annually and shall be computed at the following percentages of the taxpayer's North Carolina taxable income.

- (1) For married individuals who file a joint return under G.S. 105-152 and for surviving spouses, as defined in section 2(a) of the Code:

Over	Up To	Rate
-0-	\$21,250	6%
\$21,250	\$100,000	7%
\$100,000	NA	7.75%

- (2) For heads of households, as defined in section 2(b) of the Code:

Over	Up To	Rate
-0-	\$17,000	6%
\$17,000	\$80,000	7%
\$80,000	NA	7.75%

- (3) For unmarried individuals other than surviving spouses and heads of households:

Over	Up To	Rate
-0-	\$12,750	6%
\$12,750	\$60,000	7%
\$60,000	NA	7.75%

- (4) For married individuals who do not file a joint return under G.S. 105-152:

Over	Up To	Rate
-0-	\$10,625	6%
\$10,625	\$50,000	7%
\$50,000	NA	7.75%



(b) In lieu of the tax imposed by subsection (a) of this section, there is imposed for each taxable year upon the North Carolina taxable income of every individual a tax determined under tables, applicable to the taxable year, which may be prescribed by the Secretary. The amounts of the tax determined under the tables shall be computed on the basis of the rates prescribed by subsection (a) of this section. This subsection does not apply to an individual making a return under section 443(a)(1) of the Code for a period of less than 12 months on account of a change in the individual's annual accounting period, or to an estate or trust. The tax imposed by this subsection shall be treated as the tax imposed by subsection (a) of this section. (1989, c. 728, s. 1.4; 1989 (Reg. Sess., 1990), c. 814, s. 16; 1991, c. 45, s. 8; c. 689, s. 300; 1991 (Reg. Sess., 1992), c. 930, s. 15; 2001-424, s. 34.18(a); 2003-284, s. 39.1(a); 2003-284, ss. 39.1, 39.2; 2005-276, s. 36.1(a); 2006-66, ss. 24.2(a)-(c).)

**Subsection (a) Set Out Three Times.** — The first version of subsection (a) set out above is effective for taxable years beginning before January 1, 2007. The second version of subsection (a) set out above is effective for taxable years beginning on or after January 1, 2007. The third version of subsection (a) set out above is effective for taxable years beginning on or after January 1, 2008.

**Editor's Note.** — Session Laws 2003-284, s. 39.1, and Session Laws 2005-276, s. 36.1(a), effective for taxable years beginning on or after January 1, 2008, rewrote subsection (a). Session Laws 2006-66, s. 24.2(a) repealed Session Laws 2003-284, s. 39.1, as amended by Session Laws 2005-276, s. 36.1(a).

Session Laws 2006-66, s. 1.2, provides: "This act shall be known as 'The Current Operations and Capital Improvements Appropriations Act of 2006'."

Session Laws 2006-66, s. 28.6 is a severability clause.

**Effect of Amendments.** — Session Laws 2006-66, s. 24.2(b), effective for taxable years beginning on or after January 1, 2007, substituted "8%" for "8.25%" in subdivisions (a)(1) through (a)(4). Session Laws 2006-66, s. 24.2(c), effective for taxable years beginning on or after January 1, 2008, deleted the last column in subdivisions (a)(1) through (a)(4) and made related changes.

## CASE NOTES

**Constitutionality.** — Midyear tax rate increase implemented by 2001 N.C. Sess. Laws 424, as codified in G.S. 105-134.2(a), was not levied until the conclusion of the taxable year;

thus, the tax operated prospectively from the date of enactment and did not violate N.C. Const. art. I, § 16. *Coley v. State*, 360 N.C. 493, 631 S.E.2d 121, 2006 N.C. LEXIS 594 (2006).

## § 105-134.4. Taxable year.

### CASE NOTES

**Operation of tax increase.** — Midyear tax rate increase implemented by 2001 N.C. Sess. Laws 424, as codified in G.S. 105-134.2(a), was not levied until the conclusion of the taxable year under G.S. 105-134.4; thus, the tax oper-

ated prospectively from the date of enactment and did not violate N.C. Const. art. I, § 16. *Coley v. State*, 360 N.C. 493, 631 S.E.2d 121, 2006 N.C. LEXIS 594 (2006).

## § 105-134.5. North Carolina taxable income defined.

### CASE NOTES

**Taxable income.** — Resident taxpayer's North Carolina taxable income is one's federal taxable income determined under the Internal Revenue Code as adjusted by G.S. 105-134.6 and G.S. 105-134.7. *Coley v. State*, 360 N.C.

493, 631 S.E.2d 121, 2006 N.C. LEXIS 594 (2006).

**Cited in** *McKyer v. McKyer*, — N.C. App. —, 632 S.E.2d 828, 2006 N.C. App. LEXIS 1829 (2006).

## § 105-134.6. Adjustments to taxable income.

(a) S Corporations. — Each shareholder's pro rata share of an S Corporation's income is subject to the adjustments provided in this section.

(b) Deductions. — The following deductions from taxable income shall be made in calculating North Carolina taxable income, to the extent each item is included in taxable income:

- (1) Interest upon the obligations of any of the following:
  - a. The United States or its possessions.
  - b. This State, a political subdivision of this State, or a commission, an authority, or another agency of this State or of a political subdivision of this State.
  - c. A nonprofit educational institution organized or chartered under the laws of this State.
- (2) Gain from the disposition of obligations issued before July 1, 1995, to the extent the gain is exempt from tax under the laws of this State.
- (3) Benefits received under Title II of the Social Security Act and amounts received from retirement annuities or pensions paid under the provisions of the Railroad Retirement Act of 1937.
- (4) Repealed by Session Laws 1989 (Reg. Sess., 1990), c. 1002, s. 2.
- (5) Refunds of state, local, and foreign income taxes included in the taxpayer's gross income.
- (5a) Reserved.
- (5b) The amount received during the taxable year from one or more State, local, or federal government retirement plans to the extent the amount is exempt from tax under this Part pursuant to a court order in settlement of the following cases: *Bailey v. State*, 92 CVS 10221, 94 CVS 6904, 95 CVS 6625, 95 CVS 8230; *Emory v. State*, 98 CVS 0738; and *Patton v. State*, 95 CVS 04346. Amounts deducted under this subdivision may not also be deducted under subdivision (6) of this subsection.
- (6)a. An amount, not to exceed four thousand dollars (\$4,000), equal to the sum of the amount calculated in subparagraph b. plus the amount calculated in subparagraph c.
- b. The amount calculated in this subparagraph is the amount received during the taxable year from one or more state, local, or federal government retirement plans.
- c. The amount calculated in this subparagraph is the amount received during the taxable year from one or more retirement plans other than state, local, or federal government retirement plans, not to exceed a total of two thousand dollars (\$2,000) in any taxable year.
- d. In the case of a married couple filing a joint return where both spouses received retirement benefits during the taxable year, the maximum dollar amounts provided in this subdivision for various types of retirement benefits apply separately to each spouse's benefits.
- (7) Recodified as G.S. 105-134.6(d)(1).
- (8) Recodified as G.S. 105-134.6(d)(2).
- (9) Income that is (i) earned or received by an enrolled member of a federally recognized Indian tribe and (ii) derived from activities on a federally recognized Indian reservation while the member resides on the reservation. Income from intangibles having a situs on the reservation and retirement income associated with activities on the reservation are considered income derived from activities on the reservation.



- (10) The amount by which the basis of property under this Article exceeds the basis of the property under the Code, in the year the taxpayer disposes of the property.
  - (11) Severance wages received by a taxpayer from an employer as the result of the taxpayer's permanent, involuntary termination from employment through no fault of the employee. The amount of severance wages deducted as the result of the same termination may not exceed thirty-five thousand dollars (\$35,000) for all taxable years in which the wages are received.
  - (12) Repealed by Session Laws 1998-171, s. 2, effective October 1, 1998.
  - (13) Repealed by Session Laws 2002-126, s. 30C.4, effective for taxable years beginning on or after January 1, 2002.
  - (14) The amount paid to the taxpayer by the State under G.S. 148-84 as compensation for pecuniary loss suffered by reason of erroneous conviction and imprisonment.
  - (15) Interest, investment earnings, and gains of a trust, the settlors of which are two or more manufacturers that signed a settlement agreement with this State to settle existing and potential claims of the State against the manufacturers for damages attributable to a product of the manufacturers, if the trust meets all of the following conditions:
    - a. The purpose of the trust is to address adverse economic consequences resulting from a decline in demand of the manufactured product potentially expected to occur because of market restrictions and other provisions in the settlement agreement.
    - b. A court of this State approves and retains jurisdiction over the trust.
    - c. Certain portions of the distributions from the trust are made in accordance with certifications that meet the criteria in the agreement creating the trust and are provided by a nonprofit entity, the governing board of which includes State officials.
  - (16) The amount paid to the taxpayer during the taxable year from the Hurricane Floyd Reserve Fund in the Office of State Budget and Management for hurricane relief or assistance, but not including payments for goods or services provided by the taxpayer.
  - (17) In each of the taxpayer's first five taxable years beginning on or after January 1, 2005, an amount equal to twenty percent (20%) of the amount added to taxable income in a previous year as accelerated depreciation under subdivision (c)(8) of this section.
  - (18) The amount paid to the taxpayer during the taxable year from the Disaster Relief Reserve Fund in the Office of State Budget and Management for hurricane relief or assistance, but not including payments for goods or services provided by the taxpayer.
- (c) Additions. — The following additions to taxable income shall be made in calculating North Carolina taxable income, to the extent each item is not included in taxable income:
- (1) Interest upon the obligations of states other than this State, political subdivisions of those states, and agencies of those states and their political subdivisions.
  - (2) Any amount allowed as a deduction from gross income under the Code that is taxed under the Code by a separate tax other than the tax imposed in section 1 of the Code.
  - (3) Any amount deducted from gross income under section 164 of the Code as state, local, or foreign income tax or as state or local general sales tax to the extent that the taxpayer's total itemized deductions deducted under the Code for the taxable year exceed the standard



deduction allowable to the taxpayer under the Code reduced by the amount the taxpayer is required to add to taxable income under subdivision (4) of this subsection.

- (3a) The amount by which a shareholder's share of S Corporation income is reduced under section 1366(f)(2) of the Code for the taxable year by the amount of built-in gains tax imposed on the S Corporation under section 1374 of the Code.
- (4) The amount by which the taxpayer's additional standard deduction for aged and blind has been increased for inflation under section 63(c)(4)(A) of the Code plus the amount by which the taxpayer's basic standard deduction, including adjustments for inflation, under the Code exceeds the appropriate amount in the following chart based on the taxpayer's filing status:

<b>Filing Status</b>	<b>Standard Deduction</b>
Married filing jointly/Surviving Spouse	\$6,000
Head of Household	4,400
Single	3,000
Married filing separately	3,000

- (4a) The amount by which each of the taxpayer's personal exemptions has been increased for inflation under section 151(d)(4)(A) of the Code. This amount is reduced by five hundred dollars (\$500.00) for each personal exemption if the taxpayer's adjusted gross income (AGI), as calculated under the Code, is less than the following amounts:

<b>Filing Status</b>	<b>AGI</b>
Married, filing jointly	\$100,000
Head of Household	80,000
Single	60,000
Married, filing separately	50,000.

For the purposes of this subdivision, if the taxpayer's personal exemptions have been reduced by the applicable percentage under section 151(d)(3) of the Code, the amount by which the personal exemptions have been increased for inflation is also reduced by the applicable percentage.

- (5) The market price of the gleaned crop for which the taxpayer claims a credit for the taxable year under G.S. 105-151.14.
- (5a) **(Expires for taxable years beginning on or after January 1, 2011)** The market price of the oyster shells for which the taxpayer claims a credit for the taxable year under G.S. 105-151.30.
- (6) The amount by which the basis of property under the Code exceeds the basis of the property under this Article, in the year the taxpayer disposes of the property.
- (7) The amount of federal estate tax that is attributable to an item of income in respect of a decedent and is deducted from gross income under section 691(c) of the Code.
- (8) The applicable percentage of the amount allowed as a special accelerated depreciation deduction under section 168(k) or section 1400L of the Code, as set out in the table below. In addition, a taxpayer who was allowed a special accelerated depreciation deduction under section 168(k) or section 1400L of the Code in a taxable year beginning before January 1, 2002, and whose North Carolina taxable income in that earlier year reflected that accelerated depreciation deduction must add to federal taxable income in the taxpayer's first taxable year beginning on or after January 1, 2002, an amount equal to the amount of the deduction allowed in the earlier taxable year. These adjustments do not result in a difference in basis of the affected assets for State and federal income tax purposes. The applicable percentage is as follows:

Taxable Year	Percentage
2002	100%
2003	70%
2004	70%
2005 and thereafter	0%

- (9) **(Repealed for taxable years beginning on or after January 1, 2007)** The amount of qualifying expenses for which the taxpayer claims a credit under G.S. 105-151.29.
- (10) The amount excluded from gross income under section 199 of the Code.
- (d) Other Adjustments. — The following adjustments to taxable income shall be made in calculating North Carolina taxable income:

(1) The amount of inheritance or estate tax attributable to an item of income in respect of a decedent required to be included in gross income under the Code, adjusted as provided in G.S. 105-134.5, 105-134.6, and 105-134.7, may be deducted in the year the item of income is included. The amount of inheritance or estate tax attributable to an item of income in respect of a decedent is (i) the amount by which the inheritance or estate tax paid under Article 1 or 1A of this Chapter on property transferred to a beneficiary by a decedent exceeds the amount of the tax that would have been payable by the beneficiary if the item of income in respect of a decedent had not been included in the property transferred to the beneficiary by the decedent, (ii) multiplied by a fraction, the numerator of which is the amount required to be included in gross income for the taxable year under the Code, adjusted as provided in G.S. 105-134.5, 105-134.6, and 105-134.7, and the denominator of which is the total amount of income in respect of a decedent transferred to the beneficiary by the decedent. For an estate or trust, the deduction allowed by this subdivision shall be computed by excluding from the gross income of the estate or trust the portion, if any, of the items of income in respect of a decedent that are properly paid, credited, or to be distributed to the beneficiaries during the taxable year.

The Secretary may provide to a beneficiary of an item of income in respect of a decedent any information contained on an inheritance or estate tax return that the beneficiary needs to compute the deduction allowed by this subdivision.

- (2) The taxpayer may deduct the amount by which the taxpayer's deductions allowed under the Code were reduced, and the amount of the taxpayer's deductions that were not allowed, because the taxpayer elected a federal tax credit in lieu of a deduction. This deduction is allowed only to the extent that a similar credit is not allowed by this Part for the amount.
- (3) The taxpayer shall add to taxable income the amount of any recovery during the taxable year not included in taxable income, to the extent the taxpayer's deduction of the recovered amount in a prior taxable year reduced the taxpayer's tax imposed by this Part but, due to differences between the Code and this Part, did not reduce the amount of the taxpayer's tax imposed by the Code. The taxpayer may deduct from taxable income the amount of any recovery during the taxable year included in taxable income under section 111 of the Code, to the extent the taxpayer's deduction of the recovered amount in a prior taxable year reduced the taxpayer's tax imposed by the Code but, due



to differences between the Code and this Part, did not reduce the amount of the taxpayer's tax imposed by this Part.

(4) **(Effective for taxable years beginning before January 1, 2007)**

A taxpayer whose adjusted gross income (AGI), as calculated under the Code, is less than the amount listed in this subdivision may deduct from taxable income the amount, not to exceed seven hundred fifty dollars (\$750.00), contributed to an account in the Parental Savings Trust Fund of the State Education Assistance Authority established pursuant to G.S. 116-209.25. In the case of a married couple filing a joint return, the maximum dollar amount of the deduction is one thousand five hundred dollars (\$1,500).

**Filing Status**

	<b>AGI</b>
Married, filing jointly	\$100,000
Head of Household	80,000
Single	60,000
Married, filing separately	50,000

(4) **(Effective for taxable years beginning on or after January 1, 2007 and repealed for taxable years beginning on or after January 1, 2011)**

A taxpayer whose adjusted gross income (AGI), as calculated under the Code, is less than the amount listed in this subdivision may deduct from taxable income the amount, not to exceed two thousand dollars (\$2,000), contributed to an account in the Parental Savings Trust Fund of the State Education Assistance Authority established pursuant to G.S. 116-209.25. In the case of a married couple filing a joint return, the maximum dollar amount of the deduction is four thousand dollars (\$4,000).

**Filing Status**

	<b>AGI</b>
Married, filing jointly	\$100,000
Head of Household	80,000
Single	60,000
Married, filing separately	50,000

(5) **(Effective for taxable years beginning on or after January 1, 2007 and repealed for taxable years beginning on or after January 1, 2011)**

The taxpayer shall add to taxable income the amount deducted from taxable income in a prior taxable year under subdivision (4) of this subsection to the extent this amount was withdrawn from the Parental Savings Trust Fund of the State Education Assistance Authority established pursuant to G.S. 116-209.25 and not used to pay for the qualified higher education expenses of the designated beneficiary, unless the withdrawal was made without penalty under section 529 of the Code due to the death or permanent disability of the designated beneficiary. (1989, c. 718, s. 2; c. 728, s. 1.4; c. 770, ss. 41.2, 41.3; c. 792, s. 1.1; 1989 (Reg. Sess., 1990), c. 984, s. 4; c. 1002, s. 2; 1991, c. 45, s. 9; c. 453, s. 1; c. 689, ss. 253, 254; 1991 (Reg. Sess., 1992), c. 1007, s. 3; 1993, c. 12, s. 8; c. 443, s. 8; c. 485, s. 9; 1993 (Reg. Sess., 1994), c. 745, s. 7; 1995, c. 17, s. 5; c. 42, ss. 1, 2(a), (b); c. 46, s. 3; c. 370, s. 3; 1996, 2nd Ex. Sess., c. 13, s. 8.1; c. 14, s. 9; 1997-226, s. 3; 1997-328, s. 1; 1997-388, s. 4; 1997-525, s. 1; 1998-98, s. 69; 1998-171, ss. 2, 3; 1998-212, ss. 29A.2(c), 29A.13(a); 1999-333, s. 3; 1999-463, Ex Sess., s. 4.6 (a); 2000-140, ss. 65, 93.1(a); 2001-424, ss. 12.2(b), 34.19(a), (b); 2002-126, ss. 30B.1(a), 30B.1(b), 30C.2(b), 30C.2(d), 30C.4; 2003-284, s. 37A.2; 2005-1, s. 5.7(a); 2005-276, ss. 35.1(e), 39.1(f); 2005-435, s. 55; 2006-17, ss. 2, 3; 2006-66, ss. 24.12(a), 24.18(e); 2006-220, s. 3; 2006-221, s. 27(a).)



**Subdivision (d)(4) Set Out Twice.** — The first version of subdivision (d)(4) set out above is effective for taxable years beginning before January 1, 2007. The second version of subdivision (d)(4) is effective for taxable years beginning on or after January 1, 2007, and repealed for taxable years beginning on or after January 1, 2011.

**Delayed Repeal of Subdivisions.** — Subdivisions (c)(5a), (d)(4) and (d)(5) are repealed for taxable years beginning on or after January 1, 2011. Subdivision (c)(9) is repealed for taxable years beginning on or after January 1, 2007.

Session Laws 2006-66, s. 1.2, provides: “This act shall be known as ‘The Current Operations and Capital Improvements Appropriations Act of 2006.’”

Session Laws 2006-66, s. 28.6 is a severability clause.

**Effect of Amendments.** —

Session Laws 2006-17, ss. 2 and 3, effective for taxable years beginning on or after January

1, 2006, rewrote subsection (a), and added subdivision (c)(3a).

Session Laws 2006-66, ss. 24.12.(a) and 24.18(e), effective for taxable years beginning on or after January 1, 2006, and is repealed for taxable years beginning on or after January 1, 2011, added new subdivisions (c)(5a), (d)(4), and (d)(5).

Session Laws 2006-220, s. 3, effective for taxable years beginning on and after January 1, 2007, repealed subdivision (c)(9), which read: “The amount of qualifying expenses for which the taxpayer claims a credit under G.S. 105-151.29.”

Session Laws 2006-221, s. 27(a), effective for taxable years beginning on or after January 1, 2007, in subdivision (d)(4), substituted “two thousand dollars (\$2,000)” for “seven hundred fifty dollars (\$750.00)” in the first sentence, and “four thousand dollars (\$4,000)” for “one thousand five hundred dollars (\$1,500)” in the last sentence.

**CASE NOTES**

**Cited** in *Coley v. State*, 360 N.C. 493, 631 S.E.2d 121, 2006 N.C. LEXIS 594 (2006).

**§ 105-134.7. Transitional adjustments.**

**CASE NOTES**

**Cited** in *Coley v. State*, 360 N.C. 493, 631 S.E.2d 121, 2006 N.C. LEXIS 594 (2006).

**§ 105-151.11. Credit for child care and certain employment-related expenses.**

(a) Credit. — A person who is allowed a credit against federal income tax for a percentage of employment-related expenses under section 21 of the Code shall be allowed as a credit against the tax imposed by this Part an amount equal to the applicable percentage of the employment-related expenses as defined in section 21(b)(2) of the Code. In order to claim the credit allowed by this section, the taxpayer must provide with the tax return the information required by the Secretary.

(a1) Applicable Percentage. — For employment-related expenses that are incurred only with respect to one or more dependents who are seven years old or older and are not physically or mentally incapable of caring for themselves, the applicable percentage is the appropriate percentage in the column labeled “Percentage A” in the table below, based on the taxpayer’s adjusted gross income determined under the Code. For employment-related expenses with respect to any other qualifying individual, the applicable percentage is the appropriate percentage in the column labeled “Percentage B” in the table below, based on the taxpayer’s adjusted gross income determined under the Code.

Filing Status	Adjusted Gross Income	Percentage A	Percentage B
Head of Household	Up to \$20,000	9%	13%
	Over \$20,000		
	Up to \$32,000	8%	11.5%
	Over \$32,000	7%	10%
Surviving Spouse or Joint Return	Up to \$25,000	9%	13%
	Over \$25,000		
	Up to \$40,000	8%	11.5%
	Over \$40,000	7%	10%
Single	Up to \$15,000	9%	13%
	Over \$15,000		
	Up to \$24,000	8%	11.5%
	Over \$24,000	7%	10%
Married Filing Separately	Up to \$12,500	9%	13%
	Over \$12,500		
	Up to \$20,000	8%	11.5%
	Over \$20,000	7%	10%

(b) **Employment Related Expenses.** — The amount of employment-related expenses for which a credit may be claimed may not exceed three thousand dollars (\$3,000) if the taxpayer's household includes one qualifying individual, as defined in section 21(b)(1) of the Code, and may not exceed six thousand dollars (\$6,000) if the taxpayer's household includes more than one qualifying individual. The amount of employment-related expenses for which a credit may be claimed is reduced by the amount of employer-provided dependent care assistance excluded from gross income.

(c) **Limitations.** — A nonresident or part-year resident who claims the credit allowed by this section shall reduce the amount of the credit by multiplying it by the fraction calculated under G.S. 105-134.5(b) or (c), as appropriate. No credit shall be allowed under this section for amounts deducted from gross income in calculating taxable income under the Code. The credit allowed by this section may not exceed the amount of tax imposed by this Part for the taxable year reduced by the sum of all credits allowable, except for payments of tax made by or on behalf of the taxpayer. (1981, c. 899, s. 1; 1985, c. 656, ss. 8-11; 1989, c. 728, s. 1.16; 1993, c. 432, s. 1; 1998-98, ss. 69, 99; 1998-100, s. 2; 2006-18, s. 9.)

**Effect of Amendments.** — Session Laws 2006-18, s. 9, effective for taxable years beginning on or after January 1, 2006, substituted "three thousand dollars (\$3,000)" for "two thousand four hundred dollars (\$2,400)" and "six

thousand dollars (\$6,000)" for "four thousand eight hundred dollars (\$4,800)" in the first sentence and added the second sentence in subsection (b).

## § 105-151.12. Credit for certain real property donations.

(a) A person who makes a qualified donation of an interest in real property located in North Carolina during the taxable year that is useful for (i) public beach access or use, (ii) public access to public waters or trails, (iii) fish and wildlife conservation, or (iv) other similar land conservation purposes is allowed a credit against the tax imposed by this Part equal to twenty-five percent (25%) of the fair market value of the donated property interest. To be eligible for this credit, the interest in property must be donated in perpetuity to and accepted by the State, a local government, or a body that is both organized to receive and administer lands for conservation purposes and

qualified to receive charitable contributions under the Code. Lands required to be dedicated pursuant to local governmental regulation or ordinance and dedications made to increase building density levels permitted under a regulation or ordinance are not eligible for this credit. The credit allowed under this section may not exceed two hundred fifty thousand dollars (\$250,000). To support the credit allowed by this section, the taxpayer must file with the income tax return for the taxable year in which the credit is claimed a certification by the Department of Environment and Natural Resources that the property donated is suitable for one or more of the valid public benefits set forth in this subsection.

(b) The credit allowed by this section may not exceed the amount of tax imposed by this Part for the taxable year reduced by the sum of all credits allowed, except payments of tax made by or on behalf of the taxpayer.

Any unused portion of this credit may be carried forward for the next succeeding five years.

(c) Repealed by Session Laws 1998-212, s. 29A.13(b).

(d) In the case of property owned by a married couple, if both spouses are required to file North Carolina income tax returns, the credit allowed by this section may be claimed only if the spouses file a joint return. If only one spouse is required to file a North Carolina income tax return, that spouse may claim the credit allowed by this section on a separate return.

(e) In the case of marshland for which a claim has been filed pursuant to G.S. 113-205, the offer of donation must be made before December 31, 2003 to qualify for the credit allowed by this section.

(f) **(Expires for taxable years beginning on or after January 1, 2007)** Notwithstanding G.S. 105-269.15, the maximum dollar limit that applies in determining the amount of the credit applicable to a partnership that qualifies for the credit applies separately to each partner. (1983, c. 793, s. 3; 1985, c. 278, s. 2; 1989, c. 716, s. 2; c. 727, s. 218(43); c. 728, s. 1.17; 1989 (Reg. Sess., 1990), c. 869, s. 3; 1991, c. 45, s. 10; c. 453, ss. 2, 4; 1991 (Reg. Sess., 1992), c. 930, s. 21; 1993 (Reg. Sess., 1994), c. 717, s. 4; 1997-226, s. 2; 1997-443, s. 11A.119(a); 1998-98, s. 69; 1998-179, s. 2; 1998-212, s. 29A.13(b), (d); 2001-335, s. 2; 2002-72, s. 15(b); 2004-134, s. 1; 2006-66, s. 24.15(a).)

**Editor's Note. —**

Session Laws 2001-335, s. 3, as amended by Session Laws 2004-134, s. 1, and as amended by Session Laws 2006-66, s. 24.15(a), provides that s. 2 of the 2001 act, which added subsection (f), expires for taxable years beginning on or after January 1, 2007.

Session Laws 2006-66, s. 1.2, provides: "This act shall be known as 'The Current Operations and Capital Improvements Appropriations Act of 2006'."

Session Laws 2006-66, s. 28.6 is a severability clause.

**§ 105-151.26. (Expires for taxable years beginning on or after January 1, 2011) Credit for charitable contributions by nonitemizers.**

A taxpayer who elects the standard deduction under section 63 of the Code for federal tax purposes is allowed as a credit against the tax imposed by this Part an amount equal to seven percent (7%) of the taxpayer's excess charitable contributions. The taxpayer's excess charitable contributions are the amount by which the taxpayer's charitable contributions for the taxable year that would have been deductible under section 170 of the Code if the taxpayer had not elected the standard deduction exceed two percent (2%) of the taxpayer's adjusted gross income as calculated under the Code.

No credit shall be allowed under this section for amounts deducted from gross income in calculating taxable income under the Code or for contributions for which a credit was claimed under G.S. 105-151.12, 105-151.14, or 151.30. A



**G.S. 105-151.26 is set out twice. See notes.**

nonresident or part-year resident who claims the credit allowed by this section shall reduce the amount of the credit by multiplying it by the fraction calculated under G.S. 105-134.5(b) or (c), as appropriate. The credit allowed under this section may not exceed the amount of tax imposed by this Part for the taxable year reduced by the sum of all credits allowed, except payments of tax made by or on behalf of the taxpayer. (1996, 2nd Ex. Sess., c. 13, s. 7.1; 1998-98, s. 69; 1998-183, s. 1; 2006-66, s. 24.18(d).)

**Section Set Out Twice.** — The section above is effective for taxable years beginning on or after January 1, 2006, and expires for taxable years beginning on or after January 1, 2011. For this section as in effect for taxable years beginning on or after January 1, 2011, see the main volume.

**Editor's Note.** — Session Laws 2006-66, s. 1.2, provides: "This act shall be known as 'The Current Operations and Capital Improvements Appropriations Act of 2006'."

Session Laws 2006-66, s. 28.6 is a severability clause.

**Effect of Amendments.** — Session Laws 2006-66, s. 24.18(d), effective for taxable years beginning on or after January 1, 2006, and expires for taxable years beginning on or after January 1, 2011, substituted "G.S. 105-151.12, 105-151.14, or 151.30" for "G.S. 105-151.12 or G.S. 105-151.14" in the first sentence of the second paragraph.

**§ 105-151.29. (Repealed January 1, 2010) Credit for qualifying expenses of a production company.**

(a) Definitions. — The following definitions apply in this section:

- (1) Highly compensated individual. — An individual who directly or indirectly receives compensation in excess of one million dollars (\$1,000,000) for personal services with respect to a single production. An individual receives compensation indirectly when a production company pays a personal service company or an employee leasing company that pays the individual.
- (2) Live sporting event. — A scheduled sporting competition, game, or race that is not originated by a production company, but originated solely by an amateur, collegiate, or professional organization, institution, or association for live or tape-delayed television or satellite broadcast. A live sporting event does not include commercial advertising, an episodic television series, a television pilot, a music video, a motion picture, or a documentary production in which sporting events are presented through archived historical footage or similar footage taken at least 30 days before it is used.
- (3) Production company. — Defined in G.S. 105-164.3.
- (4) Qualifying expenses. — The sum of the following amounts spent in this State by a production company in connection with a production, less the amount paid to a highly compensated individual:
  - a. Goods and services leased or purchased. For goods with a purchase price of twenty-five thousand dollars (\$25,000) or more, the amount included in qualifying expenses is the purchase price less the fair market value of the good at the time the production is completed.
  - b. Compensation and wages on which withholding payments are remitted to the Department of Revenue under Article 4A of this Chapter.

(b) Credit. — A taxpayer that is a production company and has qualifying expenses of at least two hundred fifty thousand dollars (\$250,000) with respect to a production is allowed a credit against the taxes imposed by this Part equal to fifteen percent (15%) of the production company's qualifying expenses. For

the purposes of this section, in the case of an episodic television series, an entire season of episodes is one production. The credit is computed based on all of the taxpayer's qualifying expenses incurred with respect to the production, not just the qualifying expenses incurred during the taxable year.

(c) **Pass-Through Entity.** — Notwithstanding the provisions of G.S. 105-131.8 and G.S. 105-269.15, a pass-through entity that qualifies for the credit provided in this section does not distribute the credit among any of its owners. The pass-through entity is considered the taxpayer for purposes of claiming the credit allowed by this section. If a return filed by a pass-through entity indicates that the entity is paying tax on behalf of the owners of the entity, the credit allowed under this section does not affect the entity's payment of tax on behalf of its owners.

(d) **Return.** — A taxpayer may claim the credit allowed by this section on a return filed for the taxable year in which the production activities are completed. The return must state the name of the production, a description of the production, and a detailed accounting of the qualifying expenses with respect to which a credit is claimed.

(e) **Credit Refundable.** — If the credit allowed by this section exceeds the amount of tax imposed by this Part for the taxable year reduced by the sum of all credits allowable, the Secretary must refund the excess to the taxpayer. The refundable excess is governed by the provisions governing a refund of an overpayment by the taxpayer of the tax imposed in this Part. In computing the amount of tax against which multiple credits are allowed, nonrefundable credits are subtracted before refundable credits.

(f) **Limitations.** — The amount of credit allowed under this section with respect to a production that is a feature film may not exceed seven million five hundred thousand dollars (\$7,500,000). No credit is allowed under this section for any production that satisfies one of the following conditions:

- (1) It is political advertising.
- (2) It is a television production of a news program or live sporting event.
- (3) It contains material that is obscene, as defined in G.S. 14-190.1.
- (4) It is a radio production.

(g) **Substantiation.** — A taxpayer allowed a credit under this section must maintain and make available for inspection any information or records required by the Secretary of Revenue. The taxpayer has the burden of proving eligibility for a credit and the amount of the credit. The Secretary may consult with the North Carolina Film Office of the Department of Commerce and the regional film commissions in order to determine the amount of qualifying expenses.

(h) **Report.** — The Department of Revenue must publish by May 1 of each year the following information, itemized by taxpayer for the 12-month period ending the preceding December 31:

- (1) The location of sites used in a production for which a credit was claimed.
- (2) The qualifying expenses for which a credit was claimed, classified by whether the expenses were for goods, services, or compensation paid by the production company.
- (3) The number of people employed in the State with respect to credits claimed.
- (4) The total cost to the General Fund of the credits claimed.

(i) **(Repealed effective for taxable years beginning on and after January 1, 2007) No Double Benefit.** — A taxpayer may not claim a credit under this section for qualifying expenses for which it claimed a deduction under the Code. A taxpayer that claims a credit provided under this section must adjust taxable income as provided in G.S. 105-134.6(c)(9).

(j) **Sunset.** — This section is repealed for qualifying expenses occurring on or after January 1, 2010. (2005-276, s. 39.1(b); 2005-345, ss. 47(c), 47(d); 2006-162, s. 4(b); 2006-220, s. 4.)



**Effect of Amendments. —**

Session Laws 2006-162, s. 4, effective July 24, 2006, and applicable for taxable years beginning on or after January 1, 2006, in subdivision (a)(1), inserted “directly or indirectly” in the middle of the first sentence and added the second sentence; rewrote the last sentence of subdivision (a)(2) which read: “A live sporting event shall not include commercial advertising, an episodic television series, a television pilot, music video, motion picture, or documentary production where any sporting events are presented through archived historical footage or similar footage depicting earlier live sporting events that originated more than thirty days before the time of such usage.”; and, in subdivision (a)(4), in the introductory paragraph, substituted “following amounts” for “total amount” near the beginning, deleted “for the following” following “this State” and added “,

less the amount paid to a highly compensated individual”, deleted “by the production company” following “purchased” at the end of the first sentence in subdivision (a)(1)(a), and, in subdivision (a)(4)(b), substituted “wages on which” for “wages paid by the production company, other than amounts paid to a highly compensated individual, on which the production company remitted” and inserted “are remitted” near the end.

Session Laws 2006-220, s. 4, effective for taxable years beginning on and after January 1, 2007, repealed subsection (i), which read: “No Double Benefit. — A taxpayer may not claim a credit under this section for qualifying expenses for which it claimed a deduction under the Code. A taxpayer that claims a credit provided under this section must adjust taxable income as provided in G.S. 105-134.6(c)(9).”

### **§ 105-151.30. (Repealed for taxable years beginning on or after January 1, 2011) Credit for recycling oyster shells.**

(a) Credit. — A taxpayer who donates oyster shells to the Division of Marine Fisheries of the Department of Environment and Natural Resources is eligible for a credit against the tax imposed by this Part. The amount of the credit is equal to one dollar (\$1.00) per bushel of oyster shells donated.

(b) Limitation. — The credit allowed under this section may not exceed the amount of tax imposed by this Part for the taxable year reduced by the sum of all credits allowable, except tax payment made by or on behalf of the taxpayer.

(c) Carryforward. — Any unused portion of a credit allowed in this section may be carried forward for the succeeding five years.

(d) Documentation of Credit. — To support the credit allowed by this section, the taxpayer must file with its income tax return, for the taxable year in which the credit is claimed, a certification by the Department of Environment and Natural Resources stating the number of bushels of oyster shells donated by the taxpayer.

(e) No Double Benefit. — A taxpayer who claims a credit under this section must add back to taxable income any amount deducted under the Code for the donation of the oyster shells.

(f) Sunset. — This section is repealed effective for taxable years beginning on or after January 1, 2011. (2006-66, s. 24.18(c).)

**Editor’s Note.** — Session Laws 2006-66, s. 1.2, provides: “This act shall be known as ‘The Current Operations and Capital Improvements Appropriations Act of 2006.’”

Session Laws 2006-66, s. 24.18(g) provides that this section is effective for taxable years

beginning on or after January 1, 2006, and expires for taxable years beginning on or after January 1, 2011.

Session Laws 2006-66, s. 28.6 is a severability clause.

### **§ 105-152. Income tax returns.**

(a) Who Must File. — The following individuals shall file with the Secretary an income tax return under affirmation:

- (1) Every resident required to file an income tax return for the taxable year under the Code and every nonresident who (i) derived gross



income from North Carolina sources during the taxable year attributable to the ownership of any interest in real or tangible personal property in this State or derived from a business, trade, profession, or occupation carried on in this State and (ii) is required to file an income tax return for the taxable year under the Code.

(2) Repealed by Session Laws 1991 (Reg. Sess., 1992), c. 930, s. 1.

(3) Any individual whom the Secretary believes to be liable for a tax under this Part, when so notified by the Secretary and requested to file a return.

(b) **Taxpayer Deceased or Unable to Make Return.** — If the taxpayer is unable to file the income tax return, the return shall be filed by a duly authorized agent or by a guardian or other person charged with the care of the person or property of the taxpayer. If an individual who was required to file an income tax return for the taxable year while living has died before making the return, the administrator or executor of the estate shall file the return in the decedent's name and behalf, and the tax shall be levied upon and collected from the estate.

(c) **Information Required With Return.** — The income tax return shall show the taxable income and adjustments required by this Part and any other information the Secretary requires. The Secretary may require some or all individuals required to file an income tax return to attach to the return a copy of their federal income tax return for the taxable year. The Secretary may require a taxpayer to provide the Department with copies of any other return the taxpayer has filed with the Internal Revenue Service and to verify any information in the return.

(d) **Secretary May Require Additional Information.** — When the Secretary has reason to believe that any taxpayer conducts a trade or business in a way that directly or indirectly distorts the taxpayer's taxable income or North Carolina taxable income, the Secretary may require any additional information for the proper computation of the taxpayer's taxable income and North Carolina taxable income. In computing the taxpayer's taxable income and North Carolina taxable income, the Secretary shall consider the fair profit that would normally arise from the conduct of the trade or business.

(e) **Joint Returns.** — A husband and wife whose federal taxable income is determined on a joint federal return shall file a single income tax return jointly if each spouse either is a resident of this State or has North Carolina taxable income and may file a single income tax return jointly if one spouse is not a resident and has no North Carolina taxable income. Except as otherwise provided in this Part, a wife and husband filing jointly are treated as one taxpayer for the purpose of determining the tax imposed by this Part. A husband and wife filing jointly are jointly and severally liable for the tax imposed by this Part reduced by the sum of all credits allowable including tax payments made by or on behalf of the husband and wife. However, if a spouse has been relieved of liability for federal tax attributable to a substantial understatement by the other spouse pursuant to section 6015 of the Code, that spouse is not liable for the corresponding tax imposed by this Part attributable to the same substantial understatement by the other spouse. A wife and husband filing jointly have expressly agreed that if the amount of the payments made by them with respect to the taxes for which they are liable, including withheld and estimated taxes, exceeds the total of the taxes due, refund of the excess may be made payable to both spouses jointly or, if either is deceased, to the survivor alone.

(f) Repealed by Session Laws 1991 (Reg. Sess., 1992), c. 930, s. 1. (1939, c. 158, s. 326; 1941, c. 50, s. 5; 1943, c. 400, s. 4; 1945, c. 708, s. 4; 1951, c. 643, s. 4; 1957, c. 1340, s. 4; 1967, c. 1110, s. 3; 1973, c. 476, s. 193; c. 903, s. 1; c. 1287, s. 5; 1977, c. 315; 1989, c. 728, s. 1.23; 1991 (Reg. Sess., 1992), c. 930, s. 1; 1998-98, ss. 69, 104; 1999-337, s. 25; 2006-66, s. 24.11(a).)

**Editor's Note.** — Session Laws 2006-66, s. 1.2, provides: "This act shall be known as 'The Current Operations and Capital Improvements Appropriations Act of 2006'."

Session Laws 2006-66, s. 28.6 is a severability clause.

**Effect of Amendments.** — Session Laws 2006-66, s. 24.11(a), effective for taxable years beginning on or after January 1, 2006, rewrote the first sentence in subsection (e).

## § 105-155. Time and place of filing returns; extensions; affirmation.

(a) Return. — An income tax return shall be filed at the place and in the form prescribed by the Secretary. The income tax return of every taxpayer reporting on a calendar year basis is due on or before the fifteenth day of April in each year. The income tax return of every taxpayer reporting on a fiscal year basis is due on or before the fifteenth day of the fourth month following the close of the fiscal year. These dates do not apply to a nonresident alien whose federal income tax return is due at a later date under section 6072(c) of the Code. The return of a nonresident alien affected by that Code section is due on or before the fifteenth day of the sixth month following the close of the taxable year. An information return shall be filed at the times prescribed by the Secretary. A taxpayer may ask the Secretary for an extension of time to file a return under G.S. 105-263.

(b) Repealed by 1991 (Regular Session, 1992), c. 930, s. 3.

(c) Repealed by Session Laws 1998-217, s. 44, effective October 31, 1998.

(d) Forms. — Returns and affirmations shall be in the form prescribed by the Secretary. (1939, c. 158, s. 329; 1943, c. 400, s. 4; 1951, c. 643, s. 4; 1953, c. 1302, s. 4; 1955, c. 17, s. 1; 1957, c. 1340, s. 4; 1963, c. 1169, s. 2; 1967, c. 1110, s. 3; 1973, c. 476, s. 193; 1989, c. 728, s. 1.26; 1989 (Reg. Sess., 1990), c. 984, s. 10; 1991, c. 45, s. 12; 1991 (Reg. Sess., 1992), c. 930, s. 3; 1998-217, s. 44; 2006-18, s. 8.)

**Effect of Amendments.** — Session Laws 2006-18, s. 8, effective for taxable years beginning on or after January 1, 2006, rewrote subsection (a).

## § 105-159. Federal corrections.

If a taxpayer's federal taxable income is corrected or otherwise determined by the federal government, the taxpayer must, within six months after being notified of the correction or final determination by the federal government, file an income tax return with the Secretary reflecting the corrected or determined taxable income. The Secretary shall determine from all available evidence the taxpayer's correct tax liability for the taxable year. As used in this section, the term 'all available evidence' means evidence of any kind that becomes available to the Secretary from any source, whether or not the evidence was considered in the federal correction or determination.

The Secretary shall assess and collect any additional tax due from the taxpayer as provided in Article 9 of this Chapter. The Secretary shall refund any overpayment of tax as provided in Article 9 of this Chapter. A taxpayer who fails to comply with this section is subject to the penalties in G.S. 105-236 and forfeits the right to any refund due by reason of the determination. (1939, c. 158, s. 334; 1947, c. 501, s. 4; 1949, c. 392, s. 3; 1957, c. 1340, s. 14; 1963, c. 1169, s. 2; 1967, c. 1110, s. 3; 1973, c. 476, s. 193; 1989, c. 728, s. 1.31; 1993 (Reg. Sess., 1994), c. 582, s. 1; 2006-18, s. 5.)

**Effect of Amendments.** — Session Laws 2006-18, s. 5, effective July 1, 2006, and applicable to federal determinations made on or after that date, substituted "six months" for "two years" in the first sentence of the first undesignated paragraph.



**§ 105-159.2. Designation of tax to North Carolina Public Campaign Fund.**

(a) Allocation to the North Carolina Public Campaign Fund. — To ensure the financial viability of the North Carolina Public Campaign Fund established in Article 22D of Chapter 163 of the General Statutes, the Department must allocate to that Fund three dollars (\$3.00) from the income taxes paid each year by each individual with an income tax liability of at least that amount, if the individual agrees. A taxpayer must be given the opportunity to indicate an agreement or objection to that allocation in the manner described in subsection (b) of this section. In the case of a married couple filing a joint return, each individual must have the option of agreeing or objecting to the allocation. The amounts allocated under this subsection to the Fund must be credited to it on a monthly basis.

(b) Returns. — Individual income tax returns must give an individual an opportunity to agree to the allocation of three dollars (\$3.00) of the individual's tax liability to the North Carolina Public Campaign Fund. The Department must make it clear to the taxpayer that the dollars will support a nonpartisan court system, that the dollars will go to the Fund if the taxpayer marks an agreement, and that allocation of the dollars neither increases nor decreases the individual's tax liability. The following statement must be used to meet this requirement: "Mark 'Yes' if you want to designate \$3 of taxes to this special Fund for voter education materials and for candidates who accept spending limits. Marking 'Yes' does not change your tax or refund." The Department must consult with the State Board of Elections to ensure that the information given to taxpayers complies with the intent of this section.

The Department must inform the entities it approves to reproduce the return that they must comply with the requirements of this section and that a return may not reflect an agreement or objection unless the individual completing the return decided to agree or object after being presented with the statement required by subsection (b) of this section and, as available background information or instructions, the information required by subsection (c) of this section. No software package used in preparing North Carolina income tax returns may default to an agreement or objection. A paid preparer of tax returns may not mark an agreement or objection for a taxpayer without the taxpayer's consent.

(c) Instructions. — The instruction for individual income tax returns must include the following explanatory statement: "The N.C. Public Campaign Fund provides an alternative source of campaign money to qualified candidates who accept strict campaign spending and fund-raising limits. The Fund also helps finance a Voter Guide with educational materials about voter registration, the role of the appellate courts, and the candidates seeking election as appellate judges in North Carolina. Three dollars from the taxes you pay will go to the Fund if you mark an agreement. Regardless of what choice you make, your tax will not increase, nor will any refund be reduced." (2002-158, s. 4; 2005-276, s. 23A.1(d); 2006-192, s. 18.)

**Effect of Amendments. —** taxable years beginning on or after January 1,  
Session Laws 2006-192, s. 18, effective for 2006, rewrote the section.

**Part 3. Income Tax — Estates, Trusts, and Beneficiaries.**

**§ 105-160.3. Tax credits.**

(a) Except as otherwise provided in this section, the credits allowed to an individual against the tax imposed by Part 2 of this Article shall be allowed to



the same extent to an estate or a trust against the tax imposed by this Part. Any credit computed as a percentage of income received shall be apportioned between the estate or trust and the beneficiaries based on the distributions made during the taxable year. No credit may exceed the amount of the tax imposed by this Part for the taxable year reduced by the sum of all credits allowable, except for payments of tax made by or on behalf of the estate or trust.

(b) The following credits are not allowed to an estate or trust:

- (1) G.S. 105-151. Tax credits for income taxes paid to other states by individuals.
- (2) G.S. 105-151.11. Credit for child care and certain employment-related expenses.
- (3) G.S. 105-151.18. Credit for the disabled.
- (4) G.S. 105-151.24. Credit for children.
- (5) G.S. 105-151.26. Credit for charitable contributions by nonitemizers.
- (6) Repealed by Session Laws 2004-170, s. 17, effective August 2, 2004.
- (7) (See editor's note for repeal date) G.S. 105-151.28. Credit for long-term care insurance.
- (8) (Expires for taxable years beginning on or after January 1, 2011) G.S. 105-151.30. Credit for recycling oyster shells. (1989, c. 728, s. 1.38; 1998-1, s. 5(b); 1998-98, ss. 10, 105; 1998-212, s. 29A.6(b); 2004-170, s. 17; 2006-66, s. 24.18(f).)

**Editor's Note. —**

Session Laws 2006-66, s. 1.2, provides: "This act shall be known as 'The Current Operations and Capital Improvements Appropriations Act of 2006'."

Session Laws 2006-66, s. 24.18(g), provides that this section, which added subdivision (b)(8) expires for taxable years beginning on or after January 1, 2011.

Session Laws 2006-66, s. 28.6 is a severability clause.

**Effect of Amendments. —**

Session Laws 2006-66, s. 24.18(f), effective for taxable years beginning on or after January 1, 2006, and expires for taxable years beginning on or after January 1, 2011, added new subdivision (b)(8).

## ARTICLE 4A.

### *Withholding; Estimated Income Tax for Individuals.*

## § 105-163.2. Employers must withhold taxes.

### CASE NOTES

Cited in *Coley v. State*, 360 N.C. 493, 631 S.E.2d 121, 2006 N.C. LEXIS 594 (2006).

## § 105-163.2B. North Carolina State Lottery Commission must withhold taxes.

The North Carolina State Lottery Commission, established by Chapter 18C of the General Statutes, must deduct and withhold State income taxes from the payment of winnings in an amount of six hundred dollars (\$600.00) or more. The amount of taxes to be withheld is seven percent (7%) of the winnings. The Commission must file a return, pay the withheld taxes, and report the amount withheld in the time and manner required under G.S. 105-163.6 as if the winnings were wages. The taxes the Commission withholds are held in trust for the Secretary. (2005-276, s. 31.1(bb); 2005-344, s. 10.2(a); 2006-259, s. 8(f); 2006-264, s. 91(b).)

**Editor’s Note. —**

Session Laws 2006-264, s. 91(b), which substituted “in an amount of six hundred dollars (\$600.00) or more” for “that are reportable to the Internal Revenue Service under section 3406 of the Code” in the first sentence and added “and report the amount withheld” at the end of the third sentence, was repealed by Session Laws 2006-264, s. 91(e). Session Laws 2006-264, s. 91(e) provided that if Senate Bill 1523, 2005 Regular Session (S.L. 2006-259) becomes law, subsections (b) and (c) of this section are repealed.

**Effect of Amendments. —** Session Laws 2006-259, s. 8(f), effective August 23, 2006, substituted “in an amount of six hundred dollars (\$600.00) or more” for “that are reportable to the Internal Revenue Service under section 3406 of the Code” at the end of the first sentence and substituted “return, pay the withheld taxes, and report the amount withheld” for “return and pay the withheld taxes” in the middle of the second sentence.

**§ 105-163.8. Liability of withholding agents.**

**CASE NOTES**

**Allocation of Penalty Monies Collected.** — Monetary payments for a taxpayer’s non-compliance with a mandate of Chapter 105 are penalties and, therefore, subject to N.C. Const. art. IX, § 7; thus, monies collected by the North Carolina Department of Revenue for late fil-

ings, underpayments, and for failing to comply with statutory or regulatory tax provisions are payable to public schools. N.C. Sch. Bds. Ass’n v. Moore, 359 N.C. 474, 614 S.E.2d 504, 2005 N.C. LEXIS 694 (2005).

**§ 105-163.15. Failure by individual to pay estimated income tax; interest.**

**CASE NOTES**

**Allocation of Penalty Monies Collected.** — Monetary payments for a taxpayer’s non-compliance with a mandate of Chapter 105 are penalties and, therefore, subject to N.C. Const. art. IX, § 7; thus, monies collected by the North Carolina Department of Revenue for late fil-

ings, underpayments, and for failing to comply with statutory or regulatory tax provisions are payable to public schools. N.C. Sch. Bds. Ass’n v. Moore, 359 N.C. 474, 614 S.E.2d 504, 2005 N.C. LEXIS 694 (2005).

**§ 105-163.24. Construction of Article.**

**CASE NOTES**

**Cited in** Coley v. State, 360 N.C. 493, 631 S.E.2d 121, 2006 N.C. LEXIS 594 (2006).

**ARTICLE 4C.**

*Filing of Declarations of Estimated Income Tax and Installment Payments of Estimated Income Tax by Corporations.*

**§ 105-163.41. Underpayment.**

**CASE NOTES**

**Allocation of Penalty Monies Collected.** — Monetary payments for a taxpayer’s non-

compliance with a mandate of Chapter 105 are penalties and, therefore, subject to N.C. Const.

art. IX, § 7; thus, monies collected by the North Carolina Department of Revenue for late filings, underpayments, and for failing to comply with statutory or regulatory tax provisions are

payable to public schools. N.C. Sch. Bds. Ass'n v. Moore, 359 N.C. 474, 614 S.E.2d 504, 2005 N.C. LEXIS 694 (2005).

## ARTICLE 5.

### *Sales and Use Tax.*

#### Part 1. Title, Purpose and Definitions.

### § 105-164.3. Definitions.

The following definitions apply in this Article:

- (1) Ancillary service. — A service associated with or incidental to the provision of a telecommunications service. The term includes detailed communications billing, directory assistance, vertical service, and voice mail service. A vertical service is a service, such as call forwarding, caller ID, three-way calling, and conference bridging, that allows a customer to identify a caller or manage multiple calls and call connections.
- (1a) Business. — Includes any activity engaged in by any person or caused to be engaged in by him with the object of gain, profit, benefit or advantage, either direct or indirect. The term “business” shall not be construed in this Article to include occasional and isolated sales or transactions by a person who does not hold himself out as engaged in business.
- (1b) Cable service. — The one-way transmission to subscribers of video programming or other programming service and any subscriber interaction required to select or use the service.
- (2) Candy. — A preparation of sugar, honey, or other natural or artificial sweeteners in combination with chocolate, fruits, nuts, or other ingredients or flavorings in the form of bars, drops, or pieces that do not require refrigeration. The term does not include any preparation that contains flour.
- (3) Clothing. — All human wearing apparel suitable for general use including coats, jackets, hats, hosiery, scarves, and shoes.
- (4) Clothing accessories or equipment. — Incidental items worn on the person or in conjunction with clothing including jewelry, cosmetics, eyewear, wallets, and watches.
- (4a) Combined general rate. — The State’s general rate of tax set in G.S. 105-164.4(a) plus the sum of the rates of the local sales and use taxes authorized by Subchapter VIII of this Chapter for every county in this State.
- (4b) Computer. — An electronic device that accepts information in digital or similar form and manipulates it for a result based on a sequence of instructions.
- (4c) Computer software. — A set of coded instructions designed to cause a computer or automatic data processing equipment to perform a task.
- (4d) Computer supply. — An item that is considered a “school computer supply” under the Streamlined Agreement.
- (5) Consumer. — Means and includes every person storing, using or otherwise consuming in this State tangible personal property purchased or received from a retailer either within or without this State.
- (5a), (5b) Reserved for future codification purposes.



- (5c) Custom computer software. — Computer software that is not prewritten computer software. The term includes a user manual or other documentation that accompanies the sale of the software.
- (5d) Delivered electronically. — Delivered to the purchaser by means other than tangible storage media.
- (6) Delivery charges. — Charges imposed by the retailer for preparation and delivery of personal property or services to a location designated by the consumer.
- (7) Dietary supplement. — A product that is intended to supplement the diet of humans and is required to be labeled as a dietary supplement under federal law, identifiable by the “Supplement Facts” box found on the label.
- (7a) Direct mail. — Printed material delivered or distributed by the United States Postal Service or other delivery service to a mass audience or to addresses on a mailing list provided by the purchaser or at the direction of the purchaser when the cost of the items is not billed directly to the recipients. The term includes tangible personal property supplied directly or indirectly by the purchaser to the direct mail seller for inclusion in the package containing the printed material. The term does not include multiple items of printed material delivered to a single address.
- (8) Direct-to-home satellite service. — Programming transmitted or broadcast by satellite directly to the subscribers’ premises without the use of ground equipment or distribution equipment, except equipment at the subscribers’ premises or the uplink process to the satellite.
- (8a) Drug. — A compound, substance, or preparation or a component of one of these that meets any of the following descriptions and is not food, a dietary supplement, or an alcoholic beverage:
  - a. Is recognized in the United States Pharmacopoeia, Homeopathic Pharmacopoeia of the United States, or National Formulary.
  - b. Is intended for use in the diagnosis, cure, mitigation, treatment, or prevention of disease.
  - c. Is intended to affect the structure or function of the body.
- (8b) Durable medical equipment. — Equipment that meets all of the conditions of this subdivision. The term includes repair and replacement parts for the equipment. The term does not include mobility enhancing equipment.
  - a. Can withstand repeated use.
  - b. Primarily and customarily used to serve a medical purpose.
  - c. Generally not useful to a person in the absence of an illness or injury.
  - d. Not worn in or on the body.
- (8c) Durable medical supplies. — Supplies related to use with durable medical equipment that are eligible to be covered under the Medicare or Medicaid program.
- (8d) Electronic. — Relating to technology having electrical, digital, magnetic, wireless, optical, electromagnetic, or similar capabilities.
- (8e) Eligible Internet data center. — A facility that satisfies each of the following conditions:
  - a. The facility is used primarily or is to be used primarily by a business engaged in “Internet service providers and Web search portals” industry 51811, as defined by NAICS.
  - b. The facility is comprised of a structure or series of structures located or to be located on a single parcel of land or on contiguous parcels of land that are commonly owned or owned by affiliation with the operator of that facility.

- c. The facility is located or to be located in a county that was designated, at the time of application for the written determination required under sub-subdivision d. of this subdivision, either an enterprise tier one, two, or three area or a development tier one or two area pursuant to G.S. 105-129.3 or G.S. 143B-437.08, regardless of any subsequent change in county enterprise or development tier status.
  - d. The Secretary of Commerce has made a written determination that at least two hundred fifty million dollars (\$250,000,000) in private funds has been or will be invested in real property or eligible business property, or a combination of both, at the facility within five years after the commencement of construction of the facility.
- (9) Engaged in business. — Maintaining, occupying or using permanently or temporarily, directly or indirectly, or through a subsidiary or agent, by whatever name called, any office, place of distribution, sales or sample room or place, warehouse or storage place, or other place of business, for the selling or delivering of tangible personal property for storage, use or consumption in this State, or permanently or temporarily, directly or through a subsidiary, having any representative, agent, salesman, canvasser or solicitor operating in this State in such selling or delivering, and the fact that any corporate retailer, agent or subsidiary engaged in business in this State may not be legally domesticated or qualified to do business in this State is immaterial. It also means maintaining in this State, either permanently or temporarily, directly or through a subsidiary, tangible personal property for the purpose of lease or rental. It also means making a mail order sale, as defined in this section, if one of the conditions listed in G.S. 105-164.8(b) is met. It also means the direct shipment of wine to a purchaser in this State by a wine shipper permittee under G.S. 18B-1001.1.
- (10) Food. — Substances that are sold for ingestion or chewing by humans and are consumed for their taste or nutritional value. The substances may be in liquid, concentrated, solid, frozen, dried, or dehydrated form. The term does not include an alcoholic beverage, as defined in G.S. 105-113.68, or a tobacco product, as defined in G.S. 105-113.4.
- (11) Food sold through a vending machine. — Food dispensed from a machine or another mechanical device that accepts payment.
- (12) Gross sales. — The sum total of all retail sales of tangible personal property as defined herein, whether for cash or credit without allowance for cash discount and without any deduction on account of the cost of the property sold, the cost of materials used, labor or service costs, interest paid or any other expenses whatsoever and without any deductions of any kind or character except as provided in this Article.
- (13) Hub. — Either of the following:
- a. An interstate air courier's hub is the interstate air courier's principal airport within the State for sorting and distributing letters and packages and from which the interstate air courier has, or expects to have upon completion of construction, no less than 150 departures a month under normal operating conditions.
  - b. An interstate passenger air carrier's hub is the airport in this State that meets both of the following conditions:
    - 1. The air carrier has allocated to the airport under G.S. 105-338 more than sixty percent (60%) of its aircraft value apportioned to this State.
    - 2. The majority of the air carrier's passengers boarding at the airport are connecting from other airports rather than originating at that airport.



- (14) In this (the) State. — Within the exterior limits of the State of North Carolina and includes all territory within such limits owned by or ceded to the United States of America.
- (14c) Interstate air business. — An interstate air courier, an interstate freight air carrier, or an interstate passenger air carrier.
- (15) Interstate air courier. — A person whose primary business is the furnishing of air delivery of individually addressed letters and packages for compensation, in interstate commerce, except by the United States Postal Service.
- (15b) Interstate freight air carrier. — A person whose primary business is scheduled freight air transportation, as defined in the North American Industry Classification System adopted by the United States Office of Management and Budget, in interstate commerce.
- (16) Interstate passenger air carrier. — A person whose primary business is scheduled passenger air transportation, as defined in the North American Industry Classification System adopted by the United States Office of Management and Budget, in interstate commerce.
- (17) Lease or rental. — A transfer of possession or control of tangible personal property for a fixed or indeterminate term for consideration. The term does not include any of the following:
- a. A transfer of possession or control of property under a security agreement or deferred payment plan that requires the transfer of title upon completion of the required payments.
  - b. A transfer of possession or control of property under an agreement that requires the transfer of title upon completion of required payments and payment of an option price that does not exceed the greater of one hundred dollars (\$100.00) or one percent (1%) of the total required payments.
  - c. The providing of tangible personal property along with an operator for a fixed or indeterminate period of time if the operator is necessary for the equipment to perform as designed. For the purpose of this sub-subdivision, an operator must do more than maintain, inspect, or set up the tangible personal property.
- (17a) Load and leave. — Delivery to the purchaser by use of a tangible storage media where the tangible storage media is not physically transferred to the purchaser.
- (18) Mail order sale. — A sale of tangible personal property, ordered by mail, telephone, computer link, or other similar method, to a purchaser who is in this State at the time the order is remitted, from a retailer who receives the order in another state and transports the property or causes it to be transported to a person in this State. It is presumed that a resident of this State who remits an order was in this State at the time the order was remitted.
- (19) Major recycling facility. — Defined in G.S. 105-129.25.
- (20) Manufactured home. — A structure that is designed to be used as a dwelling and is manufactured in accordance with the specifications for manufactured homes issued by the United States Department of Housing and Urban Development.
- a., b. Repealed by Session Laws 2003-400, s. 13, effective January 1, 2004, and applicable to sales of modular homes on and after that date.
- (21) Mobile telecommunications service. — A radio communication service carried on between mobile stations or receivers and land stations and by mobile stations communicating among themselves and includes all of the following:
- a. Both one-way and two-way radio communication services.
  - b. A mobile service that provides a regularly interacting group of base, mobile, portable, and associated control and relay stations



- for private one-way or two-way land mobile radio communications by eligible users over designated areas of operation.
- c. Any service for which a federal license is required in a personal communications service.
- (21a) Mobility enhancing equipment. — Equipment that meets all of the conditions of this subdivision. The term includes repair and replacement parts for the equipment. The term does not include durable medical equipment.
- a. Primarily and customarily used to provide or increase the ability of an individual to move from one place to another.
- b. Appropriate for use either in a home or motor vehicle.
- c. Not generally used by a person with normal mobility.
- d. Not normally provided on a motor vehicle by a motor vehicle manufacturer.
- (21b) Modular home. — A factory-built structure that is designed to be used as a dwelling, is manufactured in accordance with the specifications for modular homes under the North Carolina State Residential Building Code, and bears a seal or label issued by the Department of Insurance pursuant to G.S. 143-139.1.
- (21c) Modular homebuilder. — A person who furnishes for consideration a modular home to a purchaser that will occupy the modular home. The purchaser can be a person that will lease or rent the unit as real property.
- (22) Moped. — A vehicle that has two or three wheels, no external shifting device, and a motor that does not exceed 50 cubic centimeters piston displacement and cannot propel the vehicle at a speed greater than 30 miles per hour on a level surface.
- (23) Motor vehicle. — A vehicle that is designed primarily for use upon the highways and is either self-propelled or propelled by a self-propelled vehicle, but does not include:
- a. A moped.
- b. Special mobile equipment.
- c. A tow dolly that is exempt from motor vehicle title and registration requirements under G.S. 20-51(10) or (11).
- d. A farm tractor or other implement of husbandry.
- e. A manufactured home, a mobile office, or a mobile classroom.
- f. Road construction or road maintenance machinery or equipment.
- (23a) NAICS. — Defined in G.S. 105-129.81.
- (24) Net taxable sales. — Means and includes the gross retail sales of the business of the retailer taxed under this Article after deducting exempt sales and nontaxable sales.
- (25) Nonresident retail or wholesale merchant. — A person who does not have a place of business in this State, is engaged in the business of acquiring, by purchase, consignment, or otherwise, tangible personal property and selling the property outside the State, and is registered for sales and use tax purposes in a taxing jurisdiction outside the State.
- (25a) Over-the-counter drug. — A drug that can be dispensed under federal law without a prescription and is required by 21 C.F.R. § 210.66 to have a label containing a “Drug Facts” panel and a statement of its active ingredients.
- (26) Person. — The same meaning as in G.S. 105-228.90.
- (26a) Place of primary use. — The street address representative of where the use of a customer’s telecommunications service primarily occurs. The street address must be the customer’s residential street address or primary business street address. For mobile telecommunications

service, the street address must be within the licensed service area of the service provider. If the customer who contracted with the telecommunications provider for the telecommunications service is not the end user of the service, the end user is considered the customer for the purpose of determining the place of primary use.

- (27) Prepaid telephone calling service. — Prepaid wireline calling service or prepaid wireless calling service.
- (27a) Prepaid wireless calling service. — A right that meets all of the following requirements:
  - a. Authorizes the purchase of mobile telecommunications service, either exclusively or in conjunction with other services.
  - b. Must be paid for in advance.
  - c. Is sold in units or dollars whose number or dollar value declines with use and is known on a continuous basis.
- (27b) Prepaid wireline calling service. — A right that meets all of the following requirements:
  - a. Authorizes the exclusive purchase of wireline telecommunications service.
  - b. Must be paid for in advance.
  - c. Enables the origination of calls by means of an access number, authorization code, or another similar means, regardless of whether the access number or authorization code is manually or electronically dialed.
  - d. Is sold in units or dollars whose number or dollar value declines with use and is known on a continuous basis.
- (28) Prepared food. — Food that meets at least one of the conditions of this subdivision. Prepared food does not include food the retailer sliced, repackaged, or pasteurized but did not heat, mix, or sell with eating utensils.
  - a. It is sold in a heated state or it is heated by the retailer.
  - b. It consists of two or more foods mixed or combined by the retailer for sale as a single item. This sub-subdivision does not include foods containing raw eggs, fish, meat, or poultry that require cooking by the consumer as recommended by the Food and Drug Administration to prevent food borne illnesses.
  - c. It is sold with eating utensils provided by the retailer, such as plates, knives, forks, spoons, glasses, cups, napkins, and straws.
- (29) Prescription. — An order, formula, or recipe issued orally, in writing, electronically, or by another means of transmission by a physician, dentist, veterinarian, or another person licensed to prescribe drugs.
- (29a) Prewritten computer software. — Computer software, including prewritten upgrades, that is not designed and developed by the author or another creator to the specifications of a specific purchaser. The term includes software designed and developed by the author or another creator to the specifications of a specific purchaser when it is sold to a person other than the specific purchaser.
- (30) Production company. — A person engaged in the business of making original motion picture, television, or radio images for theatrical, commercial, advertising, or educational purposes.
- (30a) **(Effective July 1, 2007 and applicable to purchases made on or after that date)** Professional motorsports racing team. — A racing team that satisfies all of the following conditions:
  - a. The team is operated for profit.
  - b. A majority of the revenues of the team is derived from sponsorship of the racing team and prize money.
  - c. The team competes in at least sixty-six percent (66%) of the races sponsored in a single season by a motorsports sanctioning body.



- (30b) Prosthetic device. — A replacement, corrective, or supporting device worn on or in the body that meets one of the conditions of this subdivision. The term includes repair and replacement parts for the device.
- a. Artificially replaces a missing portion of the body.
  - b. Prevents or corrects a physical deformity or malfunction.
  - c. Supports a weak or deformed portion of the body.
- (31) Protective equipment. — Items for human wear and designed as protection of the wearer against injury or disease or as protection against damage or injury of other persons or property but not suitable for general use including breathing masks, face shields, hard hats, and tool belts.
- (32) Purchase. — Acquired for a consideration whether
- a. The acquisition was effected by a transfer of title or possession, or both, or a license to use or consume;
  - b. The transfer was absolute or conditional regardless of the means by which it was effected; and
  - c. The consideration is a price or rental in money or by way of exchange or barter.
- It shall also include the procuring of a retailer to erect, install or apply tangible personal property for use in this State.
- (33) Purchase price. — The term has the same meaning as the term “sales price” when applied to an item subject to use tax.
- (34) Retail sale or sale at retail. — The sale, lease, or rental for any purpose other than for resale, sublease, or subrent.
- (35) Retailer. — Means and includes every person engaged in the business of making sales of tangible personal property at retail, either within or without this State, or peddling the same or soliciting or taking orders for sales, whether for immediate or future delivery, for storage, use or consumption in this State and every manufacturer, producer or contractor engaged in business in this State and selling, delivering, erecting, installing or applying tangible personal property for use in this State notwithstanding that said property may be permanently affixed to a building or realty or other tangible personal property. “Retailer” also means a person who makes a mail order sale, as defined in this section, if one of the conditions listed in G.S. 105-164.8(b) is met. Provided, however, that when in the opinion of the Secretary it is necessary for the efficient administration of this Article to regard any salesmen, solicitors, representatives, consignees, peddlers, truckers or canvassers as agents of the dealers, distributors, consignors, supervisors, employers or persons under whom they operate or from whom they obtain the tangible personal property sold by them regardless of whether they are making sales on their own behalf or on behalf of such dealers, distributors, consignors, supervisors, employers or persons, the Secretary may so regard them and may regard the dealers, distributors, consignors, supervisors, employers or persons as “retailers” for the purpose of this Article.
- (36) Sale or selling. — The transfer of title or possession of tangible personal property, conditional or otherwise, in any manner or by any means whatsoever, for a consideration paid or to be paid.

The term includes the fabrication of tangible personal property for consumers by persons engaged in business who furnish either directly or indirectly the materials used in the fabrication work. The term also includes the furnishing or preparing for a consideration of any tangible personal property consumed on the premises of the person furnishing or preparing the property or consumed at the place at



which the property is furnished or prepared. The term also includes a transaction in which the possession of the property is transferred but the seller retains title or security for the payment of the consideration.

If a retailer engaged in the business of selling prepared food and drink for immediate or on-premises consumption also gives prepared food or drink to its patrons or employees free of charge, for the purposes of this Article the property given away is considered sold along with the property sold. If a retailer gives an item of inventory to a customer free of charge on the condition that the customer purchase similar or related property, the item given away is considered sold along with the item sold. In all other cases, property given away or used by any retailer or wholesale merchant is not considered sold, whether or not the retailer or wholesale merchant recovers its cost of the property from sales of other property.

- (37) Sales price. — The total amount or consideration for which personal property or services are sold, leased, or rented. The consideration may be in the form of cash, credit, property, or services. The sales price must be valued in money, regardless of whether it is received in money.
- a. The term includes all of the following:
1. The retailer's cost of the property sold.
  2. The cost of materials used, labor or service costs, interest, losses, all costs of transportation to the retailer, all taxes imposed on the retailer, and any other expense of the retailer.
  3. Charges by the retailer for any services necessary to complete the sale.
  4. Delivery charges.
  5. Installation charges.
  6. The value of exempt personal property given to the consumer when taxable and exempt personal property are bundled together and sold by the retailer as a single product or piece of merchandise.
  7. Credit for trade-in.
- b. The term does not include any of the following:
1. Discounts, including cash, term, or coupons, that are not reimbursed by a third party, are allowed by the retailer, and are taken by a consumer on a sale.
  2. Interest, financing, and carrying charges from credit extended on the sale, if the amount is separately stated on the invoice, bill of sale, or a similar document given to the consumer.
  3. Any taxes imposed directly on the consumer that are separately stated on the invoice, bill of sale, or similar document given to the consumer.
- (37a) Satellite digital audio radio service. — A radio communication service in which audio programming is digitally transmitted by satellite to an earth-based receiver, whether directly or via a repeater station.
- (37b) School supply. — An item that is commonly used by a student in the course of study and is considered a 'school supply', a 'school art supply', or 'school instructional material' under the Streamlined Agreement.
- (38) Secretary. — The Secretary of the North Carolina Department of Revenue.
- (39) Repealed by Session Laws 2002-16, s. 3, effective August 1, 2002, and applicable to taxable services reflected on bills dated after August 1, 2002.

- (40) Soft drink. — A nonalcoholic beverage that contains natural or artificial sweeteners. The term does not include beverages that contain one or more of the following:
- a. Milk or milk products.
  - b. Soy, rice, or similar milk substitutes.
  - c. More than fifty percent (50%) vegetable or fruit juice.
- (41) Special mobile equipment. — Any of the following:
- a. A vehicle that has a permanently attached crane, mill, well-boring apparatus, ditch-digging apparatus, air compressor, electric welder, feed mixer, grinder, or other similar apparatus is driven on the highway only to get to and from a nonhighway job and is not designed or used primarily for the transportation of persons or property.
  - b. A vehicle that has permanently attached special equipment and is used only for parade purposes.
  - c. A vehicle that is privately owned, has permanently attached fire-fighting equipment, and is used only for fire-fighting purposes.
  - d. A vehicle that has permanently attached playground equipment and is used only for playground purposes.
- (42) Sport or recreational equipment. — Items designed for human use and worn in conjunction with an athletic or recreational activity that are not suitable for general use including ballet shoes, cleated athletic shoes, shin guards, and ski boots.
- (43) State agency. — A unit of the executive, legislative, or judicial branch of State government, such as a department, a commission, a board, a council, or The University of North Carolina. The term does not include a local board of education.
- (44) Storage. — Means and includes any keeping or retention in this State for any purpose by the purchaser thereof, except sale in the regular course of business, of tangible personal property purchased from a retailer.
- (45) Storage and Use; Exclusion. — “Storage” and “use” do not include the keeping, retaining or exercising of any right or power over tangible personal property by the purchaser thereof for the original purpose of subsequently transporting it outside the State for use by said purchaser thereafter solely outside the State and which purpose is consummated, or for the purpose of being processed, fabricated or manufactured into, attached to or incorporated into, other tangible personal property to be transported outside the State and thereafter used by the purchaser thereof solely outside the State.
- (45a) Streamlined Agreement. — The Streamlined Sales and Use Tax Agreement as amended in November 2005.
- (46) Tangible personal property. — Personal property that may be seen, weighed, measured, felt, or touched or is in any other manner perceptible to the senses. The term includes electricity, water, gas, steam, and prewritten computer software.
- (47) Taxpayer. — Any person liable for taxes under this Article.
- (48) Telecommunications service. — The electronic transmission, conveyance, or routing of voice, data, audio, video, or any other information or signals to a point, or between or among points. The term includes any transmission, conveyance, or routing in which a computer processing application is used to act on the form, code, or protocol of the content for purposes of the transmission, conveyance, or routing, regardless of whether it is referred to as voice-over Internet protocol or the Federal Communications Commission classifies it as enhanced or value added. The term does not include the following:



- a. Data processing and information services that allow data to be generated, acquired, stored, processed, or retrieved and delivered by an electronic transmission to a customer whose primary purpose for using the service is to obtain the processed data or information.
  - b. The sale, installation, maintenance, or repair of tangible personal property.
  - c. Directory advertising and other advertising.
  - d. Billing and collection services provided to a third party.
  - e. Internet access service.
  - f. Radio and television audio and video programming service, regardless of the medium of delivery, and the transmission, conveyance, or routing of the service by the programming service provider. The term includes cable service and audio and video programming service provided by a mobile telecommunications service provider.
  - g. Ancillary service.
  - h. A digital product delivered electronically, including software, music, a ring tone, video, and reading material.
- (49) Use. — The exercise of any right, power, or dominion whatsoever over tangible personal property or a service by the purchaser of the property or service. The term includes withdrawal from storage, distribution, installation, affixation to real or personal property, and exhaustion or consumption of the tangible personal property or service by the owner or purchaser. The term does not include the sale of tangible personal property or a service in the regular course of business.
- (50) Use tax. — The tax imposed by Part 2 of this Article.
- (50c) Video programming. — Programming provided by, or generally considered comparable to programming provided by, a television broadcast station, regardless of the method of delivery.
- (51) Wholesale merchant. — Every person who engages in the business of buying or manufacturing any tangible personal property and selling same to registered retailers, wholesalers and nonresident retail or wholesale merchants for resale. It shall also include persons making sales of tangible personal property which are defined herein as wholesale sales. For the purposes of this Article any person, firm, corporation, estate or trust engaged in the business of manufacturing, producing, processing or blending any articles of commerce and maintaining a store or stores, warehouse or warehouses, or any other place or places, separate and apart from the place of manufacture or production, for the sale or distribution of its products (other than bakery products) to other manufacturers or producers, wholesale or retail merchants, for the purpose of resale shall be deemed a “wholesale merchant.”
- (52) Wholesale sale. — A sale of tangible personal property by a wholesale merchant to a manufacturer, or registered jobber or dealer, or registered wholesale or retail merchant, for the purpose of resale but does not include a sale to users or consumers not for resale. (1957, c. 1340, s. 5; 1959, c. 1259, s. 5; 1961, c. 1213, s. 1; 1967, c. 1110, s. 6; 1973, c. 476, s. 193; c. 1287, s. 8; 1975, c. 104; c. 275, s. 6; 1979, c. 48, s. 2; c. 71; c. 801, s. 72; 1983, c. 713, ss. 87, 88; 1983 (Reg. Sess., 1984), c. 1097, ss. 4, 5; 1985, c. 23; 1987, c. 27; c. 557, s. 3.1; c. 854, ss. 2, 3; 1987 (Reg. Sess., 1988), c. 1044, s. 3; c. 1096, ss. 1-3; 1989, c. 692, s. 3.2; 1989 (Reg. Sess., 1990), c. 813, s. 13; 1991, c. 45, s. 15; c. 79, ss. 1, 3; c. 689, s. 190.1(a); 1991 (Reg. Sess., 1992), c. 949, s. 3; 1993, c. 354, s.



16; c. 484, s. 1; c. 507, s. 1; 1995 (Reg. Sess., 1996), c. 649, s. 2; 1996, 2nd Ex. Sess., c. 14, ss. 13, 14; 1997-6, s. 7; 1997-370, s. 1; 1997-426, s. 4; 1998-22, s. 4; 1998-55, ss. 7, 13; 1998-98, ss. 13.1(a), 106; 1999-337, s. 28(a), (b); 1999-360, s. 6(a)-(c); 1999-438, s. 4; 2000-153, s. 4; 2000-173, s. 9; 2001-347, ss. 2.1-2.7; 2001-414, s. 14; 2001-424, s. 34.17(b); 2001-430, ss. 1, 2; 2001-476, s. 18(a); 2001-489, s. 3(a); 2002-16, ss. 1, 2, 3; 2002-170, s. 6; 2003-284, s. 45.2; 2003-400, ss. 13, 14; 2003-402, s. 12; 2004-124, s. 32B.3; 2004-170, ss. 18, 19; 2005-276, ss. 33.2, 33.3; 2006-33, s. 1; 2006-66, ss. 24.10(a), 24.17(a); 2006-151, s. 2; 2006-162, s. 5(a); 2006-168, ss. 4.1, 4.3; 2006-252, ss. 2.25(a), (a1), (c), 2.26.)

#### **Editor's Note. —**

Subdivision (1) was added by Session Laws 2006-33, s. 1, as subdivision (01) and was redesignated at the direction of the Revisor of Statutes. Subdivisions (1) and (1a) were redesignated as subdivisions (1a) and (1b) respectively, and subdivisions (27a) and (27b) were redesignated as subdivisions (27b) and (27a), respectively, at the direction of the Revisor of Statutes.

Session Laws 2006-66, s. 1.2, provides: "This act shall be known as 'The Current Operations and Capital Improvements Appropriations Act of 2006'."

Session Laws 2006-66, s. 24.17(c), as amended by Session Laws 2006-168, s. 4.3, and Session Laws 2006-252, s. 2.25(c), provides: "Subsection (b) of this section becomes effective October 1, 2006, and applies to sales made on or after that date. The remainder of this section is effective when it becomes law [July 10, 2006]."

Session Laws 2006-66, s. 28.6 is a severability clause.

Session Laws 2006-151, s. 20 is a severability clause.

Session Laws 2006-252, s. 2.25(a), which made amendments similar to Session Laws 2006-168, did not take effect because House Bill 2744, 2005 General Assembly (2006-168) became law.

#### **Effect of Amendments. —**

Session Laws 2006-33, s. 1, effective January 1, 2007, added subdivision (1); rewrote subdivision (27); added present subdivision (27a) and redesignated former subdivisions (27)a through (27)d as present subdivisions (27b)a through (27b)d; added subdivision (27a); and rewrote subdivisions (45a) and (48).

Session Laws 2006-66, s. 24.10(a), effective July 1, 2007, and applicable to purchases made on or after that date, added present subsection (30a) and redesignated former subsection (30a) as present subsection (30b).

Session Laws 2006-66, s. 24.17(a), effective July 10, 2006, as amended by Session Laws 2006-168, s. 4.3, added new subdivisions (8e) and (23a). For effective date and applicability, see editor's note.

Session Laws 2006-151, s. 2, effective January 1, 2007, added subdivision (50c).

Session Laws 2006-162, s. 5(a), effective July 24, 2006, rewrote subdivision (49).

Session Laws 2006-168, s. 4.1, effective July 27, 2006, inserted the quotation marks around "Internet service providers and Web search portals" in subdivision (8e).

Session Laws 2006-252, s. 2.25(a1), effective January 1, 2007, inserted "or a development tier one or two area," "or G.S. 143B-437.08," and "or development" in subdivision (8e)c.

Session Laws 2006-252, s. 2.26, effective January 1, 2007, rewrote subdivision (23a).

### **CASE NOTES**

**Raw Materials As Tangible Personal Property.** — Raw materials, purchased out-of-state and incorporated out-of-state into building components, which were then used in the construction of buildings in North Carolina,

were tangible personal property that was subject to the use tax found in G.S. 105-164.6(b). *Morton Bldgs., Inc. v. Tolson*, 172 N.C. App. 119, 615 S.E.2d 906, 2005 N.C. App. LEXIS 1579 (2005).

## **Part 2. Taxes Levied.**

### **§ 105-164.4. Tax imposed on retailers.**

(a) **(Effective until July 1, 2007 — see notes)** A privilege tax is imposed on a retailer at the following percentage rates of the retailer's net taxable sales

**G.S. 105-164.4(a) is set out twice. See note.**

or gross receipts, as appropriate. The general rate of tax is four and one-quarter percent (4.25%).

(a) **(Effective July 1, 2007 — see notes)** A privilege tax is imposed on a retailer at the following percentage rates of the retailer's net taxable sales or gross receipts, as appropriate. The general rate of tax is four percent (4%).

(1) The general rate of tax applies to the sales price of each item or article of tangible personal property that is sold at retail and is not subject to tax under another subdivision in this section.

(1a) The rate of two percent (2%) applies to the sales price of each manufactured home sold at retail, including all accessories attached to the manufactured home when it is delivered to the purchaser. The maximum tax is three hundred dollars (\$300.00) per article. Each section of a manufactured home that is transported separately to the site where it is to be erected is a separate article.

(1b) The rate of three percent (3%) applies to the sales price of each aircraft or boat sold at retail, including all accessories attached to the item when it is delivered to the purchaser. The maximum tax is one thousand five hundred dollars (\$1,500) per article.

(1c), (1d) and (1e) Repealed by Session Laws 2005-276, s. 33.4(b), effective January 1, 2006.

(1f) The rate of two and eighty-three-hundredths percent (2.83%) applies to the sales price of electricity described in this subdivision and measured by a separate meter or another separate device:

a. Sales of electricity to farmers to be used by them for any farm purposes other than preparing food, heating dwellings, and other household purposes. The quantity of electricity or gas purchased or used at any one time shall not be a determinative factor as to whether its sale or use is or is not subject to the rate of tax provided in this subdivision.

b. **(Repealed effective July 1, 2007)** Sales of electricity to manufacturing industries and manufacturing plants for use in connection with the operation of the industries and plants other than sales of electricity to be used for residential heating purposes. The quantity of electricity purchased or used at any one time shall not be a determinative factor as to whether its sale or use is or is not subject to the rate of tax provided in this subdivision.

c. Sales of electricity to commercial laundries or to pressing and dry-cleaning establishments for use in machinery used in the direct performance of the laundering or the pressing and cleaning service.

(1g) Repealed by Session Laws 2004-110, s. 6.1, effective October 1, 2004, and applicable to sales of electricity made on or after that date.

(1h) **(Expires for sales made on or after October 1, 2007)** The rate of seventeen-hundredths percent (0.17%) applies to the sales price of electricity sold to an aluminum smelting facility for use in connection with the operation of that facility and measured by a separate meter or measuring device.

(1i) **(Effective July 1, 2007)** The rate of two and six-tenths percent (2.6%) applies to the sales price of electricity that is measured by a separate meter or another separate device and sold to manufacturing industries and manufacturing plants for use in connection with the operation of the industries and plants.

(2) The applicable percentage rate applies to the gross receipts derived from the lease or rental of tangible personal property by a person who



**G.S. 105-164.4(a) is set out twice. See note.**

is engaged in the business of leasing or renting tangible personal property, or is a retailer and leases or rents property of the type sold by the retailer. The applicable percentage rate is the rate and the maximum tax, if any, that applies to a sale of the property that is leased or rented. A person who leases or rents property shall also collect the tax imposed by this section on the separate retail sale of the property.

- (3) Operators of hotels, motels, tourist homes, tourist camps, and similar type businesses and persons who rent private residences and cottages to transients are considered retailers under this Article. A tax at the general rate of tax is levied on the gross receipts derived by these retailers from the rental of any rooms, lodgings, or accommodations furnished to transients for a consideration. This tax does not apply to any private residence or cottage that is rented for less than 15 days in a calendar year or to any room, lodging, or accommodation supplied to the same person for a period of 90 or more continuous days.

As used in this subdivision, the term “persons who rent to transients” means (i) owners of private residences and cottages who rent to transients and (ii) rental agents, including “real estate brokers” as defined in G.S. 93A-2, who rent private residences and cottages to transients on behalf of the owners. If a rental agent is liable for the tax imposed by this subdivision, the owner is not liable.

- (4) Every person engaged in the business of operating a dry cleaning, pressing, or hat-blocking establishment, a laundry, or any similar business, engaged in the business of renting clean linen or towels or wearing apparel, or any similar business, or engaged in the business of soliciting cleaning, pressing, hat blocking, laundering or linen rental business for any of these businesses, is considered a retailer under this Article. A tax at the general rate of tax is levied on the gross receipts derived by these retailers from services rendered in engaging in any of the occupations or businesses named in this subdivision. The tax imposed by this subdivision does not apply to receipts derived from coin, token, or card-operated washing machines, extractors, and dryers. The tax imposed by this subdivision does not apply to gross receipts derived from services performed for resale by a retailer that pays the tax on the total gross receipts derived from the services.
- (4a) The rate of three percent (3%) applies to the gross receipts derived from sales of electricity, other than sales of electricity subject to tax under another subdivision in this section. A person who sells electricity is considered a retailer under this Article.
- (4b) A person who sells tangible personal property at a specialty market, other than the person’s own household personal property, is considered a retailer under this Article. A tax at the general rate of tax is levied on the sales price of each article sold by the retailer at the specialty market. The term “specialty market” has the same meaning as defined in G.S. 66-250.
- (4c) The combined general rate applies to the gross receipts derived from providing telecommunications service and ancillary service. A person who provides telecommunications service or ancillary service is considered a retailer under this Article. These services are taxed in accordance with G.S. 105-164.4C.
- (4d) The sale or recharge of prepaid telephone calling service is taxable at the general rate of tax. The tax applies regardless of whether tangible personal property, such as a card or a telephone, is transferred. The



**G.S. 105-164.4(a) is set out twice. See note.**

tax applies to a service that is sold in conjunction with prepaid wireless calling service. Prepaid telephone calling service is taxable at the point of sale instead of at the point of use and is sourced in accordance with G.S. 105-164.4B. Prepaid telephone calling service taxed under this subdivision is not subject to tax as a telecommunications service.

- (5) Repealed by Session Laws 1998-212, s. 29A.1(a), effective May 1, 1999.
- (6) The combined general rate applies to the gross receipts derived from providing video programming to a subscriber in this State. A cable service provider, a direct-to-home satellite service provider, and any other person engaged in the business of providing video programming is considered a retailer under this Article.
- (6a) The general rate applies to the gross receipts derived from providing satellite digital audio radio service. For services received by a mobile or portable station, the service is sourced to the subscriber's business or home address. A person engaged in the business of providing satellite digital audio radio service is a retailer under this Article.
- (7) The combined general rate applies to the sales price of spirituous liquor other than mixed beverages. As used in this subdivision, the terms "spirituous liquor" and "mixed beverage" have the meanings provided in G.S. 18B-101.
- (8) The rate of two and one-half percent (2.5%) applies to the sales price of each modular home sold at retail, including all accessories attached to the modular home when it is delivered to the purchaser. The sale of a modular home to a modular homebuilder is considered a retail sale. A person who sells a modular home at retail is allowed a credit against the tax imposed by this subdivision for sales or use tax paid to another state on tangible personal property incorporated in the modular home. The retail sale of a modular home occurs when a modular home manufacturer sells a modular home to a modular homebuilder or directly to the end user of the modular home.

(b) The tax levied in this section shall be collected from the retailer and paid by him at the time and in the manner as hereinafter provided. Provided, however, that any person engaging or continuing in business as a retailer shall pay the tax required on the net taxable sales of such business at the rates specified when proper books are kept showing separately the gross proceeds of taxable and nontaxable sales of tangible personal property in such form as may be accurately and conveniently checked by the Secretary or his duly authorized agent. If such records are not kept separately the tax shall be paid as a retailer on the gross sales of business and the exemptions and exclusions provided by this Article shall not be allowed. The tax levied in this section is in addition to all other taxes whether levied in the form of excise, license or privilege or other taxes.

(c) Certificate of Registration. — Before a person may engage in business as a retailer or a wholesale merchant, the person must obtain a certificate of registration from the Department in accordance with G.S. 105-164.29. (1957, c. 1340, s. 5; 1959, c. 1259, s. 5; 1961, c. 826, s. 2; 1963, c. 1169, ss. 3, 11; 1967, c. 1110, s. 6; c. 1116; 1969, c. 1075, s. 5; 1971, c. 887, s. 1; 1973, c. 476, s. 193; c. 1287, s. 8; 1975, c. 752; 1977, c. 903; 1977, 2nd Sess., c. 1218; 1979, c. 17, s. 1; c. 22; c. 48, s. 1; c. 527, s. 1; c. 801, s. 73; 1981, c. 984, ss. 1, 2; 1981 (Reg. Sess., 1982), cc. 1207, 1273; 1983, c. 510; c. 713, ss. 89, 93; c. 805, ss. 1, 2; 1983 (Reg. Sess., 1984), c. 1065, ss. 1, 2, 4; c. 1097, ss. 6, 13; 1985, c. 704; 1985 (Reg. Sess., 1986), c. 925; c. 1005; 1987, c. 557, ss. 4, 5; c. 800, ss. 2, 3; c. 854, s. 1; 1987 (Reg. Sess., 1988), c. 1044, s. 4; 1989, c. 692, ss. 3.1, 3.3, 8.4(8); c. 770, s. 74.4; 1989

(Reg. Sess., 1990), c. 813, ss. 14, 15; 1991, c. 598, s. 5; c. 689, s. 311; c. 690, s. 1; 1993, c. 372, s. 1; c. 484, s. 2; 1995, c. 17, s. 6; c. 477, s. 1; 1996, 2nd Ex. Sess., c. 13, ss. 1.1, 9.1, 9.2; 1997-475, s. 1.1; 1998-22, s. 5; 1998-55, ss. 8, 14; 1998-98, ss. 13.2, 48(a), (b); 1998-121, ss. 3, 5; 1998-197, s. 1; 1998-212, s. 29A.1(a); 1999-337, ss. 29, 30; 1999-360, s. 3(a), (b); 1999-438, s. 1; 2000-140, s. 67(a); 2001-424, ss. 34.13(a), 34.17(a), 34.23(b), 34.25(a); 2001-430, ss. 3, 4, 5; 2001-476, ss. 17(b)-(d), (f); 2001-487, ss. 67(b), 122(a)-(c); 2002-16, s. 4; 2003-284, s. 38.1; 2003-400, s. 15; 2004-110, ss. 6.1, 6.2, 6.3; 2005-144, s. 9.1; 2005-276, ss. 33.1, 33.4(a), 33.4(b); 2006-33, ss. 2, 11; 2006-66, ss. 24.1(a), (b), (c), 24.19(a), (b); 2006-151, s. 3.)

**Introductory Language of Subsection (a) Set Out Twice.** — The first version of the introductory language of subsection (a) set out above is effective until July 1, 2007. The second version of the introductory language of subsection (a) set out above is effective July 1, 2007.

**Editor's Note.** —

Session Laws 2001-424, s. 34.13(c), as amended by Session Laws 2003-284, s. 38.1, as amended by Session Laws 2005-144, s. 9.1, as amended by Session Laws 2005-276, s. 33.1, provides: "This section [s. 34.13 of Session Laws 2001-424] becomes effective October 16, 2001, and applies to sales made on or after that date. This section does not affect the rights or liabilities of the State, a taxpayer, or another person arising under a statute amended or repealed by this section before the effective date of its amendment or repeal; nor does it affect the right to any refund or credit of a tax that accrued under the amended or repealed statute before the effective date of its amendment or repeal." Session Laws 2006-66, s. 24.1(a), deleted the second sentence, which read: "This section is repealed effective for sales made on or after July 1, 2007."

Session Laws 2006-66, s. 1.2, provides: "This act shall be known as 'The Current Operations and Capital Improvements Appropriations Act of 2006'."

Session Laws 2006-66, s. 28.6 is a severability clause.

Session Laws 2006-151, s. 20 is a severability clause.

**Effect of Amendments.** —

Session Laws 2006-33, s. 2, effective January 1, 2007, in subdivision (a)(4c), inserted "service and ancillary" preceding "service" in the first sentence, and "or ancillary service" in the second sentence and rewrote the last sentence; and added the third sentence in subdivision (a)(4d).

Session Laws 2006-33, s. 11, effective July 1, 2006, and applicable to purchases made on or after that date, rewrote subdivision (a)(8).

Session Laws 2006-66, s. 24.1(b), effective December 1, 2006, and applies to sales made on or after that date, substituted "four and one-quarter percent (4.25%)" for "four and one half percent (4 1/2%)" in subsection (a).

Session Laws 2006-66, s. 24.1(c), effective July 1, 2007, and applicable to sales made on or after that date, substituted "four percent (4%)" for "four and one quarter percent (4.25%)" in the last sentence of subsection (a).

Session Laws 2006-66, s. 24.19(a), effective July 1, 2007, and applicable to sales made on or after that date, repealed subdivision (a)(1f)b.

Session Laws 2006-66, s. 24.19(b), effective July 1, 2007, and applicable to sales made on or after that date, added new subdivision (a)(1i).

Session Laws 2006-151, s. 3, effective January 1, 2007, in subdivision (a)(6), substituted "video programming" for "any of the following broadcast services" in the first sentence, and rewrote the second sentence, which read: "A person engaged in the business of providing any of these services is considered a retailer under this Article: a. Direct-to-home satellite service. b. Cable service."

## CASE NOTES

### I. General Consideration.

#### I. GENERAL CONSIDERATION.

**Constitutionality.** — G.S. 105-164.4(a)(6), which imposes a sales tax on direct-to-home satellite service, but not on cable television service, does not discriminate against satellite providers in favor of cable companies on its face and in its practical effect because the differen-

tial tax results solely from differences between the nature of the provision of satellite and cable services, and not from the geographical location of the businesses. *DirectTV, Inc. v. State*, — N.C. App. —, 632 S.E.2d 543, 2006 N.C. App. LEXIS 1651 (2006).



## § 105-164.4B. Sourcing principles.

(a) General Principles. — The following principles apply in determining where to source the sale of a product. These principles apply regardless of the nature of the product.

- (1) Over-the-counter. — When a purchaser receives a product at a business location of the seller, the sale is sourced to that business location.
- (2) Delivery to specified address. — When a purchaser receives a product at a location specified by the purchaser and the location is not a business location of the seller, the sale is sourced to the location where the purchaser receives the product.
- (3) Delivery address unknown. — When a seller of a product does not know the address where a product is received, the sale is sourced to the first address or location listed in this subdivision that is known to the seller:
  - a. The business or home address of the purchaser.
  - b. The billing address of the purchaser or, if the product is prepaid wireless calling service, the location associated with the mobile telephone number.
  - c. The address from which tangible personal property was shipped or from which a service was provided.

(b) Periodic Rental Payments. — When a lease or rental agreement requires recurring periodic payments, the payments are sourced as follows:

- (1) For leased or rented property, the first payment is sourced in accordance with the principles set out in subsection (a) of this section and each subsequent payment is sourced to the primary location of the leased or rented property for the period covered by the payment. This subdivision applies to all property except a motor vehicle, an aircraft, transportation equipment, and a utility company railway car.
- (2) For leased or rented property that is a motor vehicle or an aircraft but is not transportation equipment, all payments are sourced to the primary location of the leased or rented property for the period covered by the payment.
- (3) For leased or rented property that is transportation equipment, all payments are sourced in accordance with the principles set out in subsection (a) of this section.
- (4) For a railway car that is leased or rented by a utility company and would be transportation equipment if it were used in interstate commerce, all payments are sourced in accordance with the principles set out in subsection (a) of this section.

(c) Transportation Equipment Defined. — As used in the section, the term “transportation equipment” means any of the following used to carry persons or property in interstate commerce: a locomotive, a railway car, a commercial motor vehicle as defined in G.S. 20-4.01, or an aircraft. The term includes a container designed for use on the equipment and a component part of the equipment.

(d) Exceptions. — This section does not apply to the following:

- (1) Telecommunications services. — Telecommunications services are sourced in accordance with G.S. 105-164.4C.
- (2) Direct mail. — Direct mail that meets one of the conditions of this subdivision is sourced to the location where the property is delivered. In all other cases, direct mail is sourced in accordance with the principles set out in subsection (a) of this section.
  - a. Direct mail purchased pursuant to a direct pay permit.
  - b. When the purchaser provides the seller with information to show the jurisdictions to which the direct mail is to be delivered.



(2001-347, s. 2.9; 2002-16, s. 5; 2003-284, s. 45.3; 2004-170, s. 20; 2006-33, s. 3; 2006-66, s. 24.13(a).)

**Editor's Note. —**

Session Laws 2006-66, s. 1.2, provides: "This act shall be known as 'The Current Operations and Capital Improvements Appropriations Act of 2006'."

Session Laws 2006-66, s. 28.6 is a severability clause.

**Effect of Amendments. —**

Session Laws 2006-33, s. 3, effective January 1, 2007, in subdivision (a)(3)b, substituted

"wireless calling" for "telephone calling service that authorizes the purchase of mobile telecommunications."

Session Laws 2006-66, s. 24.13(a), effective July 1, 2006, and applicable to lease or rental payments made on or after that date, substituted "equipment, and a utility company railway car" for "equipment" at the end of subdivision (b)(1); added subdivision (b)(4) and made a minor stylistic change.

## § 105-164.4C. Telecommunications service and ancillary service.

(a) General. — The gross receipts derived from providing telecommunications service or ancillary service in this State are taxed at the rate set in G.S. 105-164.4(a)(4c). Telecommunications service is provided in this State if the service is sourced to this State under the sourcing principles set out in subsections (a1) and (a2) of this section. Ancillary service is provided in this State if the telecommunications service to which it is ancillary is provided in this State. The definitions and provisions of the federal Mobile Telecommunications Sourcing Act apply to the sourcing and taxation of mobile telecommunications services.

(a1) General Sourcing Principles. — The following general sourcing principles apply to telecommunications services. If a service falls within one of the exceptions set out in subsection (a2) of this section, the service is sourced in accordance with the exception instead of the general principle.

- (1) Flat rate. — A telecommunications service that is not sold on a call-by-call basis is sourced to this State if the place of primary use is in this State.
- (2) General call-by-call. — A telecommunications service that is sold on a call-by-call basis and is not a postpaid calling service is sourced to this State in the following circumstances:
  - a. The call both originates and terminates in this State.
  - b. The call either originates or terminates in this State and the telecommunications equipment from which the call originates or terminates and to which the call is charged is located in this State. This applies regardless of where the call is billed or paid.
- (3) Postpaid. — A postpaid calling service is sourced to the origination point of the telecommunications signal as first identified by either the seller's telecommunications system or, if the system used to transport the signal is not the seller's system, by information the seller receives from its service provider.

(a2) Sourcing Exceptions. — The following telecommunications services and products are sourced in accordance with the principles set out in this subsection:

- (1) Mobile. — Mobile telecommunications service is sourced to the place of primary use, unless the service is prepaid wireless calling service or is air-to-ground radiotelephone service. Air-to-ground radiotelephone service is a postpaid calling service that is offered by an aircraft common carrier to passengers on its aircraft and enables a telephone call to be made from the aircraft. The sourcing principle in this subdivision applies to a service provided as an adjunct to mobile telecommunications service if the charge for the service is included

within the term “charges for mobile telecommunications services” under the federal Mobile Telecommunications Sourcing Act.

- (2) Prepaid. — Prepaid telephone calling service is sourced in accordance with G.S. 105-164.4B.
- (3) Private. — Private telecommunications service is sourced in accordance with subsection (e) of this section.
- (b) Repealed by Session Laws 2006-33, s. 4, effective January 1, 2007.
- (c)(1) - (10) Repealed by Session Laws 2006-33, s. 4, effective January 1, 2007.
- (11) Repealed by Session Laws 2005-276, s. 33.7, effective October 1, 2005.
- (12) - (16) Repealed by Session Laws 2006-33, s. 4, effective January 1, 2007.
- (d) Recodified as G.S. 105-164.4D by Session Laws 2006-151, s. 4, effective January 1, 2007.
- (e) Private Line. — The gross receipts derived from private telecommunications service are sourced as follows:
  - (1) If all the customer’s channel termination points are located in this State, the service is sourced to this State.
  - (2) If all the customer’s channel termination points are not located in this State and the service is billed on the basis of channel termination points, the charge for each channel termination point located in this State is sourced to this State.
  - (3) If all the customer’s channel termination points are not located in this State and the service is billed on the basis of channel mileage, the following applies:
    - a. A charge for a channel segment between two channel termination points located in this State is sourced to this State.
    - b. Fifty percent (50%) of a charge for a channel segment between a channel termination point located in this State and a channel termination point located in another state is sourced to this State.
  - (4) If all the customer’s channel termination points are not located in this State and the service is not billed on the basis of channel termination points or channel mileage, a percentage of the charge for the service is sourced to this State. The percentage is determined by dividing the number of channel termination points in this State by the total number of channel termination points.
- (f) Call Center Cap. The gross receipts tax on telecommunications service that originates outside this State, terminates in this State, and is provided to a call center that has a direct pay permit issued by the Department under G.S. 105-164.27A may not exceed fifty thousand dollars (\$50,000) a calendar year. This cap applies separately to each legal entity.
- (g) Credit. — A taxpayer who pays a tax legally imposed by another state on a telecommunications service taxable under this section is allowed a credit against the tax imposed in this section.
- (h) Definitions. — The following definitions apply in this section:
  - (1) Ancillary service. — Defined in G.S. 105-164.3.
  - (1a) Call-by-call basis. — A method of charging for a telecommunications service whereby the price of the service is measured by individual calls.
  - (2) Call center. — Defined in G.S. 105-164.27A.
  - (3) Mobile telecommunications service. — Defined in G.S. 105-164.3.
  - (4) Place of primary use. — Defined in G.S. 105-164.3.
  - (5) Postpaid calling service. — A telecommunications service that is charged on a call-by-call basis and is obtained by making payment at the time of the call either through the use of a credit or payment mechanism, such as a bank card, travel card, credit card, or debit



card, or by charging the call to a telephone number that is not associated with the origination or termination of the telecommunications service. A postpaid calling service includes a service that meets all the requirements of a prepaid wireline telephone calling service, except the exclusive use requirement.

- (6) Prepaid telephone calling service. — Defined in G.S. 105-164.3.
- (7) Private telecommunications service. — Telecommunications service that entitles a subscriber of the service to exclusive or priority use of a communications channel or group of channels.
- (8) Telecommunications service. — Defined in G.S. 105-164.3. (2001-430, s. 6; 2001-487, ss. 67(a), (c), 69(b); 2002-16, s. 10; 2002-16, ss. 6, 7, 8, 9, 11, 14; 2003-416, s. 16(a); 2005-276, ss. 33.6, 33.7; 2006-33, s. 4; 2006-151, s. 4.)

**Editor's Note.** —

G.S. 105-164.4C(d) was recodified as G.S. 105-164.4D by Session Laws 2006-151, s. 4, effective January 1, 2007.

Subdivision (h)(1) was added by Session Laws 2006-33, s. 4, as subdivision (h)(01), and was redesignated at the direction of the Revisor of Statutes. Subdivision (h)(1) was redesignated as (h)(1a) to preserve alphabetical order at the direction of the Revisor of Statutes.

Session Laws 2006-151, s. 20, is a severability clause.

**Effect of Amendments.** —

Session Laws 2006-33, s. 4, effective January 1, 2007, rewrote the section catchline; in subsection (a), added “or ancillary service” following “providing telecommunications service” in the first sentence, and added the third sentence; in subdivision (a2)(1), deleted “authorized by a” preceding “prepaid” and substituted “wireless” for “telephone” thereafter; deleted former subsections (b) and (c); added subdivision (h)(01); and added “wireline” preceding “telephone calling service” in the last sentence of subdivision (h)(5).

## § 105-164.4D. Bundled services.

When a taxable service is bundled with a service that is not taxable, the tax applies to the gross receipts from the taxable service in the bundle as follows:

- (1) If the service provider offers all the services in the bundle on an unbundled basis, tax is due on the unbundled price of the taxable service, less the discount resulting from the bundling. The discount for a service as the result of bundling is the proportionate price decrease of the service, determined on the basis of the total unbundled price of all the services in the bundle compared to the bundled price of the services.
- (2) If the service provider does not offer one or more of the services in the bundle on an unbundled basis, tax is due on the taxable service based on a reasonable allocation of revenue to that service. If the service provider maintains an account for revenue from a taxable service, the service provider's allocation of revenue to that service for the purpose of determining the tax due on the service must reflect its accounting allocation of revenue to that service. (2006-151, ss. 4, 5.)

**Editor's Note.** — This section was subsection (d) of G.S. 105-164.4C. It has been recodified and rewritten as G.S. 105-164.4D by Session Laws 2006-151, ss. 4 and 5, effective January 1, 2007.

Session Laws 2006-151, s. 20 is a severability clause.

**Effect of Amendments.** — Session Laws 2006-151, s. 5, effective January 1, 2007, deleted “telecommunications” following “When a taxable” in the introductory paragraph of the section.

## § 105-164.6. Complementary use tax.

- (a) Tax. — An excise tax at the applicable rate set in G.S. 105-164.4 is



imposed on the products listed below. The applicable rate is the rate and maximum tax, if any, that would apply to the sale of the product. A product is subject to tax under this section only if it is subject to tax under G.S. 105-164.4.

- (1) Tangible personal property purchased inside or outside this State for storage, use, or consumption in this State. This subdivision includes property that becomes part of a building or another structure.
- (2) Tangible personal property leased or rented inside or outside this State for storage, use, or consumption in this State.
- (3) Services sourced to this State.

(b) **Liability.** — The tax imposed by this section is payable by the person who purchases, leases, or rents tangible personal property or who purchases a service. If the property purchased becomes a part of a building or other structure in the State and the purchaser is a contractor or subcontractor, the contractor, the subcontractor, and the owner of the building are jointly and severally liable for the tax. The liability of a contractor, a subcontractor, or an owner who did not purchase the property is satisfied by receipt of an affidavit from the purchaser certifying that the tax has been paid.

(c) **Credit.** — A credit is allowed against the tax imposed by this section for the following:

- (1) The amount of sales or use tax paid on the item to this State. Payment of sales or use tax to this State on an item by a retailer extinguishes the liability of a purchaser for the tax imposed under this section.
- (2) The amount of sales or use tax paid on the item to another state. If the amount of tax paid to the other state is less than the amount of tax imposed by this section, the difference is payable to this State. The credit allowed by this subdivision does not apply to tax paid to a state that does not grant a similar credit for sales or use taxes paid in North Carolina.

(d), (e) Repealed by Session Laws 2005-276, s. 33.8, effective October 1, 2005.

(f) **Registration.** — Before a person may engage in business in this State selling or delivering tangible personal property for storage, use, or consumption in this State, the person must obtain a certificate of registration from the Department. To obtain a certificate of registration, a person must register with the Department.

The holder of the certificate of registration must pay the tax levied under this Article. A certificate of registration is valid unless it is revoked for failure to comply with the provisions of this Article or becomes void. A certificate issued to a retailer becomes void if, for a period of 18 months, the retailer files no returns or files returns showing no sales.

(g) Repealed by Session Laws 1995, c. 7, s. 1. (1957, c. 1340, s. 5; 1959, c. 1259, s. 5; 1961, c. 826, s. 2; 1967, c. 1110, s. 6; 1973, c. 476, s. 193; 1979, c. 17, s. 2; c. 48, ss. 3, 4; c. 179, s. 3; c. 527, s. 2; 1979, 2nd Sess., c. 1100, s. 1; c. 1175; 1981, cc. 18, 65; 1983, c. 713, s. 90; 1983 (Reg. Sess., 1984), c. 1065, s. 3; 1989, c. 692, s. 3.4; 1991, c. 689, s. 312; c. 690, s. 3; 1995, c. 7, s. 1; c. 17, s. 7; 1998-121, s. 4; 1999-438, s. 1.1; 2001-414, s. 15; 2003-416, ss. 17, 24(a); 2005-276, s. 33.8; 2006-162, s. 6.)

**Effect of Amendments.** —  
Session Laws 2006-162, s. 6, effective July

24, 2006, inserted “or use” in the middle of the first sentence of subdivision (c)(2).

#### CASE NOTES

**Raw Materials As Tangible Personal Property.** — Raw materials, purchased out-of-state and incorporated out-of-state into build-

ing components, which were then used in the construction of buildings in North Carolina, were tangible personal property that was sub-

ject to the use tax found in G.S. 105-164.6(b). 615 S.E.2d 906, 2005 N.C. App. LEXIS 1579  
Morton Bldgs., Inc. v. Tolson, 172 N.C. App. 119, (2005).

### § 105-164.7. Sales tax part of purchase price.

Every retailer subject to the tax levied in G.S. 105-164.4 shall at the time of selling or delivering or taking an order for the sale or delivery of taxable tangible personal property or a taxable service, or collecting the sales price, add to the sales price the amount of tax due. The tax constitutes a part of the purchase price, is a debt from the purchaser to the retailer until paid, and is recoverable at law in the same manner as other debts. The tax must be stated and charged separately from the sales price, shown separately on the retailer's sales records, and paid by the purchaser to the retailer as trustee for and on account of the State. The retailer is liable for the collection of the tax and for its payment to the Secretary. The retailer's failure to charge the tax to or to collect the tax from the purchaser does not affect this liability. It is the intent of this Article that the tax be added to the sales price of tangible personal property and services when sold at retail and be borne and passed on to the customer, instead of being borne by the retailer. (1957, c. 1340, s. 5; 1973, c. 476, s. 193; 2000-19, s. 1.3; 2006-162, s. 7.)

**Effect of Amendments.** — Session Laws 2006-162, s. 7, effective July 24, 2006, substituted "charge the tax to or to collect" for "charge to or collect" near the end of the next to the last sentence.

### § 105-164.12B. Tangible personal property bundled with service contract.

(a) **Bundled Transaction Defined.** — A bundled transaction is a transaction in which all of the following conditions are met:

- (1) A seller transfers an item of tangible personal property to a consumer on the condition that the consumer enter into an agreement to purchase services on an ongoing basis for a minimum period of at least six months.
- (2) The agreement requires the consumer to pay a cancellation fee to the service provider if the consumer cancels the contract for services within the minimum period.
- (3) For the item transferred, the seller:
  - a. Does not charge the consumer; or
  - b. Charges the consumer a price that, after any discount or rebate the seller gives the consumer, is below the purchase price the seller paid for the item.

(b) **Bundled Transaction Is a Sale; Sales Price.** — If a seller transfers an item of tangible personal property as part of a bundled transaction, a sale has occurred, and the sales price of the item is presumed to be the retail price at which the item would sell if no agreement for services were entered into. Part of this price may be paid by the consumer at the time of the transfer; the remainder of the price is considered paid as part of the price to be paid for the services contracted for. Sales tax is due on any part of the price paid by the consumer at the time of the transfer.

(c) **No Additional Sales Tax if Services Taxed.** — If the services for which the consumer was required to contract are subject to services taxes at a combined rate equal to or greater than the combined State and local general rate of sales and use tax, then no additional sales tax is due on the transfer. However, if the consumer cancels the contract for services before the expiration of the minimum period, sales tax applies to the cancellation fee paid by the consumer.



(d) **Additional Sales Tax if Services Not Taxed.** — If the services for which the consumer was required to contract are not subject to services taxes at a combined rate equal to or greater than the combined State and local general rate of sales and use tax, then sales tax is due at the time of the transfer on the remainder of the sales price not paid at that time.

(e) **Services Taxes Defined.** — For the purpose of this section, the term “services taxes” means any combination of State franchise tax on gross receipts, State sales tax, or local sales tax levied on the sale of or gross receipts from the services.

(f) **Determination of Purchase Price.** — For the purpose of this section, the purchase price a seller paid for an item is presumed to be no greater than the price the seller paid for the same model within 12 months before the bundled transaction, as shown on the seller’s invoices. (1996, 2nd Ex. Sess., c. 13, s. 5.1; 2001-414, ss. 16, 17; 2006-151, s. 6.)

**Editor’s Note.** —

Session Laws 2006-151, s. 20, is a severability clause.

**Effect of Amendments.** — Session Laws

2006-151, s. 6, effective January 1, 2007, substituted “Tangible personal property bundled with service contract” for “Bundled transactions” in the section heading.

### Part 3. Exemptions and Exclusions.

#### § 105-164.13. Retail sales and use tax.

The sale at retail and the use, storage, or consumption in this State of the following tangible personal property and services are specifically exempted from the tax imposed by this Article:

##### Agricultural Group.

- (1) Any of the following items sold to a farmer for use by the farmer in the planting, cultivating, harvesting, or curing of farm crops or in the production of dairy products, eggs, or animals. A “farmer” includes a dairy operator, a poultry farmer, an egg producer, a livestock farmer, a farmer of crops, and a farmer of an aquatic species, as defined in G.S. 106-758.
  - a. Commercial fertilizer, lime, land plaster, plastic mulch, plant bed covers, potting soil, and seeds.
  - b. Farm machinery, attachment and repair parts for farm machinery, and lubricants applied to farm machinery. The term ‘machinery’ includes implements that have moving parts or are operated or drawn by an animal. The term does not include implements operated wholly by hand or motor vehicles required to be registered under Chapter 20 of the General Statutes.
  - c. A horse or mule.
  - d. Fuel other than electricity.
- (1a) Sales of the following to a farmer, as defined in subdivision (1) of this section:
  - a. A container used for a purpose set out in subdivision (1) of this section or in packaging and transporting the farmer’s product for sale.
  - b. A grain, feed, or soybean storage facility, and parts and accessories attached to the facility.
- (2) Repealed by Session Laws 2001, c. 514, s. 1, effective February 1, 2002.
- (2a) Any of the following substances when purchased for use on animals or plants, as appropriate, held or produced for commercial purposes.



This exemption does not apply to any equipment or devices used to administer, release, apply, or otherwise dispense these substances:

- a. Remedies, vaccines, medications, litter materials, and feeds for animals.
  - b. Rodenticides, insecticides, herbicides, fungicides, and pesticides.
  - c. Defoliants for use on cotton or other crops.
  - d. Plant growth inhibitors, regulators, or stimulators, including systemic and contact or other sucker control agents for tobacco and other crops.
  - e. Semen.
- (3) Products of forests and mines in their original or unmanufactured state when such sales are made by the producer in the capacity of producer.
- (4) Cotton, tobacco, peanuts or other farm products sold to manufacturers for further manufacturing or processing.
- (4a) Baby chicks and poults sold for commercial poultry or egg production.
- (4b) Products of a farm sold in their original state by the producer of the products if the producer is not primarily a retail merchant and ice used to preserve agriculture, aquaculture and commercial fishery products until the products are sold at retail.
- (4c) Any of the following items concerning the housing, raising, or feeding of animals:
- a. Commercially manufactured facilities to be used for commercial purposes for housing, raising, or feeding animals or for housing equipment necessary for these commercial activities.
  - b. Building materials, supplies, fixtures, and equipment that become a part of and are used in the construction, repair, or improvement of an enclosure or a structure specifically designed, constructed, and used for housing, raising, or feeding animals or for housing equipment necessary for one of these commercial activities.
  - c. Commercially manufactured equipment, and parts and accessories for the equipment, used in a facility that is exempt from tax under this subdivision or in an enclosure or a structure whose building materials are exempt from tax under this subdivision.
- (4d) Any of the following tobacco items:
- a. The lease or rental of tobacco sheets used in handling tobacco in the warehouse and transporting tobacco to and from the warehouse.
  - b. A metal flue sold for use in curing tobacco, whether the flue is attached to a handfired furnace or used in connection with a mechanical burner.
  - c. A bulk tobacco barn or rack, parts and accessories attached to the tobacco barn or rack, and any similar apparatus, part, or accessory used to cure or dry tobacco or another crop.
- (4e) Repealed by Session Laws 2006-162, s. 8(b), effective July 24, 2006.
- (4f) Sales of the following to a person who is engaged in the commercial logging business:
- a. Logging machinery. — Logging machinery is machinery used to harvest raw forest products for transport to first market.
  - b. Attachments and repair parts for logging machinery.
  - c. Lubricants applied to logging machinery.
  - d. Fuel used to operate logging machinery.
- (5) Manufactured products produced and sold by manufacturers or producers to other manufacturers, producers, or registered retailers or wholesale merchants, for the purpose of resale except as modified by G.S. 105-164.3(51). This exemption does not extend to or include retail sales to users or consumers not for resale.

- (5a) Products that are subject to tax under Article 5F of this Chapter.
- (5b) Sales to a telephone company regularly engaged in providing telephone service to subscribers on a commercial basis of central office equipment, switchboard equipment, private branch exchange equipment, terminal equipment other than public pay telephone terminal equipment, and parts and accessories attached to the equipment.
- (5c) Sales of towers, broadcasting equipment, and parts and accessories attached to the equipment to a radio or television company licensed by the Federal Communications Commission.
- (5d) Sales of broadcasting equipment and parts and accessories attached to the equipment to a cable service provider. For the purposes of this subdivision, 'broadcasting equipment' does not include cable.
- (6) Repealed by Session Laws 1989 (Regular Session, 1990), c. 1068, s. 1.
- (7) Sales of products of waters in their original or unmanufactured state when such sales are made by the producer in the capacity of producer. Fish and seafoods are likewise exempt when sold by the fisherman in that capacity.
- (8) Sales to a manufacturer of tangible personal property that enters into or becomes an ingredient or component part of tangible personal property that is manufactured. This exemption does not apply to sales of electricity.
- (8a) Sales to a small power production facility, as defined in 16 U.S.C. § 796(17)(A), of fuel used by the facility to generate electricity.
- (9) Sales of boats, fuel oil, lubricating oils, machinery, equipment, nets, rigging, paints, parts, accessories, and supplies to persons for use by them principally in commercial fishing operations within the meaning of G.S. 113-168, except when the property is for use by persons principally to take fish for recreation or personal use or consumption. As used in this subdivision, "fish" is defined as in G.S. 113-129(7).
- (10) Sales of the following to commercial laundries or to pressing and dry cleaning establishments:
  - a. Articles or materials used for the identification of garments being laundered or dry cleaned, wrapping paper, bags, hangers, starch, soaps, detergents, cleaning fluids and other compounds or chemicals applied directly to the garments in the direct performance of the laundering or the pressing and cleaning service.
  - b. Laundry and dry-cleaning machinery, parts and accessories attached to the machinery, and lubricants applied to the machinery.
  - c. Fuel, other than electricity, used in the direct performance of the laundering or the pressing and cleaning service.
- (10a) Sales of the following to a major recycling facility:
  - a. Lubricants and other additives for motor vehicles or machinery and equipment used at the facility.
  - b. Materials, supplies, parts, and accessories, other than machinery and equipment, that are not capitalized by the taxpayer and are used or consumed in the manufacturing and material handling processes at the facility.
  - c. Electricity used at the facility.
- (10b) Recodified as G.S. 105-164.13(10a)c. by Session Laws 2005-276, s. 33.9, effective January 1, 2006.
- (11) Any of the following fuel:
  - a. Motor fuel, as defined in G.S. 105-449.60, except motor fuel for which a refund of the per gallon excise tax is allowed under G.S. 105-449.105A or G.S. 105-449.107.
  - b. Alternative fuel taxed under Article 36D of this Chapter, unless a refund of that tax is allowed under G.S. 105-449.107.

- (11a) Sales of diesel fuel to railroad companies for use in rolling stock other than motor vehicles. The definitions in G.S. 105-333 apply in this subdivision.

Medical Group.

- (12) Sales of any of the following items:
- a. Prosthetic devices.
  - b. Mobility enhancing equipment sold on a prescription.
  - c. Durable medical equipment sold on prescription.
  - d. Durable medical supplies sold on prescription.
- (13) All of the following drugs, including their packaging materials and any instructions or information about the drugs included in the package with them:
- a. Drugs required by federal law to be dispensed only on prescription.
  - b. Over-the-counter drugs sold on prescription.
  - c. Insulin.
- (13a) Repealed by Session Laws 1996, Second Extra Session, c. 14, s. 16.
- (13b) Repealed by Session Laws 1999, c. 438, s. 7, effective October 1, 1999.
- (13c) Nutritional supplements sold by a chiropractic physician at a chiropractic office to a patient as part of the patient's plan of treatment, as authorized by G.S. 90-151.1.

Printed Materials Group.

- (14) Public school books on the adopted list, the selling price of which is fixed by State contract.
- (14a) Recodified as subdivision (33a) by Session Laws 2000-120, s. 5, effective July 14, 2000.

Transactions Group.

- (15) Accounts of purchasers, representing taxable sales, on which the tax imposed by this Article has been paid, that are found to be worthless and actually charged off for income tax purposes may, at corresponding periods, be deducted from gross sales. In the case of a municipality that sells electricity, the account maybe deducted if it meets all the conditions for charge-off that would apply if the municipality were subject to income tax. Any accounts deducted pursuant to this subdivision must be added to gross sales if afterwards collected.
- (16) Sales of an article repossessed by the vendor if tax was paid on the sales price of the article.

Exempt Status Group.

- (17) Sales which a state would be without power to tax under the limitations of the Constitution or laws of the United States or under the Constitution of this State.

Unclassified Group.

- (18) Repealed by Session Laws 2005-276, s. 33.9, effective January 1, 2006.
- (19) Repealed by Session Laws 1991, c. 618, s. 1.
- (20) Sales by blind merchants operating under supervision of the Department of Health and Human Services.



- (21) The lease or rental of motion picture films used for exhibition purposes where the lease or rental of such property is an established business or part of an established business or the same is incidental or germane to said business of the lessee.
- (22) The lease or rental of films, motion picture films, transcriptions and recordings to radio stations and television stations operating under a certificate from the Federal Communications Commission.
- (22a) Sales of audiovisual masters made or used by a production company in making visual and audio images for first generation reproduction. For the purpose of this subdivision, an "audiovisual master" is an audio or video film, tape, or disk or another audio or video storage device from which all other copies are made.
- (23) Sales of the following packaging items:
  - a. Wrapping paper, labels, wrapping twine, paper, cloth, plastic bags, cartons, packages and containers, cores, cones or spools, wooden boxes, baskets, coops and barrels, including paper cups, napkins and drinking straws and like articles sold to manufacturers, producers and retailers, when such materials are used for packaging, shipment or delivery of tangible personal property which is sold either at wholesale or retail and when such articles constitute a part of the sale of such tangible personal property and are delivered with it to the customer.
  - b. A container that is used as packaging by the owner of the container or another person to enclose tangible personal property for delivery to a purchaser of the property and is required to be returned to its owner for reuse.
- (24) Sales of fuel and other items of tangible personal property for use or consumption by or on ocean-going vessels which ply the high seas in interstate or foreign commerce in the transport of freight and/or passengers for hire exclusively, when delivered to an officer or agent of such vessel for the use of such vessel; provided, however, that sales of fuel and other items of tangible personal property made to officers, agents, members of the crew or passengers of such vessels for their personal use shall not be exempted from payment of the sales tax.
- (25) Sales by merchants on the Cherokee Indian Reservation when such merchants are authorized to do business on the Reservation and are paying the tribal gross receipts levy to the Tribal Council.
- (26) Food sold not for profit by public or private school cafeterias within school buildings during the regular school day.
- (26a) Food sold not for profit by a public school cafeteria to a child care center that participates in the Child and Adult Care Food Program of the Department of Public Instruction.
- (27) Meals and food products served to students in dining rooms regularly operated by State or private educational institutions or student organizations thereof.
- (28) Sales of newspapers by newspaper street vendors, by newspaper carriers making door-to-door deliveries, and by means of vending machines and sales of magazines by magazine vendors making door-to-door sales.
- (29) Repealed by Session Laws 2005-435, s. 30, effective September 27, 2005.
- (29a) Repealed by Session Laws 1995 (Regular Session, 1996), c. 646, s. 5.
- (30) Sales from vending machines when sold by the owner or lessee of said machines at a price of one cent (1¢) per sale.
- (31) Sales of meals not for profit to elderly and incapacitated persons by charitable or religious organizations not operated for profit which are

entitled to the refunds provided by G.S. 105-164.14(b), when such meals are delivered to the purchasers at their places of abode.

- (31a) Food sold by a church or religious organization not operated for profit when the proceeds of the sales are actually used for religious activities.
- (31b) Repealed by Session Laws 1996, Second Extra Session, c. 14, s. 16.
- (32) Sales of motor vehicles, the sale of a motor vehicle body to be mounted on a motor vehicle chassis when a certificate of title has not been issued for the chassis, and the sale of a motor vehicle body mounted on a motor vehicle chassis that temporarily enters the State so the manufacturer of the body can mount the body on the chassis.
- (33) Tangible personal property purchased solely for the purpose of export to a foreign country for exclusive use or consumption in that or some other foreign country, either in the direct performance or rendition of professional or commercial services, or in the direct conduct or operation of a trade or business, all of which purposes are actually consummated, or purchased by the government of a foreign country for export which purpose is actually consummated. "Export" shall include the acts of possessing and marshalling such property, by either the seller or the purchaser, for transportation to a foreign country, but shall not include devoting such property to any other use in North Carolina or the United States. "Foreign country" shall not include any territory or possession of the United States.

In order to qualify for this exemption, an affidavit of export indicating compliance with the terms and conditions of this exemption, as prescribed by the Secretary of Revenue, must be submitted by the purchaser to the seller, and retained by the seller to evidence qualification for the exemption.

If the purposes qualifying the property for exemption are not consummated, the purchaser shall be liable for the tax which was avoided by the execution of the aforesaid affidavit as well as for applicable penalties and interest and the affidavit shall contain express provision that the purchaser has recognized and assumed such liability.

The principal purpose of this exemption is to encourage the flow of commerce through North Carolina ports that is now moving through out-of-state ports. However, it is not intended that property acquired for personal use or consumption by the purchaser, including gifts, shall be exempt hereunder.

- (33a) Tangible personal property sold by a retailer to a purchaser within or without this State, when the property is delivered in this State to a common carrier or to the United States Postal Service for delivery to the purchaser or the purchaser's designees outside this State and the purchaser does not subsequently use the property in this State.
- (34) Sales of items by a nonprofit civic, charitable, educational, scientific or literary organization when the net proceeds of the sales will be given or contributed to the State of North Carolina or to one or more of its agencies or instrumentalities, or to one or more nonprofit charitable organizations, one of whose purposes is to serve as a conduit through which such net proceeds will flow to the State or to one or more of its agencies or instrumentalities.
- (35) Sales by a nonprofit civic, charitable, educational, scientific, literary, or fraternal organization when all of the following conditions are met:
  - a. The sales are conducted only upon an annual basis for the purpose of raising funds for the organization's activities.
  - b. The proceeds of the sale are actually used for the organization's activities.



- c. The products sold are delivered to the purchaser within 60 days after the first solicitation of any sale made during the organization's annual sales period.
- (36) Advertising supplements and any other printed matter ultimately to be distributed with or as part of a newspaper.
  - (37) Repealed by Session Laws 2001-424, s. 34.23(a), effective December 1, 2001, and applicable to sales made on or after that date.
  - (38) Food and other items lawfully purchased under the Food Stamp Program, 7 U.S.C. § 51, and supplemental foods lawfully purchased with a food instrument issued under the Special Supplemental Food Program, 42 U.S.C. § 1786, and supplemental foods purchased for direct distribution by the Special Supplemental Food Program.
  - (39) Sales of paper, ink, and other tangible personal property to commercial printers and commercial publishers for use as ingredients or component parts of free distribution periodicals and sales by printers of free distribution periodicals to the publishers of these periodicals. As used in this subdivision, the term "free distribution periodical" means a publication that is continuously published on a periodic basis monthly or more frequently, is provided without charge to the recipient, and is distributed in any manner other than by mail.
  - (40) Sales to the Department of Transportation.
  - (41) Sales of mobile classrooms to local boards of education or to local boards of trustees of community colleges.
  - (42) Tangible personal property that is purchased by a retailer for resale or is manufactured or purchased by a wholesale merchant for resale and then withdrawn from inventory and donated by the retailer or wholesale merchant to either a governmental entity or a nonprofit organization, contributions to which are deductible as charitable contributions for federal income tax purposes.
  - (43) Custom computer software. Custom computer software and the portion of prewritten computer software that is modified or enhanced if the modification or enhancement is designed and developed to the specifications of a specific purchaser and the charges for the modification or enhancement are separately stated.
  - (43a) Computer software delivered electronically or delivered by load and leave.
  - (44) Piped natural gas. — This item is exempt because it is taxed under Article 5E of this Chapter.
  - (45) Sales of the following items to an interstate passenger air carrier for use at its hub:
    - a. Aircraft lubricants, aircraft repair parts, and aircraft accessories.
    - b. Aircraft simulators for flight crew training.
  - (45a) Sales to an interstate air business of tangible personal property that becomes a component part of or is dispensed as a lubricant into commercial aircraft during its maintenance, repair, or overhaul. For the purpose of this subdivision, commercial aircraft includes only aircraft that has a certified maximum take-off weight of more than 12,500 pounds and is regularly used to carry for compensation passengers, commercial freight, or individually addressed letters and packages.
  - (45b) Sales of the following items to an interstate air courier for use at its hub:
    - a. Aircraft lubricants, aircraft repair parts, and aircraft accessories.
    - b. Materials handling equipment, racking systems, and related parts and accessories for the storage or handling and movement of tangible personal property at an airport or in a warehouse or distribution facility.



- (46) Sales of electricity by a municipality whose only wholesale supplier of electric power is a federal agency and who is required by a contract with that federal agency to make payments in lieu of taxes.
- (47) An amount charged as a deposit on a beverage container that is returnable to the vendor for reuse when the amount is refundable or creditable to the vendee, whether or not the deposit is separately charged.
- (48) An amount charged as a deposit on an aeronautic, automotive, industrial, marine, or farm replacement part that is returnable to the vendor for rebuilding or remanufacturing when the amount is refundable or creditable to the vendee, whether or not the deposit is separately charged. This exemption does not include tires or batteries.
- (49) Installation charges when the charges are separately stated.
- (49a) Delivery charges for delivery of direct mail if the charges are separately stated on an invoice or similar billing document given to the purchaser.
- (50) Fifty percent (50%) of the sales price of tangible personal property sold through a coin-operated vending machine, other than tobacco.
- (51) Water delivered by or through main lines or pipes for either commercial or domestic use or consumption.
- (52) Items subject to sales and use tax under G.S. 105-164.4, other than electricity and telecommunications service, if all of the following conditions are met:
  - (a) The items are purchased by a State agency for its own use and in accordance with G.S. 105-164.29A.
  - (b) The items are purchased pursuant to a valid purchase order issued by the State agency that contains the exemption number of the agency and a description of the property purchased, or the items purchased are paid for with a State-issued check, electronic deposit, credit card, procurement card, or credit account of the State agency.
  - (c) For all purchases other than by an agency-issued purchase order, the agency must provide to or have on file with the retailer the agency's exemption number.
- (53) Sales to a professional land surveyor of tangible personal property on which custom aerial survey data is stored in digital form or is depicted in graphic form. Data is custom if it was created to the specifications of the professional land surveyor purchasing the property. A professional land surveyor is a person licensed as a surveyor under Chapter 89C of the General Statutes.
- (54) The following telecommunications services and charges:
  - a. Telecommunications service that is a component part of or is integrated into a telecommunications service that is resold. This exemption does not apply to service purchased by a pay telephone provider who uses the service to provide pay telephone service. Examples of services that are resold include carrier charges for access to an intrastate or interstate interexchange network, interconnection charges paid by a provider of mobile telecommunications service, and charges for the sale of unbundled network elements. An unbundled network element is a network element, as defined in 47 U.S.C. § 153(29), to which access is provided on an unbundled basis pursuant to 47 U.S.C. § 251(c)(3).
  - b. Pay telephone service.
  - c. 911 charges imposed under G.S. 62A-4 or G.S. 62A-23 and remitted to the Emergency Telephone System Fund under G.S. 62A-7 or the Wireless Fund under G.S. 62A-24.

- d. Charges for telecommunications service made by a hotel, motel, or another entity whose gross receipts are taxable under G.S. 105-164.4(a)(3) when the charges are incidental to the occupancy of the entity's accommodations.
  - e. Telecommunications service purchased by a State agency or a unit of local government for the North Carolina Information Highway or another data network owned or leased by the State or unit of local government.
- (55) Sales of electricity for use at an eligible Internet data center and eligible business property to be located and used at an eligible Internet data center. As used in this subdivision, "eligible business property" is property that is capitalized for tax purposes under the Code and is used either:
- a. For the provision of Internet service or Web search portal services as contemplated by G.S. 105-164.3(8e)a., including equipment cooling systems for managing the performance of the property.
  - b. For the generation, transformation, transmission, distribution, or management of electricity, including exterior substations and other business personal property used for these purposes.
  - c. To provide related computer engineering or computer science research.

If the level of investment required by G.S. 105-164.3(8e)d. is not timely made, then the exemption provided under this subdivision is forfeited. If the level of investment required by G.S. 105-164.3(8e)d. is timely made but any specific eligible business property is not located and used at an eligible Internet data center, then the exemption provided for such eligible business property under this subdivision is forfeited. If the level of investment required by G.S. 105-164.3(8e)d. is timely made but any portion of the electricity is not used at an eligible Internet data center, then the exemption provided for such electricity under this subdivision is forfeited. A taxpayer that forfeits an exemption under this subdivision is liable for all past taxes avoided as a result of the forfeited exemption, computed from the date the taxes would have been due if the exemption had not been allowed, plus interest at the rate established under G.S. 105-241.1(i). If the forfeiture is triggered due to the lack of a timely investment required by G.S. 105-164.3(8e)d., then interest is computed from the date the taxes would have been due if the exemption had not been allowed. For all other forfeitures, interest is computed from the time as of which the eligible business property or electricity was put to a disqualifying use. The past taxes and interest are due 30 days after the date the exemption is forfeited. A taxpayer that fails to pay the past taxes and interest by the due date is subject to the provisions of G.S. 105-236. (1957, c. 1340, s. 5; 1959, c. 670; c. 1259, s. 5; 1961, c. 826, s. 2; cc. 1103, 1163; 1963, c. 1169, ss. 7-9; 1965, c. 1041; 1967, c. 756; 1969, c. 907; 1971, c. 990; 1973, c. 476, s. 143; c. 708, s. 1; cc. 1064, 1076; c. 1287, s. 8; 1975, 2nd Sess., c. 982; 1977, c. 771, s. 4; 1977, 2nd Sess., c. 1219, s. 43.6; 1979, c. 46, ss. 1, 2; c. 156, s. 1; c. 201; c. 625, ss. 1, 2; c. 801, ss. 74, 75; 1979, 2nd Sess., c. 1099, s. 1; 1981, cc. 14, 207, 982; 1983, c. 156; c. 570, s. 21; c. 713, ss. 91, 92; c. 873; c. 887; 1983 (Reg. Sess., 1984), c. 1071, s. 1; 1985, c. 114, s. 4; c. 555; c. 656, ss. 24, 25; 1985 (Reg. Sess., 1986), c. 953; c. 973; c. 982, s. 2; 1987, c. 800, s. 1; 1987 (Reg. Sess., 1988), c. 937; 1989, c. 692, ss. 3.5, 3.6; c. 748, s. 1; 1989 (Reg. Sess., 1990), c. 989; c. 1060; c. 1068, ss. 1, 2; 1991, c. 45, s. 17; c. 79, s. 2; c. 618, s. 1; c. 689, s. 314; 1991 (Reg. Sess., 1992), c. 931, ss. 1, 2; c. 935, s. 1; c. 940, s. 1; c. 949, s. 1; c. 1007, s. 44; 1993, c. 484, s.



3; c. 513, s. 11; 1993 (Reg. Sess., 1994), c. 739, s. 1; 1995, c. 390, s. 14; c. 451, s. 1; c. 477, ss. 2, 3; 1995 (Reg. Sess., 1996), c. 646, ss. 4, 5; c. 649, s. 1; 1996, 2nd Ex. Sess., c. 14, ss. 15, 16; 1997-369, s. 2; 1997-370, s. 2; 1997-397, s. 1; 1997-423, s. 3; 1997-443, s. 11A.118(a); 1997-456, s. 27; 1997-506, s. 36; 1997-521, s. 1; 1998-22, s. 6; 1998-55, ss. 9, 15; 1998-98, ss. 14, 14.1, 49, 107; 1998-146, s. 9; 1998-171, s. 10(a), (b); 1998-225, s. 4.3; 1999-337, s. 31; 1999-360, s. 7(a)-(c); 1999-438, ss. 5-12; 2000-120, s. 5; 2000-153, s. 5; 2001-347, s. 2.12; 2001-424, s. 34.23(a); 2001-476, s. 17(e); 2001-509, s. 1; 2001-514, s. 1; 2002-184, s. 9; 2003-284, ss. 45.5, 45.5A; 2003-349, s. 11; 2003-416, ss. 18(a), 21; 2003-431, s. 1; 2004-124, ss. 32B.2, 32B.4; 2005-276, s. 33.9; 2005-435, ss. 30, 31; 2006-19, s. 1; 2006-33, s. 5; 2006-66, s. 24.17(b); 2006-162, ss. 8(a), 8(b); 2006-168, s. 4.2; 2006-252, s. 2.25(b).)

#### **Editor's Note. —**

Session Laws 2006-19, s. 3, provides: "This act does not affect the rights or liabilities of the State, a taxpayer, or another person arising under a statute amended by this act before the effective date of this act, nor does it affect the right to any refund of a tax that accrued under the amended statute before the effective date of its amendment."

Session Laws 2006-66, s. 1.2, provides: "This act shall be known as 'The Current Operations and Capital Improvements Appropriations Act of 2006.'"

Session Laws 2006-66, s. 28.6 is a severability clause.

#### **Effect of Amendments. —**

Session Laws 2006-19, s. 1, effective July 1, 2006, and applicable to items purchased on or after that date, added subdivision (4f).

Session Laws 2006-33, s. 5, effective January 1, 2007, added subdivision (54).

Session Laws 2006-66, s. 24.17(b), effective October 1, 2006, and applicable to sales made on or after that date, added new subdivision (55).

Session Laws 2006-162, ss. 8(a) and (b), effective July 24, 2006, rewrote (1a) which read: "A container sold to a farmer, as defined in subdivision (1) of this section, used for a purpose set out in that subdivision or in packaging and transporting the farmer's product for sale"; and deleted former (4e) which read: "A grain, feed, or soybean storage facility, and parts and accessories attached to the facility."

Session Laws 2006-168, s. 4.2, and Session Laws 2006-252, s. 2.25(b), effective October 1, 2006, and applicable to sales made on or after that date, substituted "such" for "the" twice in the last undesignated paragraph in subdivision (55).

## **§ 105-164.14. Certain refunds authorized.**

(a) Interstate Carriers. — An interstate carrier is allowed a refund, in accordance with this section, of part of the sales and use taxes paid by it on the purchase in this State of railway cars and locomotives, and fuel, lubricants, repair parts, and accessories for a motor vehicle, railroad car, locomotive, or airplane the carrier operates. An "interstate carrier" is a person who is engaged in transporting persons or property in interstate commerce for compensation. The Secretary shall prescribe the periods of time, whether monthly, quarterly, semiannually, or otherwise, with respect to which refunds may be claimed, and shall prescribe the time within which, following these periods, an application for refund may be made.

An applicant for refund shall furnish the following information and any proof of the information required by the Secretary:

- (1) A list identifying the railway cars, locomotives, fuel, lubricants, repair parts, and accessories purchased by the applicant inside or outside this State during the refund period.
- (2) The purchase price of the items listed in subdivision (1) of this subsection.
- (3) The sales and use taxes paid in this State on the listed items.
- (4) The number of miles the applicant's motor vehicles, railroad cars, locomotives, and airplanes were operated both inside and outside this State during the refund period.



(5) Any other information required by the Secretary.

For each applicant, the Secretary shall compute the amount to be refunded as follows. First, the Secretary shall determine the ratio of the number of miles the applicant operated its motor vehicles, railroad cars, locomotives, and airplanes in this State during the refund period to the number of miles it operated them both inside and outside this State during the refund period. Second, the Secretary shall determine the applicant's proportional liability for the refund period by multiplying this mileage ratio by the purchase price of the items identified in subdivision (1) of this subsection and then multiplying the resulting product by the tax rate that would have applied to the items if they had all been purchased in this State. Third, the Secretary shall refund to each applicant the excess of the amount of sales and use taxes the applicant paid in this State during the refund period on these items over the applicant's proportional liability for the refund period.

(a1) **(Repealed for purchases made on or after January 1, 2009)** Passenger Plane Maximum. — An interstate passenger air carrier is allowed a refund of the net amount of sales and use tax paid by it in this State on fuel during a calendar year in excess of two million five hundred thousand dollars (\$2,500,000). The "net amount of sales and use tax paid" is the amount paid less the refund allowed under subsection (a) of this section. A request for a refund must be in writing and must include any information and documentation the Secretary requires. A request for a refund is due within six months after the end of the calendar year for which the refund is claimed. The refund allowed by this subsection is in addition to the refund allowed in subsection (a) of this section. This subsection is repealed for purchases made on or after January 1, 2009.

(a2) Utility Companies. — A utility company is allowed a refund, in accordance with this section, of part of the sales and use taxes paid by it on the purchase in this State of railway cars and locomotives and accessories for a railway car or locomotive the utility company operates. The Secretary shall prescribe the periods of time, whether monthly, quarterly, semiannually, or otherwise, with respect to which refunds may be claimed and shall prescribe the time within which, following these periods, an application for refund may be made.

An applicant for refund shall furnish the following information and any proof of the information required by the Secretary:

- (1) A list identifying the railway cars, locomotives, and accessories purchased by the applicant inside or outside this State during the refund period.
- (2) The purchase price of the items listed in subdivision (1) of this subsection.
- (3) The sales and use taxes paid in this State on the listed items.
- (4) The number of miles the applicant's railway cars and locomotives were operated both inside and outside this State during the refund period.
- (5) Any other information required by the Secretary.

For each applicant, the Secretary shall compute the amount to be refunded as follows. First, the Secretary shall determine the ratio of the number of miles the applicant operated its railway cars and locomotives in this State during the refund period to the number of miles it operated them both inside and outside this State during the refund period. Second, the Secretary shall determine the applicant's proportional liability for the refund period by multiplying this mileage ratio by the purchase price of the items identified in subdivision (1) of this subsection and then multiplying the resulting product by the tax rate that would have applied to the items if they had all been purchased in this State. Third, the Secretary shall refund to each applicant the excess of the amount of sales and use taxes the applicant paid in this State during the refund period on these items over the applicant's proportional liability for the refund period.

(b) **Nonprofit Entities and Hospital Drugs.** — A nonprofit entity included in the following list is allowed a semiannual refund of sales and use taxes paid by it under this Article on direct purchases of tangible personal property and services, other than electricity, telecommunications service, and ancillary service, for use in carrying on the work of the nonprofit entity:

- (1) Hospitals not operated for profit, including hospitals and medical accommodations operated by an authority created under the Hospital Authorities Law, Article 2 of Chapter 131E of the General Statutes.
- (2) Educational institutions not operated for profit.
- (3) Churches, orphanages, and other charitable or religious institutions and organizations not operated for profit.
- (4) Qualified retirement facilities whose property is excluded from property tax under G.S. 105-278.6A.

Sales and use tax liability indirectly incurred by a nonprofit entity on building materials, supplies, fixtures, and equipment that become a part of or annexed to any building or structure that is owned or leased by the nonprofit entity and is being erected, altered, or repaired for use by the nonprofit entity for carrying on its nonprofit activities is considered a sales or use tax liability incurred on direct purchases by the nonprofit entity.

A hospital that is not allowed a refund under this subsection of sales and use taxes paid on its direct purchases of tangible personal property is allowed a semiannual refund of sales and use taxes paid by it on medicines and drugs purchased for use in carrying out its work.

The refunds allowed under this subsection for certain nonprofit entities and for medicines and drugs purchased by hospitals do not apply to organizations, corporations, and institutions that are owned and controlled by the United States, the State, or a unit of local government, except hospital facilities created under Article 2 of Chapter 131E of the General Statutes and nonprofit hospitals owned and controlled by a unit of local government that elect to receive semiannual refunds under this subsection instead of annual refunds under subsection (c).

A request for a refund must be in writing and must include any information and documentation required by the Secretary. A request for a refund for the first six months of a calendar year is due the following October 15; a request for a refund for the second six months of a calendar year is due the following April 15.

(c) **Certain Governmental Entities.** — A governmental entity listed in this subsection is allowed an annual refund of sales and use taxes paid by it under this Article on direct purchases of tangible personal property and services, other than electricity, telecommunications service, and ancillary service. Sales and use tax liability indirectly incurred by a governmental entity on building materials, supplies, fixtures, and equipment that become a part of or annexed to any building or structure that is owned or leased by the governmental entity and is being erected, altered, or repaired for use by the governmental entity is considered a sales or use tax liability incurred on direct purchases by the governmental entity for the purpose of this subsection. A request for a refund must be in writing and must include any information and documentation required by the Secretary. A request for a refund is due within six months after the end of the governmental entity's fiscal year.

This subsection applies only to the following governmental entities:

- (1) A county.
- (2) A city as defined in G.S. 160A-1.
- (2a) A consolidated city-county as defined in G.S. 160B-2.
- (2b), (2c) Repealed by Session Laws 2005-276, s. 7.51(a), effective July 1, 2005, and applicable to sales made on or after that date.
- (3) A metropolitan sewerage district or a metropolitan water district in this State.



- (4) A water and sewer authority created under Chapter 162A of the General Statutes.
  - (5) A lake authority created by a board of county commissioners pursuant to an act of the General Assembly.
  - (6) A sanitary district.
  - (7) A regional solid waste management authority created pursuant to G.S. 153A-421.
  - (8) An area mental health, developmental disabilities, and substance abuse authority, other than a single-county area authority, established pursuant to Article 4 of Chapter 122C of the General Statutes.
  - (9) A district health department, or a public health authority created pursuant to Part 1A of Article 2 of Chapter 130A of the General Statutes.
  - (10) A regional council of governments created pursuant to G.S. 160A-470.
  - (11) A regional planning and economic development commission or a regional economic development commission created pursuant to Chapter 158 of the General Statutes.
  - (12) A regional planning commission created pursuant to G.S. 153A-391.
  - (13) A regional sports authority created pursuant to G.S. 160A-479.
  - (14) A public transportation authority created pursuant to Article 25 of Chapter 160A of the General Statutes.
  - (14a) A facility authority created pursuant to Part 4 of Article 20 of Chapter 160A of the General Statutes.
  - (15) A regional public transportation authority created pursuant to Article 26 of Chapter 160A of the General Statutes, or a regional transportation authority created pursuant to Article 27 of Chapter 160A of the General Statutes.
  - (16) A local airport authority that was created pursuant to a local act of the General Assembly.
  - (17) A joint agency created by interlocal agreement pursuant to G.S. 160A-462 to operate a public broadcasting television station.
  - (18) Repealed by Session Laws 2001-474, s. 7, effective November 29, 2001.
  - (19) Repealed by Session Laws 2001-474, s. 7, effective November 29, 2001.
  - (20) A constituent institution of The University of North Carolina, but only with respect to sales and use tax paid by it for tangible personal property or services that are eligible for refund under this subsection acquired by it through the expenditure of contract and grant funds.
  - (21) The University of North Carolina Health Care System.
  - (22) A regional natural gas district created pursuant to Article 28 of Chapter 160A of the General Statutes.
- (d) Late Applications. — Refunds applied for more than three years after the due date are barred.
- (d1) Alcoholic Beverages. — The refunds authorized by this section do not apply to purchases of alcoholic beverages, as defined in G.S. 18B-101.
- (e) State Agencies. — The State is allowed quarterly refunds of local sales and use taxes paid indirectly by the State agency on building materials, supplies, fixtures, and equipment that become a part of or annexed to a building or structure that is owned or leased by the State agency and is being erected, altered, or repaired for use by the State agency.
- A person who pays local sales and use taxes on building materials or other tangible personal property for a State building project shall give the State agency for whose project the property was purchased a signed statement containing all of the following information:
- (1) The date the property was purchased.



- (2) The type of property purchased.
- (3) The project for which the property was used.
- (4) If the property was purchased in this State, the county in which it was purchased.
- (5) If the property was not purchased in this State, the county in which the property was used.
- (6) The amount of sales and use taxes paid.

If the property was purchased in this State, the person shall attach a copy of the sales receipt to the statement. A State agency to whom a statement is submitted shall verify the accuracy of the statement.

Within 15 days after the end of each calendar quarter, every State agency shall file with the Secretary a written application for a refund of taxes to which this subsection applies paid by the agency during the quarter. The application shall contain all information required by the Secretary. The Secretary shall credit the local sales and use tax refunds directly to the General Fund.

(f) Information to Counties and Cities. — The Secretary must give information on refunds of tax made under this section to a designated county or city official within 30 days after the official makes a written request to the Secretary for the information. For a request made by a county official, the Secretary must give the official a list of each claimant that received a refund in the past 12 months of at least one thousand dollars (\$1,000) of tax paid to the county. For a request made by a city official, the Secretary must give the official a list of each claimant that received a refund in the past 12 months of at least one thousand dollars (\$1,000) of tax paid to all the counties in which the city is located. The list must include the name and address of each of these claimants and the amount of the refund received from each county covered by the request.

A claimant that has received a refund under this section of tax paid to a county must give information on the refund to a designated official of the county or a city located in the county. The claimant must give the information to the county or city official within 30 days after the official makes a written request to the claimant for the information. For a request by a county or city official, the claimant must give the official a copy of the request for the refund and any supporting documentation requested by the official to verify the request. If a claimant determines that a refund it has received under this section is incorrect, the claimant must file an amended request for a refund.

For the purpose of this subsection, a designated county official is the chair of the board of county commissioners or a county official designated in a resolution adopted by the Board, and a designated city official is the mayor of the city or a city official designated in a resolution adopted by the city's governing board. Information given to a county or city official under this section is not a public record and may not be disclosed except as provided in G.S. 153A-148.1 or G.S. 160A-208.1.

(g) Major Recycling Facilities. — The owner of a major recycling facility is allowed an annual refund of sales and use taxes paid by it under this Article on building materials, building supplies, fixtures, and equipment that become a part of the real property of the recycling facility. Liability incurred indirectly by the owner for sales and use taxes on these items is considered tax paid by the owner. A request for a refund must be in writing and must include any information and documentation required by the Secretary. A request for a refund is due within six months after the end of the major recycling facility's fiscal year. Refunds applied for after the due date are barred.

(h) Low Enterprise or Development Tier Machinery. — Eligible taxpayers are allowed an annual refund of sales and use taxes paid under this Article as provided in this subsection.

- (1) Refunds. — An eligible person is allowed an annual refund of sales and use taxes paid by it under this Article at the general rate of tax on

eligible machinery and equipment it purchases for use in an enterprise tier one area or an enterprise tier two area, as defined in G.S. 105-129.3 or a development tier one area, as defined in G.S. 143B-437.08. Liability incurred indirectly by the taxpayer for sales and use taxes on these items is considered tax paid by the taxpayer. A request for a refund must be in writing and must include any information and documentation required by the Secretary. A request for a refund is due within six months after the end of the State's fiscal year. Refunds applied for after the due date are barred.

- (2) **Eligibility.** — A person is eligible for the refund provided in this subsection if it is engaged primarily in one of the businesses listed in G.S. 105-129.4(a) in an enterprise tier one area or an enterprise tier two area, as defined in G.S. 105-129.3 or if it is engaged primarily in one of the businesses listed in G.S. 105-129.83(a) in a development tier one area, as defined in G.S. 143B-437.08.

- (3) **Machinery and equipment.** — For the purpose of this subsection, the term “machinery and equipment” means engines, machinery, equipment, tools, and implements used or designed to be used in one of the businesses listed in G.S. 105-129.4(a) or G.S. 105-129.83(a). Machinery and equipment are eligible for the refund provided in this subsection if the taxpayer places them in service in an enterprise tier one area or an enterprise tier two area, as defined in G.S. 105-129.3, or a development tier one area, as defined in G.S. 143B-437.08, capitalizes them for tax purposes under the Code, and does not lease them to another party.

(i) **(Repealed for taxes paid on or after January 1, 2008) Nonprofit Insurance Companies.** — Eligible nonprofit insurance companies are allowed an annual refund of sales and use taxes paid under this Article as provided in this subsection.

- (1) **Refunds.** — An eligible nonprofit insurance company is allowed an annual refund of sales and use taxes paid by it under this Article on building materials, building supplies, fixtures, and equipment that become a part of its real property. Liability incurred indirectly by the company for sales and use taxes on these items is considered tax paid by the company. A request for a refund must be in writing and must include any information and documentation required by the Secretary. A request for a refund is due within six months after the end of the insurance company's fiscal year. Refunds applied for after the due date are barred.

- (2) **Eligibility.** — An insurance company is eligible for the refund provided in this subsection if it meets all of the following conditions:

- a. It is a nonprofit corporation.
- b. It is operated for the exclusive purpose of providing insurance and annuity contracts to or for the benefit of (i) organizations exempt from federal income tax under section 501(c)(3) of the Code and their employees or (ii) public institutions and their employees.
- c. The Secretary of Commerce has certified that the insurance company will invest at least twenty million dollars (\$20,000,000) in constructing a facility in this State for the conduct of its operations.

- (3) **Forfeiture.** — If an eligible insurance company does not make the required minimum investment within five years after its first refund under this subsection, it loses its eligibility and forfeits all refunds already received under this subsection. Upon forfeiture, the company is liable for tax under this Article equal to the amount of all past taxes refunded under this subsection, plus interest at the rate established



in G.S. 105-241.1(i), computed from the date each refund was issued. The tax and interest are due 30 days after the date of the forfeiture. A company that fails to pay the tax and interest is subject to the penalties provided in G.S. 105-236.

(j) **(Repealed for sales made on or after January 1, 2013)** Certain Industrial Facilities. — The owner of an eligible facility is allowed an annual refund of sales and use taxes as provided in this subsection.

- (1) Refund. — The owner of an eligible facility is allowed an annual refund of sales and use taxes paid by it under this Article on qualified building materials, building supplies, fixtures, and equipment that become a part of the real property of the eligible facility. Liability incurred indirectly by the owner for sales and use taxes on these items is considered tax paid by the owner. Building materials, building supplies, fixtures, and equipment are qualified if they are installed in the construction of the facility. Purchases for subsequent repair, renovation, or equipment replacement are not qualified.

A request for a refund must be in writing and must include any information and documentation required by the Secretary. A request for a refund is due within six months after the end of the State's fiscal year. Refunds applied for after the due date are barred.

- (2) Eligibility. — A facility is eligible under this subsection if it meets all of the following conditions:
  - a. It is primarily engaged in one of the industries listed in this subsection.
  - b. **(See editor's note for effective date)** The Secretary of Commerce has certified that the owner of the facility will invest at least the required amount of private funds to construct the facility in this State. For the purpose of this subsection, costs of construction may include costs of acquiring and improving land for the facility and costs of equipment for the facility. If the facility is located in a development tier one area as defined in G.S. 143B-437.08 the required amount is fifty million dollars (\$50,000,000). For all other facilities, the required amount is one hundred million dollars (\$100,000,000). In the case of a computer manufacturing facility, the owner may invest these funds either directly or indirectly through a related entity or strategic partner as those terms are defined in G.S. 105-129.61. For the purpose of this subsection, the term "facility" has the same meaning as under G.S. 105-129.61.
  - c. If the facility is primarily engaged in financial services, securities operations, and related systems development, it satisfies all of the following conditions:
    1. It is owned and operated by the business for which the services are provided or by a related entity of that business as defined in G.S. 105-130.7A.
    2. No part of it is leased to a third-party tenant that is not a related entity of the business.
- (3) Industries. — This subsection applies to the following industries:
  - a. Air courier services. Air courier services has the same meaning as in G.S. 105-129.2.
  - b. Aircraft manufacturing. Aircraft manufacturing means manufacturing or assembling complete aircraft.
  - c. Bioprocessing. Bioprocessing means biomanufacturing or processing that includes the culture of cells to make commercial products, the purification of biomolecules from cells, or the use of these molecules in manufacturing.



- d. Computer manufacturing. Computer manufacturing means manufacturing or assembling electronic computers, such as personal computers, workstations, laptops, and computer servers. The term includes the assembly or integration of processors, coprocessors, memory, storage, and input/output devices into a user-programmable final product. The term includes manufacturing or assembling computer peripheral equipment, such as storage devices, printers, monitors, input/output devices, and terminals only if the manufacture or assembly of this peripheral equipment occurs at a facility or campus at which the taxpayer also manufactures or assembles electronic computers.
- e. Reserved for future codification purposes.
- f. Financial services, securities operations, and related systems development. Financial services, securities operations, and related systems development means one or both of the following functions:
  - 1. Performing analysis, operations, trading, or sales functions for investment banking, securities dealing and brokering, securities trading and underwriting, investment portfolio/mutual fund management, retirement services, or employee benefit administration.
  - 2. Developing information technology systems and applications, managing and enhancing operating applications and databases, or providing, operating, and maintaining telecommunications networks and distributed and mainframe computing resources for investment banking, securities dealing and brokering, securities trading and underwriting, investment portfolio/mutual fund management, retirement services, or employee benefit administration.
- g. Motor vehicle manufacturing. Motor vehicle manufacturing means any of the following:
  - 1. Manufacturing complete automobiles and light-duty motor vehicles.
  - 2. Manufacturing heavy-duty truck chassis and assembling complete heavy-duty trucks, buses, heavy-duty motor homes, and other special purpose heavy-duty motor vehicles for highway use.
  - 3. Manufacturing complete military armored vehicles, nonarmored military universal carriers, combat tanks, and specialized components for combat tanks.
- h. Reserved for future codification purposes.
- i. Reserved for future codification purposes.
- j. Pharmaceutical and medicine manufacturing and distribution of pharmaceuticals and medicines. Pharmaceutical and medicine manufacturing means any of the following:
  - 1. Manufacturing biological and medicinal products. For the purpose of this sub-subdivision, a biological product is a preparation that is synthesized from living organisms or their products and used medically as a diagnostic, preventive, or therapeutic agent. For the purpose of this sub-subdivision, bacteria, viruses, and their parts are considered living organisms.
  - 2. Processing botanical drugs and herbs by grading, grinding, and milling.
  - 3. Isolating active medicinal principals from botanical drugs and herbs.

4. Manufacturing pharmaceutical products intended for internal and external consumption in forms such as ampoules, tablets, capsules, vials, ointments, powders, solutions, and suspensions.
  - k. Reserved for future codification purposes.
  - l. Reserved for future codification purposes.
  - m. Semiconductor manufacturing. Semiconductor manufacturing means development and production of semiconductor material, devices, or components.
- (4) Forfeiture. — If the owner of an eligible facility does not make the required minimum investment within five years after the first refund under this subsection with respect to the facility, the facility loses its eligibility and the owner forfeits all refunds already received under this subsection. Upon forfeiture, the owner is liable for tax under this Article equal to the amount of all past taxes refunded under this subsection, plus interest at the rate established in G.S. 105-241.1(i), computed from the date each refund was issued. The tax and interest are due 30 days after the date of the forfeiture. A person that fails to pay the tax and interest is subject to the penalties provided in G.S. 105-236.
- (5) Sunset. This subsection is repealed for sales made on or after January 1, 2013.
- (k) Reports. — The Department of Revenue shall publish by May 1 of each year the following information itemized by taxpayer for the 12-month period ending the preceding December 31:
- (1) The number of taxpayers claiming a refund allowed in subsections (a1), (g), (h), (i), (j), and (l) of this section.
  - (2) The total amount of purchases with respect to which refunds were claimed.
  - (3) The total cost to the General Fund of the refunds claimed.
- (l) (Repealed for purchases made on or after January 1, 2009)**
- Aviation Fuel for Motorsports Events. — A professional motorsports racing team or a motorsports sanctioning body is allowed a refund of the sales and use tax paid by it in this State on aviation fuel that is used to travel to or from a motorsports event in this State, to travel to a motorsports event in another state from a location in this State, or to travel to this State from a motorsports event in another state. For the purposes of this subsection, a “motorsports event” includes a motorsports race, a motorsports sponsor event, and motor sports testing. A request for a refund must be in writing and must include any information and documentation the Secretary requires. A request for a refund is due within six months after the end of the State’s fiscal year. Refunds applied for after the due date are barred. This subsection is repealed for purchases made on or after January 1, 2009.
- (m) (Effective July 1, 2007) Professional Motor Racing Vehicles.** — A professional motorsports racing team is allowed a refund of fifty percent (50%) of the sales and use tax paid by it in this State on tangible personal property, other than tires or accessories, that comprises any part of a professional motor racing vehicle. For the purposes of this subsection, “accessories” includes instrumentation, telemetry, consumables, and paint. A request for a refund must be in writing and must include any information and documentation the Secretary requires. A request for a refund is due within six months after the end of the State’s fiscal year. Refunds applied for after the due date are barred. (1957, c. 1340, s. 5; 1961, c. 826, s. 2; 1963, cc. 169, 1134; 1965, c. 1006; 1967, c. 1110, s. 6; 1969, c. 1298, s. 1; 1971, cc. 89, 286; 1973, c. 476, s. 193; 1977, c. 895, s. 1; 1979, c. 47; c. 801, ss. 77, 79-82; 1983, c. 594, s. 1; c. 891, s. 13; 1983 (Reg. Sess., 1984), c. 1097, s. 7; 1985, cc. 431, 523; 1985 (Reg. Sess., 1986), c.



863, s. 5; 1987, c. 557, ss. 8, 9; c. 850, s. 16; 1987 (Reg. Sess., 1988), c. 1044, s. 5; 1989, c. 168, s. 5; c. 251; c. 780, s. 1.1; 1989 (Reg. Sess., 1990), c. 936, s. 4; 1991, c. 356, s. 1; c. 689, s. 190.1(b); 1991 (Reg. Sess., 1992), c. 814, s. 1; c. 917, s. 1; c. 1030, s. 25; 1995, c. 17, s. 8; c. 21, s. 1; c. 458, s. 7; c. 461, s. 13; c. 472, s. 1; 1995 (Reg. Sess., 1996), c. 646, s. 6; 1996, 2nd Ex. Sess., c. 18, s. 15.7(a); 1997-340, s. 1; 1997-393, s. 2; 1997-423, s. 1; 1997-426, s. 5; 1997-502, s. 3; 1998-55, ss. 16, 17; 1998-98, s. 15; 1998-212, ss. 29A.4(a), 29A.14(i), 29A.18(b); 1999-360, ss. 4, 5(a), (b), 9; 1999-438, s. 14; 2000-56, s. 9; 2000-140, s. 92.A(c); 2001-414, s. 1; 2001-474, s. 7; 2003-416, ss. 18(b)-(e), 23; 2003-431, ss. 2, 3; 2003-435, 2nd Ex. Sess., s. 4.1; 2004-110, s. 5.1; 2004-124, s. 32B.1; 2004-170, s. 21(a); 2004-204, 1st Ex. Sess., s. 3; 2005-276, ss. 7.27(a), 7.51(a), 33.12; 2005-429, s. 2.12; 2005-435, ss. 32(a), 33(a)-(c), 61, 61.1; 2006-33, s. 6; 2006-66, ss. 24.6(a), (b), (c), 24.10(b), 24.13(b), 24A.1(a); 2006-162, ss. 9, 27; 2006-168, s. 3.1; 2006-252, ss. 2.2, 2.3.)

#### Editor's Note. —

Session Laws 2005-435, s. 62, as amended by Session Laws 2006-66, s. 24.6(c), provides that Part III of the act, which adds new subsections (a1) and (k) [recodified as (l)] to G.S. 105-164.14, becomes effective January 1, 2005, applies to purchases made on or after that date. Part III of Session Laws 2005-435 does not affect the rights or liabilities of the State, a taxpayer, or another person arising under a statute amended or repealed by Part III before the effective date of its amendment or repeal; nor does it affect the right to any refund or credit of a tax that accrued under the amended or repealed statute before the effective date of its amendment or repeal. Session Laws 2006-66, s. 24.6(c), deleted the sunset provision for G.S. 105-164.14 for purchases made on or after January 1, 2007.

Session Laws 2006-66, s. 1.2, provides: "This act shall be known as 'The Current Operations and Capital Improvements Appropriations Act of 2006'."

Session Laws 2006-66, s. 28.6 is a severability clause.

Session Laws 2006-168, s. 3.2, provides: "The changes made to G.S. 105-164.14(j)(2)b. by Section 3.1 of this act become effective January 1, 2005, and apply to sales made on or after that date. The remainder of this part becomes effective July 1, 2006, and applies to purchases made on or after that date."

#### Effect of Amendments. —

Session Laws 2006-33, s. 6, effective January 1, 2007, substituted "electricity, telecommunications service, and ancillary" for "electricity and telecommunications" in subsections (b) and (c).

Session Laws 2006-66, s. 24.6(a) and (b), effective July 1, 2006, in subsection (a1), added the last sentence; and in subsection (l), added "Aviation Fuel for" preceding "Motorsports Events" and "professional" preceding "motorsports racing" and added the last sentence.

Session Laws 2006-66, s. 24.10(b), effective July 1, 2007, and applicable to purchases made on or after that date, added new subsection (m).

Session Laws 2006-66, s. 24.13(b), effective July 1, 2006, applicable to purchases made on or after that date, added new subsection (a2).

Session Laws 2006-66, s. 24A.1(a), effective July 1, 2006, and applicable to purchases made on or after that date, added new subsection (d1).

Session Laws 2006-162, s. 9, effective July 24, 2006, substituted "subsections (a1), (g), (h), (i), (j), and (l)" for "subsections (g), (h), (i), and (j)" in the middle of subdivision (k)(1).

Session Laws 2006-162, s. 27, effective July 24, 2006, deleted the former last sentence in the first paragraph of subsection (c), which read: "The Secretary shall make an annual report of the Department of Public Instruction and the Fiscal Research Division of the General Assembly by March 1 of the amount of refunds, identified by taxpayer, claimed under subdivisions (2b) and (2c) of this subsection over the preceding year."

Session Laws 2006-168, s. 3.1, effective January 1, 2005, and applicable to sales made on or after that date, substituted "For the purpose of this subsection," for "In the case of a computer manufacturing facility," at the beginning of the last sentence in subdivision (j)(2)(b); effective July 1, 2006, and applicable to purchases made on or after that date, in subdivision (j)(2), substituted "all" for "both" in the introductory paragraph and added subdivision (j)(2)(c); added subdivision (j)(3)(f); and substituted "January 1, 2013" for "January 1, 2010" at the end of subdivision (j)(5).

Session Laws 2006-252, ss. 2.2 and 2.3, effective January 1, 2007, in subsection (h), inserted "or Development" in the catchline, inserted "or a development tier one area, as defined in G.S. 143B-437.08" in the first sentence of subdivision (1), added "or if it is engaged primarily in one of the businesses listed in G.S. 105-129.83(a) in a development tier one area, as defined in G.S. 143B-437.08" at the end of



subdivision (2), and inserted “or G.S. 105-129.83(a)” at the end of the first sentence, and “or a development tier one area, as defined in G.S. 143B-437.08” in the second sentence, of subdivision (3); and in subdivision (j)(2)b, sub-

stituted “located in a development tier one area as defined in G.S. 143B-437.08” for “located in an enterprise tier one, two, or three area as defined in G.S. 105-129.3.”

## Part 4. Reporting and Payment.

### § 105-164.15A. Effective date of rate changes for services.

The effective date of a rate change for a service taxable under this Article is administered as follows:

- (1) For a rate increase, the new rate applies to the first billing period that starts on or after the effective date. For a service billed after it is provided, the first billing period starts on the effective date. For a service billed before it is provided, the first billing period starts on the first day of the month after the effective date.
- (2) For a rate decrease, the new rate applies to bills rendered on or after the effective date. (2005-276, s. 33.13; 2006-162, s. 10.)

**Effect of Amendments.** — Session Laws 2006-162, s. 10, effective July 24, 2006, added (1).

### § 105-164.16. (Effective until October 1, 2007) Returns and payment of taxes.

(a) General. — Sales and use taxes are payable quarterly, monthly, or semimonthly as specified in this section. A return is due quarterly or monthly as specified in this section. A return must be filed with the Secretary on a form prescribed by the Secretary and in the manner required by the Secretary. A return must be signed by the taxpayer or the taxpayer’s agent.

A sales tax return must state the taxpayer’s gross sales for the reporting period, the amount and type of sales made in the period that are exempt from tax under G.S. 105-164.13 or are elsewhere excluded from tax, the amount of tax due, and any other information required by the Secretary. A use tax return must state the purchase price of tangible personal property or services that were purchased or received during the reporting period and are subject to tax under G.S. 105-164.6, the amount of tax due, and any other information required by the Secretary. Returns that do not contain the required information will not be accepted. When an unacceptable return is submitted, the Secretary will require a corrected return to be filed.

(b) Quarterly. — A taxpayer who is consistently liable for less than one hundred dollars (\$100.00) a month in State and local sales and use taxes must file a return and pay the taxes due on a quarterly basis. A quarterly return covers a calendar quarter and is due by the last day of the month following the end of the quarter.

(b1) Monthly. — A taxpayer who is consistently liable for more than one hundred dollars (\$100.00) but less than ten thousand dollars (\$10,000) a month in State and local sales and use taxes must file a return and pay the taxes due on a monthly basis. A monthly return is due by the 20th day of the month following the calendar month covered by the return.

(b2) Semimonthly. — A taxpayer who is consistently liable for at least ten thousand dollars (\$10,000) a month in State and local sales and use taxes must pay the tax twice a month and must file a return on a monthly basis. One semimonthly payment covers the period from the first day of the month through the 15th day of the month. The other semimonthly payment covers the

**G.S. 105-164.16 is set out twice. See note.**

period from the 16th day of the month through the last day of the month. The semimonthly payment for the period that ends on the 15th day of the month is due by the 25th day of that month. The semimonthly payment for the period that ends on the last day of the month is due by the 10th day of the following month.

A return covers both semimonthly payment periods. The return is due by the 20th day of the month following the month of the payment periods covered by the return. A taxpayer is not subject to interest on or penalties for an underpayment for a semimonthly payment period if the taxpayer timely pays at least ninety-five percent (95%) of the lesser of the following and includes the underpayment with the monthly return for those semimonthly payment periods:

(1) The amount due for each semimonthly payment period.

(2) The average semimonthly payment for the prior calendar year.

(b3) Category. — The Secretary must monitor the amount of State and local sales and use taxes paid by a taxpayer or estimate the amount of taxes to be paid by a new taxpayer and must direct each taxpayer to pay tax and file returns in accordance with the appropriate schedule. In determining the amount of taxes due from a taxpayer, the Secretary must consider the total amount due from all places of business owned or operated by the same person as the amount due from that person. A taxpayer must file a return and pay tax in accordance with the Secretary's direction until notified in writing to file and pay under a different schedule.

(c) Repealed by Session Laws 2001-427, s. 6(a), effective January 1, 2002, and applicable to taxes levied on or after that date.

(d) **(Effective for taxable years beginning before January 1, 2010)** Use Tax on Out-of-State Purchases. — Use tax payable by an individual who purchases tangible personal property outside the State for a nonbusiness purpose is due on an annual basis. For an individual who is not required to file an individual income tax return under Part 2 of Article 4 of this Chapter, the annual reporting period ends on the last day of the calendar year and a use tax return is due by the following April 15. For an individual who is required to file an individual income tax return, the annual reporting period ends on the last day of the individual's income tax year, and the use tax must be paid on the income tax return as provided in G.S. 105-269.14. (1957, c. 1340, s. 5; 1967, c. 1110, s. 6; 1973, c. 476, s. 193; 1979, c. 801, s. 83; 1983 (Reg. Sess., 1984), c. 1097, s. 14; 1985, c. 656, s. 26; 1985 (Reg. Sess., 1986), c. 1007; 1987, c. 557, s. 6; 1989 (Reg. Sess., 1990), c. 945, s. 1; 1991, c. 690, s. 4; 1993, c. 450, s. 7; 1997-77, s. 1; 1998-121, s. 1; 1999-341, s. 1; 2000-120, s. 11; 2001-347, s. 2.14; 2001-414, s. 18; 2001-427, s. 6(a); 2001-430, s. 7; 2002-184, ss. 10, 11; 2003-284, ss. 44.1, 45.8; 2003-416, s. 26; 2005-276, s. 33.24; 2006-162, s. 5(b).)

**Section Set Out Twice.** — The section set out above is effective until October 1, 2007. For this section effective October 1, 2007, see the following section, also numbered G.S. 105-164.16.

**Effect of Amendments.** —

Session Laws 2006-162, s. 5(b), effective July 24, 2006, in the second sentence of the second paragraph in (a), substituted "property or services that were purchased" for "property that was purchased" and substituted "are subject" for "is subject."

**§ 105-164.16. (Effective October 1, 2007) Returns and payment of taxes.**

(a) General. — Sales and use taxes are payable when a return is due. A return is due quarterly or monthly as specified in this section. A return must



**G.S. 105-164.16 is set out twice. See notes.**

be filed with the Secretary on a form prescribed by the Secretary and in the manner required by the Secretary. A return must be signed by the taxpayer or the taxpayer's agent.

A sales tax return must state the taxpayer's gross sales for the reporting period, the amount and type of sales made in the period that are exempt from tax under G.S. 105-164.13 or are elsewhere excluded from tax, the amount of tax due, and any other information required by the Secretary. A use tax return must state the purchase price of tangible personal property or services that were purchased or received during the reporting period and are subject to tax under G.S. 105-164.6, the amount of tax due, and any other information required by the Secretary. Returns that do not contain the required information will not be accepted. When an unacceptable return is submitted, the Secretary will require a corrected return to be filed.

(b) Quarterly. — A taxpayer who is consistently liable for less than one hundred dollars (\$100.00) a month in State and local sales and use taxes must file a return and pay the taxes due on a quarterly basis. A quarterly return covers a calendar quarter and is due by the last day of the month following the end of the quarter.

(b1) Monthly. — A taxpayer who is consistently liable for more than one hundred dollars (\$100.00) a month in State and local sales and use taxes must file a return and pay the taxes due on a monthly basis. A monthly return is due by the 20th day of the month following the calendar month covered by the return.

(b2) Prepayment. — A taxpayer who is consistently liable for at least ten thousand dollars (\$10,000) a month in State and local sales and use taxes must make a monthly prepayment of the next month's tax liability. The prepayment is due on the date a monthly return is due. The prepayment must equal at least sixty-five percent (65%) of any of the following:

- (1) The amount of tax due for the current month.
- (2) The amount of tax due for the same month in the preceding year.
- (3) The average monthly amount of tax due in the preceding calendar year.

(b3) Category. — The Secretary must monitor the amount of State and local sales and use taxes paid by a taxpayer or estimate the amount of taxes to be paid by a new taxpayer and must direct each taxpayer to pay tax and file returns as required by this section. In determining the amount of taxes due from a taxpayer, the Secretary must consider the total amount due from all places of business owned or operated by the same person as the amount due from that person. A taxpayer must file a return and pay tax in accordance with the Secretary's direction.

(c) Repealed by Session Laws 2001-427, s. 6(a), effective January 1, 2002, and applicable to taxes levied on or after that date.

(d) **(Effective for taxable years beginning before January 1, 2010)** Use Tax on Out-of-State Purchases. — Use tax payable by an individual who purchases tangible personal property outside the State for a nonbusiness purpose is due on an annual basis. For an individual who is not required to file an individual income tax return under Part 2 of Article 4 of this Chapter, the annual reporting period ends on the last day of the calendar year and a use tax return is due by the following April 15. For an individual who is required to file an individual income tax return, the annual reporting period ends on the last day of the individual's income tax year, and the use tax must be paid on the income tax return as provided in G.S. 105-269.14.

(d) **(Effective for taxable years beginning on or after January 1, 2010)** Use Tax on Out-of-State Purchases. — Notwithstanding subsection (b),



**G.S. 105-164.16 is set out twice. See notes.**

an individual who purchases tangible personal property outside the State for a nonbusiness purpose shall file a use tax return on an annual basis. The annual reporting period ends on the last day of the calendar year. The return is due by the due date, including any approved extensions, for filing the individual's income tax return. (1957, c. 1340, s. 5; 1967, c. 1110, s. 6; 1973, c. 476, s. 193; 1979, c. 801, s. 83; 1983 (Reg. Sess., 1984), c. 1097, s. 14; 1985, c. 656, s. 26; 1985 (Reg. Sess., 1986), c. 1007; 1987, c. 557, s. 6; 1989 (Reg. Sess., 1990), c. 945, s. 1; 1991, c. 690, s. 4; 1993, c. 450, s. 7; 1997-77, s. 1; 1998-121, s. 1; 1999-341, s. 1; 2000-120, s. 11; 2001-347, s. 2.14; 2001-414, s. 18; 2001-427, s. 6(a); 2001-430, s. 7; 2002-184, ss. 10, 11; 2003-284, ss. 44.1, 45.8; 2003-416, s. 26; 2005-276, s. 33.24; 2006-162, s. 5(b); 2006-33, s. 9.)

**Section Set Out Twice.** — The section above is effective October 1, 2007. For the section as in effect until October 1, 2007, see the preceding section, also numbered G.S. 105-164.16.

**Subsection (d) Set Out Twice.** — The first version of subsection (d) set out above is effective for taxable years beginning before January 1, 2010. The second version of subsection (d) set out above is effective for taxable years beginning on or after January 1, 2010.

**Effect of Amendments.** — Session Laws 2006-33, s. 9, effective October 1, 2007, substi-

tuted “when a return is due” for “quarterly, monthly, or semimonthly as specified in this section” in the first sentence of subsection (a); deleted “but less than ten thousand dollars (\$10,000)” following “(\$100.00)” in the first sentence of subsection (b1); rewrote subsection (b2); in (b3), substituted “as required by this section” for “in accordance with the appropriate schedule” at the end of the first sentence, and “direction” for “direction until notified in writing to file and pay under a different schedule” in the last sentence.

**§ 105-164.21B:** Repealed by Session Laws 2006-151, s. 9, effective January 1, 2007.

## Part 5. Records Required to Be Kept.

### § 105-164.27A. Direct pay permit.

(a) **Tangible Personal Property.** — A direct pay permit for tangible personal property authorizes its holder to purchase any tangible personal property without paying tax to the seller and authorizes the seller to not collect any tax on a sale to the permit holder. A person who purchases tangible personal property under a direct pay permit issued under this subsection is liable for use tax due on the purchase. The tax is payable when the property is placed in use. A direct pay permit issued under this subsection does not apply to taxes imposed under G.S. 105-164.4(a)(1f) or G.S. 105-164.4(a)(4a).

A person who purchases direct mail may apply to the Secretary for a direct pay permit for the purchase of direct mail. The direct pay permit issued for direct mail does not apply to any purchase other than the purchase of direct mail.

A person who purchases tangible personal property whose tax status cannot be determined at the time of the purchase because of one of the reasons listed below may apply to the Secretary for a direct pay permit for tangible personal property:

- (1) The place of business where the property will be used is not known at the time of the purchase and a different tax consequence applies depending on where the property is used.
- (2) The manner in which the property will be used is not known at the time of the purchase and one or more of the potential uses is taxable but others are not taxable.

(b) **Telecommunications Service.** — A direct pay permit for telecommunications service authorizes its holder to purchase telecommunications service and ancillary service without paying tax to the seller and authorizes the seller to not collect any tax on a sale to the permit holder. A person who purchases these services under a direct pay permit must file a return and pay the tax due monthly to the Secretary. A direct pay permit issued under this subsection does not apply to any tax other than the tax on telecommunications service and ancillary service.

A call center that purchases telecommunications service that originates outside this State and terminates in this State may apply to the Secretary for a direct pay permit for telecommunications service and ancillary service. A call center is a business that is primarily engaged in providing support services to customers by telephone to support products or services of the business. A business is primarily engaged in providing support services by telephone if at least sixty percent (60%) of its calls are incoming.

(c) **Application.** — An application for a direct pay permit must be made on a form provided by the Secretary and contain the information required by the Secretary. The Secretary may grant the application if the Secretary finds that the applicant complies with the sales and use tax laws and that the applicant's compliance burden will be greatly reduced by use of the permit.

(d) **Revocation.** — A direct pay permit is valid until the holder returns it to the Secretary or the Secretary revokes it. The Secretary may revoke a direct pay permit if the holder of the permit does not file a sales and use tax return on time, does not pay sales and use tax on time, or otherwise fails to comply with the sales and use tax laws. (2000-120, s. 1; 2001-414, s. 20; 2001-430, s. 9; 2002-72, s. 18; 2003-284, s. 45.9; 2003-416, s. 16(b); 2006-33, s. 7.)

**Effect of Amendments.** —

Session Laws 2006-33, s. 7, effective January 1, 2007, in subsection (b), in the first paragraph added "and ancillary service" in the first and last sentences, substituted "these services" for

"telecommunications service" in the second sentence; and, in the second paragraph, inserted "service and ancillary" following "telecommunications" in the first sentence.

## Part 7A. Uniform Sales and Use Tax Administration Act.

### § 105-164.42H. Certification of certified automated system and effect of certification.

(a) **Certification.** — The Secretary may certify a software program as a certified automated system if the Secretary determines that the program correctly determines all of the following and that the software can generate reports and returns required by the Secretary:

- (1) The applicable combined State and local sales and use tax rate for a sale, based on the sourcing principles in G.S. 105-164.4B.
- (2) Whether or not an item is exempt from tax, based on a uniform product code or another method.
- (3) Repealed by Session Laws 2006-33, s. 12, effective June 1, 2006.
- (4) The amount of tax to be remitted for each taxpayer for a reporting period.
- (5) Any other issue necessary for the application or calculation of sales and use tax due.

(b) **Liability.** — A seller may choose to use a certified automated system in performing its sales tax administration functions. A seller that uses a certified automated system is liable for sales and use taxes due on transactions it processes using the certified automated system except for underpayments of tax attributable to errors in the functioning of the system. A person that



provides a certified automated system is responsible for the proper functioning of that system and is liable for underpayments of tax attributable to errors in the functioning of the system. (2000-120, s. 2; 2001-347, ss. 1.1, 1.3; 2005-276, s. 33.31; 2006-33, s. 12.)

**Effect of Amendments.** — Session Laws 2006-33, s. 12, effective June 1, 2006, repealed former subdivision (a)(3), which read: “Whether or not an exemption certificate offered by a

purchaser is a valid certificate, based on the Department’s registry of holders of exemption certificates.”

## Part 8. Administration and Enforcement.

### § 105-164.44F. Distribution of part of telecommunications taxes to cities.

(a) **(Effective until July 1, 2007)** Amount. — The Secretary must distribute part of the taxes imposed by G.S. 105-164.4(a)(4c) on telecommunications service and ancillary service. The Secretary must make the distribution within 75 days after the end of each calendar quarter. The amount the Secretary must distribute is the following percentages of the net proceeds of the taxes collected during the quarter:

- (1) Eighteen and seventy one-hundredths percent (18.70%) minus two million six hundred twenty thousand nine hundred forty-eight dollars (\$2,620,948), must be distributed to cities in accordance with this section. The deduction is one-fourth of the annual amount by which the distribution to cities of the gross receipts franchise tax on telephone companies, imposed by former G.S. 105-20, was required to be reduced beginning in fiscal year 1995-96 as a result of the “freeze deduction.”
- (2) Seven and seven-tenths percent (7.7%) must be distributed to counties and cities as provided in G.S. 105-164.44I.

(a) **(Effective July 1, 2007)** Amount. — The Secretary must distribute part of the taxes imposed by G.S. 105-164.4(a)(4c) on telecommunications service and ancillary service. The Secretary must make the distribution within 75 days after the end of each calendar quarter. The amount the Secretary must distribute is the following percentages of the net proceeds of the taxes collected during the quarter:

- (1) Nineteen and forty-two one-hundredths percent (19.42%) minus two million six hundred twenty thousand nine hundred forty-eight dollars (\$2,620,948), must be distributed to cities in accordance with this section. The deduction is one-fourth of the annual amount by which the distribution to cities of the gross receipts franchise tax on telephone companies, imposed by former G.S. 105-20, was required to be reduced beginning in fiscal year 1995-96 as a result of the “freeze deduction.”
- (2) Eight percent (8%) must be distributed to counties and cities as provided in G.S. 105-164.44I.

(b) Share of Cities Incorporated on or After January 1, 2001. — The share of a city incorporated on or after January 1, 2001, is its per capita share of the amount to be distributed to all cities incorporated on or after this date. This amount is the proportion of the total to be distributed under this section that is the same as the proportion of the population of cities incorporated on or after January 1, 2001, compared to the population of all cities. In making the distribution under this subsection, the Secretary must use the most recent annual population estimates certified to the Secretary by the State Budget Officer.



(c) **Share of Cities Incorporated Before January 1, 2001.** — The share of a city incorporated before January 1, 2001, is its proportionate share of the amount to be distributed to all cities incorporated before this date. A city's proportionate share for a quarter is based on the amount of telephone gross receipts franchise taxes attributed to the city under G.S. 105-116.1 for the same quarter that was the last quarter in which taxes were imposed on telephone companies under repealed G.S. 105-120. The amount to be distributed to all cities incorporated before January 1, 2001, is the amount determined under subsection (a) of this section, minus the amount distributed under subsection (b) of this section.

The following changes apply when a city incorporated before January 1, 2001, alters its corporate structure. When a change described in subdivision (2) or (3) occurs, the resulting cities are considered to be cities incorporated before January 1, 2001, and the distribution method set out in this subsection rather than the method set out in subsection (b) of this section applies:

- (1) If a city dissolves and is no longer incorporated, the proportional shares of the remaining cities incorporated before January 1, 2001, must be recalculated to adjust for the dissolution of that city.
- (2) If two or more cities merge or otherwise consolidate, their proportional shares are combined.
- (3) If a city divides into two or more cities, the proportional share of the city that divides is allocated among the new cities on a per capita basis.

(d) **Share of Cities Served by a Telephone Membership Corporation.** — The share of a city served by a telephone membership corporation, as described in Chapter 117 of the General Statutes, is computed as if the city was incorporated on or after January 1, 2001, under subsection (b) of this section. If a city is served by a telephone membership corporation and another provider, then its per capita share under this subsection applies only to the population of the area served by the telephone membership corporation.

(e) **Ineligible Cities.** — An ineligible city is disregarded for all purposes under this section. A city incorporated on or after January 1, 2000, is not eligible for a distribution under this section unless it meets both of the following requirements:

- (1) It is eligible to receive funds under G.S. 136-41.2.
- (2) A majority of the mileage of its streets is open to the public.

(f) **Nature.** — The General Assembly finds that the revenue distributed under this section is local revenue, not a State expenditure, for the purpose of Section 5(3) of Article III of the North Carolina Constitution. Therefore, the Governor may not reduce or withhold the distribution. (2001-424, s. 34.25(b); 2001-430, s. 10; 2001-487, s. 67(d); 2002-120, s. 4; 2004-203, s. 5(g); 2005-276, s. 33.19; 2005-435, s. 34(c); 2006-33, s. 8; 2006-66, ss. 24.1(d), (e), (f), (g); 2006-151, s. 7.)

**Subsection (a) is set out twice.** — The first version of subsection (a) set out above is effective until July 1, 2007. The second version of subsection (a) set out above is effective July 1, 2007.

**Editor's Note.** —

Session Laws 2006-66, s. 24.1(d), which had amended subsection (a) by substituting "(18.70%)" for "(18.03%)" and making related changes, was contingent on House Bill 2047, 2005 General Assembly (2006-151) not becoming law. Session Laws 2006-151 did become law, so session laws 2006-66, s. 24.1(d) did not take effect.

Session Laws 2006-66, s. 24.1(e), which had amended subsection (a) by substituting "(19.42%)" for "(18.70%)" and made related changes, was contingent on House Bill 2047, 2005 General Assembly (2006-151) not becoming law. Since Session Laws 2006-151 did become law, S.L. 2006-66, s. 24.1(e) was not given effect.

Session Laws 2006-151, s. 20, is a severability clause.

**Effect of Amendments.** —

Session Laws 2006-33, s. 8, effective January 1, 2007, inserted "service and ancillary" preced-

ing “service” in the first sentence of subsection (a).

Session Laws 2006-66, s. 24.1(f), effective January 1, 2007, and applicable to taxes collected on or after that date, substituted “eighteen and seventy one-hundredths percent (18.70%)” for “eighteen and three one hundredths percent (18.03%)” in the first sentence of subdivision (a)(1); and in subdivision (a)(2), substituted “seven-tenths” for “twenty three one hundredths” and “(7.7%)” for “(7.23%).”

Session Laws 2006-66, s. 24.1(g), effective July 1, 2007, and applicable to taxes collected on or after that date, substituted “Nineteen and forty-two one-hundredths percent (19.42%)” for “Eighteen and seventy one hundredths percent (18.70%)” in subdivision (a)(1); and substituted “Eight percent (8%)” for “Seven and seven tenths percent (7.7%)” in subdivision (a)(2).

Session Laws 2006-151, s. 7, effective January 1, 2007, and applicable to the distribution made within 75 days after March 31, 2007, for the quarter starting January 1, 2007, in the introductory paragraph of subsection (a), deleted “to the cities” following “The secretary must distribute” near the beginning, substituted “the following percentages” for “eighteen and three one-hundredths percent (18.03%)”, and made minor punctuation changes; in subdivision (a)(1), added “Eighteen and three one-hundredths percent (18.03%),” to the beginning of the first sentence, substituted “(\$2,620,948), must be distributed to cities in accordance with this section.” for “(\$2,620,948).” at the end of the first sentence, substituted “The” for “This” at the beginning of the second sentence, and deleted the third sentence; added subdivision (a)(2).

## § 105-164.44H. Transfer to State Public School Fund.

### Editor’s Note. —

Session Laws 2005-276, s. 7.51(c), as amended by Session Laws 2005-345, s. 7, and as amended by Session Laws 2006-66, s. 7.20(b), provides: “Notwithstanding the provisions of G.S. 105-164.44H, for the 2006-2007 fiscal year, the amount transferred to the State Public School Fund each quarter shall equal one-fourth of the amount refunded under G.S.

105-164.14(c)(2b) and (2c) during the 2005-2006 fiscal year for State sales and use taxes only plus or minus the percentage of that amount by which the total collection of State sales and use tax increased or decreased during the preceding fiscal year. The remainder of this section becomes effective July 1, 2005, and applies to sales made on or after that date.”

## § 105-164.44I. Distribution of part of sales tax on video programming service and telecommunications service to counties and cities.

(a) **(Effective until July 1, 2007)** Distribution. — The Secretary must distribute to the counties and cities part of the taxes imposed by G.S. 105-164.4(a)(4c) on telecommunications service and G.S. 105-164.4(a)(6) on video programming service. The Secretary must make the distribution within 75 days after the end of each calendar quarter. The amount the Secretary must distribute is the sum of the revenue listed in this subsection. The Secretary must distribute two million dollars (\$2,000,000) of this amount in accordance with subsection (b) of this section and the remainder in accordance with subsections (c) and (d) of this section. The revenue to be distributed under this section consists of the following:

- (1) The amount specified in G.S. 105-164.44F(a)(2).
- (2) Twenty-three and six tenths percent (23.6%) of the net proceeds of the taxes collected during the quarter on video programming, other than on direct-to-home satellite service.
- (3) Thirty-seven and one-tenths percent (37.1%) of the net proceeds of the taxes collected during the quarter on direct-to-home satellite service.

(a) **(Effective July 1, 2007)** Distribution. — The Secretary must distribute to the counties and cities part of the taxes imposed by G.S. 105-164.4(a)(4c) on telecommunications service and G.S. 105-164.4(a)(6) on video programming service. The Secretary must make the distribution within 75 days after the end of each calendar quarter. The amount the Secretary must distribute is the sum of the revenue listed in this subsection. The Secretary must distribute two



**G.S. 105-164.44I(a) is set out twice. See note.**

million dollars (\$2,000,000) of this amount in accordance with subsection (b) of this section and the remainder in accordance with subsections (c) and (d) of this section. The revenue to be distributed under this section consists of the following:

- (1) The amount specified in G.S. 105-164.44F(a)(2).
- (2) Twenty-five percent (25%) of the net proceeds of the taxes collected during the quarter on video programming, other than on direct-to-home satellite service.
- (3) Thirty-seven and five tenths percent (37.5%) of the net proceeds of the taxes collected during the quarter on direct-to-home satellite service.

(b) Supplemental PEG Support. — The Secretary must include the applicable amount of supplemental PEG channel support in each quarterly distribution to a county or city. The amount to include is one-fourth of twenty-five thousand dollars (\$25,000) for each qualifying PEG channel operated by the county or city. The amount of money distributed under this subsection may not exceed two million dollars (\$2,000,000) in a fiscal year. If the amount to be distributed for qualifying PEG channels in a fiscal year would otherwise exceed this maximum amount, the Secretary must proportionately reduce the applicable amount distributable for each PEG channel. If the amount to be distributed for qualifying PEG channels in a fiscal year is less than two million dollars (\$2,000,000), the Secretary must credit the excess amount to the PEG Channel Fund established in G.S. 66-359.

A county or city must certify to the Secretary by July 15 of each year the number of qualifying PEG channels it operates. A qualifying PEG channel is one that meets the programming requirements under G.S. 66-357(d). A county or city may not receive PEG channel support under this subsection for more than three qualifying PEG channels.

The amount included under this subsection in a distribution to a county or city is intended to supplement the PEG channel support available in the amount distributed under this section. The money distributed to a county or city under this subsection must be used by it for the operation and support of PEG channels. For purposes of this subsection, the term “PEG channel” has the same meaning as in G.S. 66-350.

(c) 2006-2007 Fiscal Year Distribution. — The share of a county or city is its proportionate share of the amount to be distributed to all counties and cities under this subsection. The proportionate share of a county or city is the base amount for the county or city compared to the base amount for all other counties and cities. The base amount of a county or city that did not impose a cable franchise tax under G.S. 153A-154 or G.S. 160A-214 before July 1, 2006, is two dollars (\$2.00) times the most recent annual population estimate for that county or city. The base amount of a county or city that imposed a cable franchise tax under either G.S. 153A-154 or G.S. 160A-214 before July 1, 2006, is the amount of cable franchise tax and subscriber fee revenue the county or city certifies to the Secretary that it imposed during the first six months of the 2006-2007 fiscal year. A county or city must make this certification by March 15, 2007. The certification must specify the amount of revenue that is derived from the cable franchise tax and the amount that is derived from the subscriber fee.

(d) Subsequent Distributions. — For subsequent fiscal years, the Secretary must multiply the amount of a county’s or city’s share under this section for the preceding fiscal year by the percentage change in its population for that fiscal year and add the result to the county’s or city’s share for the preceding fiscal year to obtain the county’s or city’s adjusted amount. Each county’s or city’s proportionate share for that year is its adjusted amount compared to the sum of the adjusted amounts for all counties and cities.



(e) Use of Proceeds. — A county or city that imposed subscriber fees during the first six months of the 2006-2007 fiscal year must use a portion of the funds distributed to it under subsections (c) and (d) of this section for the operation and support of PEG channels. The amount of funds that must be used for PEG channel operation and support is two times the amount of subscriber fee revenue the county or city certified to the Secretary that it imposed during the first six months of the 2006-2007 fiscal year. A county or city that used part of its franchise tax revenue in fiscal year 2005-2006 for the operation and support of PEG channels or a publicly owned and operated television station must use the funds distributed to it under subsections (c) and (d) of this section to continue the same level of support for the PEG channels and public stations. The remainder of the distribution may be used for any public purpose.

(f) Late Information. — A county or city that does not submit information that the Secretary needs to make a distribution by the date the information is due is excluded from the distribution. If the county or city later submits the required information, the Secretary must include the county or city in the distribution for the quarter that begins after the date the information is received.

(g) Population Determination. — In making population determinations under this section, the Secretary must use the most recent annual population estimates certified to the Secretary by the State Budget Officer. For purposes of the distributions made under this section, the population of a county is the population of its unincorporated areas plus the population of an ineligible city in the county, as determined under this section.

(h) City Changes. — The following changes apply when a city alters its corporate structure or incorporates:

- (1) If a city dissolves and is no longer incorporated, the proportional shares of the remaining counties and cities must be recalculated to adjust for the dissolution of that city.
- (2) If two or more cities merge or otherwise consolidate, their proportional shares are combined.
- (3) If a city divides into two or more cities, the proportional share of the city that divides is allocated among the new cities on a per capita basis.
- (4) If a city incorporates after January 1, 2007, and the incorporation is not addressed by subdivisions (2) or (3) of this subsection, the share of the county in which the new city is located is allocated between the county and the new city on a per capita basis.

(i) Ineligible Cities. — An ineligible city is disregarded for all purposes under this section. A city incorporated on or after January 1, 2000, is not eligible for a distribution under this section unless it meets both of the following requirements:

- (1) It is eligible to receive funds under G.S. 136-41.2.
- (2) A majority of the mileage of its streets is open to the public.

(j) Nature. — The General Assembly finds that the revenue distributed under this section is local revenue, not a State expenditure, for the purpose of Section 5(3) of Article III of the North Carolina Constitution. Therefore, the Governor may not reduce or withhold the distribution. (2006-151, s. 8; 2006-66, ss. 24.1(h), (i).)

**Subsection (a) set out twice.** — The first version of subsection (a) set out above is effective until July 1, 2007. The second version of subsection (a) set out above is effective July 1, 2007.

**Editor's Note.** — Session Laws 2006-66, s. 1.2, provides: "This act shall be known as 'The

Current Operations and Capital Improvements Appropriations Act of 2006'."

Session Laws 2006-66, s. 28.6 is a severability clause.

Session Laws 2006-151, s. 16, provides: "To make the distribution required under G.S. 105-164.44I(b), as enacted by this act, for the 2006-

2007 fiscal year, a county or city must certify to the Secretary of Revenue by March 15, 2007, the number of qualifying PEG channels it operates.”

Session Laws 2006-151, s. 20, is a severability clause.

Session Laws 2006-151, s. 22, makes this section effective January 1, 2007, and applicable to the distribution made within 75 days after March 31, 2007, for the quarter starting January 1, 2007.

**Effect of Amendments.** — Session Laws 2006-66, s. 24.1(h), effective January 1, 2007, and applicable to taxes collected on or after that

date, substituted “Twenty-three and six tenths percent (23.6%)” for “Twenty-two and sixty-one one-hundredths percent (22.61%)” in subdivision (a)(2); in subdivision (a)(3), added “and one-tenths” preceding “percent” and substituted “(37.1%)” for “(37%).”

Session Laws 2006-66, s. 24.1(i), effective July 1, 2007, and applicable to taxes collected on or after that date, substituted “Twenty-five percent (25%)” for “Twenty three and six tenths percent (23.6%)” in subdivision (a)(2); and in subdivision (a)(3), substituted “five tenths” for “one tenths” and “(37.5%)” for “(37.1%).”

## ARTICLE 5A.

### *North Carolina Highway Use Tax.*

#### § 105-187.9. Disposition of tax proceeds.

##### **Editor’s Note.** —

Session Laws 2005-276, s. 2.2(f), as amended by Session Laws 2006-66, s.2.2(e), provides: “Notwithstanding G.S. 105-187.9(b)(1), the sum to be transferred under that subdivision for the 2005-2006 fiscal year is two hundred fifty million dollars (\$250,000,000) and for the 2006-2007 fiscal year is fifty-five million dollars (\$55,000,000).”

Session Laws 2006-66, s. 1.2, provides: “This act shall be known as ‘The Current Operations and Capital Improvements Appropriations Act of 2006.’”

Session Laws 2006-66, s. 2.2(f), provides:

“Pursuant to G.S. 105-187.9(b)(2), the sum to be transferred under that subdivision for the 2006-2007 fiscal year is two million four hundred eighty-six thousand six hundred two dollars (\$2,486,602).”

Session Laws 2006-66, s. 28.3, provides: “Except for statutory changes or other provisions that clearly indicate an intention to have effects beyond the 2006 2007 fiscal year, the textual provisions of this act apply only to funds appropriated for, and activities occurring during, the 2006 2007 fiscal year.”

Session Laws 2006-66, s. 28.6 is a severability clause.

## ARTICLE 5E.

### *Piped Natural Gas Tax.*

#### § 105-187.43. (Effective October 1, 2007) Payment of the tax.

(a) **Payment.** — The tax imposed by this Article is payable monthly. A monthly payment is due by the 20th day of the month following the calendar month in which liability for the tax accrues. The tax imposed by this Article on piped natural gas delivered to a sales or transportation customer accrues when the gas is delivered. The tax payable on piped natural gas received by a person who has direct access to an interstate pipeline for consumption by that person accrues when the gas is received.

(b) **Prepayment.** — A taxpayer who is consistently liable for at least ten thousand dollars (\$10,000) of tax a month must make a monthly prepayment of the next month’s tax liability. This requirement applies when the taxpayer meets the threshold and the Secretary notifies the taxpayer to make prepayments. A prepayment is due on the date a monthly payment is due. The prepayment must equal at least sixty-five percent (65%) of any of the following:

- (1) The amount of tax due for the current month.
- (2) The amount of tax due for the same month in the preceding year.

**G.S. 105-187.43 is set out twice. See notes.**

- (3) The average monthly amount of tax due in the preceding calendar year.

(c) Return. — A return is due quarterly. A quarterly return covers a calendar quarter and is due by the last day of the month that follows the quarter covered by the return. (1998-22, s. 1; 1999-337, s. 32(a); 2001-427, s. 6(f); 2006-33, s. 13.)

**Section Set Out Twice.** — The section above is effective October 1, 2007. For the section as in effect until October 1, 2007, see the main volume.

**Effect of Amendments.** — Session Laws 2006-33, s. 13, effective October 1, 2007, rewrote subsections (a) and (b).

**ARTICLE 5F.***Manufacturing Fuel and Certain Machinery and Equipment.***§ 105-187.51B. (Effective July 1, 2007) Tax imposed on certain recyclers and research and development companies.**

- (a) Tax. — A privilege tax is imposed on the following:

- (1) A major recycling facility that purchases any of the following tangible personal property for use in connection with the facility:
  - a. Cranes, structural steel crane support systems, and foundations related to the cranes and support systems.
  - b. Port and dock facilities.
  - c. Rail equipment.
  - d. Material handling equipment.
- (2) A research and development company in the physical, engineering, and life sciences that is included in industry 54171 of NAICS and that purchases equipment or an attachment or repair part for equipment that meets all of the following requirements:
  - a. Is capitalized by the company for tax purposes under the Code.
  - b. Is used by the company in the research and development of tangible personal property.
  - c. Would be considered mill machinery under G.S. 105-187.51 if it were purchased by a manufacturing industry or plant and used in the research and development of tangible personal property manufactured by the industry or plant.

(b) Rate. — The tax is one percent (1%) of the sales price of the equipment or other tangible personal property. The maximum tax is eighty dollars (\$80.00) per article. (2005-276, s. 33.21; 2006-66, s. 24.9(a); 2006-196, s. 12.)

**Section Set Out Twice.** — The section above is effective July 1, 2007. For the section as in effect until July 1, 2007, see the main volume.

**Editor's Note.** — Session Laws 2006-66, s. 1.2, provides: "This act shall be known as 'The Current Operations and Capital Improvements Appropriations Act of 2006'."

Session Laws 2006-66, s. 28.6 is a severability clause.

Session Laws 2006-196, s. 13, provides: "The

Revenue Laws Study Committee shall study the following issues:

"(1) The simplification of the additional tax imposed on insurance contracts on property coverage, as enacted in Section 3 of this act, and the distribution of the revenue generated by the tax. The study of this issue may include a recommendation on the percentage of revenue to be distributed to the firemen's local relief funds and the formula for making this distribution. The study may also consider the in-



creasing difference between the amount of revenue available in the Volunteer Fire Department Fund for matching grants to purchase equipment and make capital improvements and the amount of grant requests received.

“(2) The authority of the Secretary of Revenue to require taxpayers to file consolidated returns. The study of this issue may include consideration of whether the State should require some corporations or all corporations to file a consolidated return.

“(3) The feasibility of replacing the State’s current corporate income and franchise tax

laws with a commercial activity tax based upon business gross receipts.

“(4) The administrative process for the review of disputed tax matters.”

**Effect of Amendments.** — Session Laws 2006-66, s. 24.9(a), as amended by Session Laws 2006-196, s. 12, effective July 1, 2007, amended the catchline; redesignated subdivisions (a)(1) through (a)(4) as (a)(1)a through (a)(1)d; added subdivision (a)(2); and inserted “equipment or other” in the first sentence in subsection (b).

## § 105-187.52. Administration.

(a) Administration. — The privilege taxes imposed by this Article are in addition to the State use tax. Except as otherwise provided in this Article, the collection and administration of these taxes is the same as the State use tax imposed by Article 5 of this Chapter.

(b) Credit. — A credit is allowed against the tax imposed by this Article for the amount of a sales or use tax, privilege or excise tax, or substantially equivalent tax paid to another state. The credit allowed by this subsection does not apply to tax paid to another state that does not grant a similar credit for the privilege tax paid in North Carolina. (2001-347, s. 2.17; 2005-276, s. 33.22; 2006-162, s. 11.)

### **Effect of Amendments.** —

Session Laws 2006-162, s. 11, effective July 24, 2006, designated the existing provisions as

subsection (a), added the subsection (a) catchline, and added subsection (b).

## § 105-187.53. Commercial logging items.

This Article does not apply to an item that is exempt from sales and use tax under G.S. 105-164.13(4f). (2006-19, s. 2.)

**Editor’s Note.** — Session Laws 2006-19, s. 4, made this section effective July 1, 2006, and applicable to items purchased on or after that date.

Session Laws 2006-19, s. 3, provides: “This act does not affect the rights or liabilities of the

State, a taxpayer, or another person arising under a statute amended by this act before the effective date of this act, nor does it affect the right to any refund of a tax that accrued under the amended statute before the effective date of its amendment.”

## ARTICLE 6.

### *Gift Taxes.*

## § 105-197.1. Federal corrections.

If the amount of a taxpayer’s net gifts is corrected or otherwise determined by the federal government, the taxpayer must, within six months after being notified of the correction or final determination by the federal government, file a gift tax return with the Secretary of Revenue reflecting the corrected or determined net gifts. The Secretary of Revenue shall determine from all available evidence the taxpayer’s correct tax liability for the taxable year. As used in this section, the term ‘all available evidence’ means evidence of any

kind that becomes available to the Secretary from any source, whether or not the evidence was considered in the federal correction or determination.

The Secretary shall assess and collect any additional tax due from the taxpayer as provided in Article 9 of this Chapter. The Secretary shall refund any overpayment of tax as provided in Article 9 of this Chapter. A taxpayer who fails to comply with this section is subject to the penalties in G.S. 105-236 and forfeits the right to any refund due by reason of the determination. (1973, c. 1287, s. 10; 1993 (Reg. Sess., 1994), c. 582, s. 6; 2006-18, s. 6.)

**Effect of Amendments.** — Session Laws 2006-18, s. 6, effective July 1, 2006, and applicable to federal determinations made on or after July 1, 2006, substituted “six months” for “two years” in the first sentence of the first paragraph.

## ARTICLE 8B.

### *Taxes Upon Insurance Companies.*

#### **§ 105-228.5. Taxes measured by gross premiums.**

(a) Tax Levied. — A tax is levied in this section on insurers, Article 65 corporations, health maintenance organizations, and self-insurers. An insurer, health maintenance organization, or Article 65 corporation that is subject to the tax levied by this section is not subject to franchise or income taxes imposed by Articles 3 and 4, respectively, of this Chapter.

(b) Tax Base. —

- (1) Insurers. — The tax imposed by this section on an insurer or a health maintenance organization shall be measured by gross premiums from business done in this State during the preceding calendar year.
- (2) **(Repealed for taxable years beginning on or after January 1, 2008)** Additional Local Fire and Lightning Rate. — The additional tax imposed by subdivision (d) (4) of this section shall be measured by gross premiums from business done in fire districts in this State during the preceding calendar year. For the purpose of this section, the term “fire district” has the meaning provided in G.S. 58-84-5.
- (3) Article 65 Corporations. — The tax imposed by this section on an Article 65 corporation shall be measured by gross collections from membership dues, exclusive of receipts from cost plus plans, received by the corporation during the preceding calendar year.
- (4) Self-insurers. — The tax imposed by this section on a self-insurer shall be measured by the gross premiums that would be charged against the same or most similar industry or business, taken from the manual insurance rate then in force in this State, applied to the self-insurer’s payroll for the previous calendar year as determined under Article 2 of Chapter 97 of the General Statutes modified by the self-insurer’s approved experience modifier.

(b1) Calculation of Tax Base. — In determining the amount of gross premiums from business in this State, all gross premiums received in this State, credited to policies written or procured in this State, or derived from business written in this State shall be deemed to be for contracts covering persons, property, or risks resident or located in this State unless one of the following applies:

- (1) The premiums are properly reported and properly allocated as being received from business done in some other nation, territory, state, or states.
- (2) The premiums are from policies written in federal areas for persons in military service who pay premiums by assignment of service pay.



**G.S. 105-228.5(d)(2), (d)(3), (e) and (f) set out twice. See note.**

Gross premiums from business done in this State in the case of life insurance contracts, including supplemental contracts providing for disability benefits, accidental death benefits, or other special benefits that are not annuities, means all premiums collected in the calendar year, other than for contracts of reinsurance, for policies the premiums on which are paid by or credited to persons, firms, or corporations resident in this State, or in the case of group policies, for contracts of insurance covering persons resident within this State. The only deductions allowed shall be for premiums refunded on policies rescinded for fraud or other breach of contract and premiums that were paid in advance on life insurance contracts and subsequently refunded to the insured, premium payer, beneficiary or estate. Gross premiums shall be deemed to have been collected for the amounts as provided in the policy contracts for the time in force during the year, whether satisfied by cash payment, notes, loans, automatic premium loans, applied dividend, or by any other means except waiver of premiums by companies under a contract for waiver of premium in case of disability.

Gross premiums from business done in this State for all other health care plans and contracts of insurance, including contracts of insurance required to be carried by the Workers' Compensation Act, means all premiums written during the calendar year, or the equivalent thereof in the case of self-insurers under the Workers' Compensation Act, for contracts covering property or risks in this State, other than for contracts of reinsurance, whether the premiums are designated as premiums, deposits, premium deposits, policy fees, membership fees, or assessments. Gross premiums shall be deemed to have been written for the amounts as provided in the policy contracts, new and renewal, becoming effective during the year irrespective of the time or method of making payment or settlement for the premiums, and with no deduction for dividends whether returned in cash or allowed in payment or reduction of premiums or for additional insurance, and without any other deduction except for return of premiums, deposits, fees, or assessments for adjustment of policy rates or for cancellation or surrender of policies.

(c) Exclusions. — Every insurer, in computing the premium tax, shall exclude all of the following from the gross amount of premiums, and the gross amount of excluded premiums is exempt from the tax imposed by this section:

- (1) All premiums received on or after July 1, 1973, from policies or contracts issued in connection with the funding of a pension, annuity, or profit-sharing plan qualified or exempt under section 401, 403, 404, 408, 457 or 501 of the Code as defined in G.S. 105-228.90.
- (2) Premiums or considerations received from annuities, as defined in G.S. 58-7-15.
- (3) Funds or considerations received in connection with funding agreements, as defined in G.S. 58-7-16.
- (4) The following premiums, to the extent federal law prohibits their taxation under this Article:
  - a. Federal Employees Health Benefits Plan premiums.
  - b. Medicaid or Medicare premiums.

(d) **(See Editor's note)** Tax Rates; Disposition. —

- (1) Workers' Compensation. — The tax rate to be applied to gross premiums, or the equivalent thereof in the case of self-insurers, on contracts applicable to liabilities under the Workers' Compensation Act is two and five-tenths percent (2.5%). The net proceeds shall be credited to the General Fund.
- (2) **(Effective for taxable years beginning before January 1, 2007)** Other Insurance Contracts. — The tax rate to be applied to gross



G.S. 105-228.5(d)(2), (d)(3), (e) and (f) set out twice. See note.

premiums on all other taxable contracts issued by insurers and to be applied to gross premiums and gross collections from membership dues, exclusive of receipts from cost plus plans, received by Article 65 corporations is one and nine-tenths percent (1.9%). The net proceeds shall be credited to the General Fund.

(2) **(Effective for taxable years beginning on or after January 1, 2007)** Other Insurance Contracts. — The tax rate to be applied to gross premiums on all other taxable contracts issued by insurers or health maintenance organizations and to be applied to gross premiums and gross collections from membership dues, exclusive of receipts from cost plus plans, received by Article 65 corporations is one and nine-tenths percent (1.9%). The net proceeds shall be credited to the General Fund.

(3) **(Effective for taxable years beginning before January 1, 2008)** Additional Statewide Fire and Lightning Rate. — An additional tax at the rate of one and thirty-three hundredths percent (1.33%) applies to gross premiums on insurance contracts applicable to fire and lightning coverage, except marine and automobile contracts. The tax is a percentage of the gross premiums from the contracts, determined in accordance with the table in this subdivision. Twenty-five percent (25%) of the net proceeds of this additional tax shall be deposited in the Volunteer Fire Department Fund established in Article 87 of Chapter 58 of the General Statutes. The remaining net proceeds shall be credited to the General Fund.

Type of Insurance Contract	Taxable Percentage
Fire Loss	100%
Commercial Multiple Peril	
Nonliability portion	100%
Liability portion	0%
Homeowners	50%
Farm Owners	30%.

(3) **(Effective for taxable years beginning on or after January 1, 2008)** Additional Rate on Property Coverage Contracts. — An additional tax at the rate of eighty-five hundredths percent (.85%) applies to gross premiums on insurance contracts for property coverage. The tax is imposed on ten percent (10%) of the gross premiums from insurance contracts for automobile physical damage coverage and on one hundred percent (100%) of the gross premiums from all other contracts for property coverage. Twenty percent (20%) of the net proceeds of this additional tax must be credited to the Volunteer Fire Department Fund established in Article 87 of Chapter 58 of the General Statutes. Twenty-five percent (25%) of the net proceeds must be credited to the Department of Insurance for disbursement pursuant to G.S. 58-84-25. The remaining net proceeds must be credited to the General Fund.

The following definitions apply in this subdivision:

- a. Automobile physical damage. — The following lines of business identified by the NAIC: private passenger automobile physical damage and commercial automobile physical damage.
- b. Property coverage. — The following lines of business identified by the NAIC: fire, farm owners multiple peril, homeowners multiple

**G.S. 105-228.5(d)(2), (d)(3), (e) and (f) set out twice. See note.**

peril, nonliability portion of commercial multiple peril, ocean marine, inland marine, earthquake, private passenger automobile physical damage, commercial automobile physical damage, aircraft, and boiler and machinery.

c. NAIC. — National Association of Insurance Commissioners.

- (4) **(Repealed for taxable years beginning on or after January 1, 2008)** Additional Local Fire and Lightning Rate. — An additional tax shall be applied to gross premiums on contracts of insurance applicable to fire and lightning coverage within fire districts at the rate of one-half of one percent ( $\frac{1}{2}$  of 1%). The net proceeds shall be credited to the Department of Insurance for disbursement pursuant to G.S. 58-84-25.
- (5) Repealed by Session Laws 2003-284, s. 43.1, effective for taxable years beginning on or after January 1, 2004.
- (6) **(Repealed for taxable years beginning on or after January 1, 2007)** Health Maintenance Organizations. — The tax rate to be applied to gross premiums on insurance contracts issued by health maintenance organizations, including directly operated health maintenance organizations authorized under G.S. 58-67-95, is one percent (1%). The net proceeds shall be credited to the General Fund.

(e) **(Effective for taxable years beginning before January 1, 2008)** Report and Payment. — Each taxpayer doing business in this State shall, within the first 15 days of March, file with the Secretary of Revenue a full and accurate report of the total gross premiums as defined in this section, the payroll and other information required by the Secretary in the case of a self-insurer, or the total gross collections from membership dues exclusive of receipts from cost plus plans collected in this State during the preceding calendar year. The taxes imposed by this section shall be remitted to the Secretary with the report.

In the case of an insurer liable for the additional local fire and lightning tax, the report shall include the information required under G.S. 58-84-1.

(e) **(Effective for taxable years beginning on or after January 1, 2008)** Report and Payment. — Each taxpayer doing business in this State shall, within the first 15 days of March, file with the Secretary of Revenue a full and accurate report of the total gross premiums as defined in this section, the payroll and other information required by the Secretary in the case of a self-insurer, or the total gross collections from membership dues exclusive of receipts from cost plus plans collected in this State during the preceding calendar year. The taxes imposed by this section shall be remitted to the Secretary with the report.

(f) **(Effective for taxable years beginning before January 1, 2008)** Installment Payments Required. — Taxpayers that are subject to the tax imposed by this section and have a premium tax liability, not including the additional local fire and lightning tax, of ten thousand dollars (\$10,000) or more for business done in North Carolina during the immediately preceding year shall remit three equal quarterly installments with each installment equal to at least thirty-three and one-third percent ( $33\frac{1}{3}\%$ ) of the premium tax liability incurred in the immediately preceding taxable year. The quarterly installment payments shall be made on or before April 15, June 15, and October 15 of each taxable year. The company shall remit the balance by the following March 15 in the same manner provided in this section for annual returns.

The Secretary of Revenue may permit an insurance company to pay less than the required estimated payment when the insurer reasonably believes



**G.S. 105-228.5(d)(2), (d)(3), (e) and (f) set out twice. See note.**

that the total estimated payments made for the current year will exceed the total anticipated tax liability for the year.

An underpayment of an installment payment required by this subsection shall bear interest at the rate established under G.S. 105-241.1(i). Any overpayment shall bear interest as provided in G.S. 105-266(b) and, together with the interest, shall be credited to the company and applied against the taxes imposed upon the company under this Article.

**(f) (Effective for taxable years beginning on or after January 1, 2008) Installment Payments Required.** — Taxpayers that are subject to the tax imposed by this section and have a premium tax liability of ten thousand dollars (\$10,000) or more for business done in North Carolina during the immediately preceding year shall remit three equal quarterly installments with each installment equal to at least thirty-three and one-third percent (33 1/3%) of the premium tax liability incurred in the immediately preceding taxable year. The quarterly installment payments shall be made on or before April 15, June 15, and October 15 of each taxable year. The company shall remit the balance by the following March 15 in the same manner provided in this section for annual returns.

The Secretary of Revenue may permit an insurance company to pay less than the required estimated payment when the insurer reasonably believes that the total estimated payments made for the current year will exceed the total anticipated tax liability for the year.

An underpayment of an installment payment required by this subsection shall bear interest at the rate established under G.S. 105-241.1(i). Any overpayment shall bear interest as provided in G.S. 105-266(b) and, together with the interest, shall be credited to the company and applied against the taxes imposed upon the company under this Article.

**(g) Exemptions.** — This section does not apply to farmers' mutual assessment fire insurance companies or to fraternal orders or societies that do not operate for a profit and do not issue policies on any person except members. (1945, c. 752, s. 2; 1947, c. 501, s. 8; 1951, c. 643, s. 8; 1955, c. 1313, s. 5; 1957, c. 1340, s. 12; 1959, c. 1211; 1961, c. 783; 1963, c. 1096; 1969, c. 1221; 1973, cc. 142, 1019; 1975, c. 143; c. 559, s. 8; 1979, c. 714, s. 2; 1983, c. 713, s. 81; 1985, c. 119, s. 3; c. 719, ss. 1, 2; 1985 (Reg. Sess., 1986), c. 1031, ss. 1-5; 1987, c. 709, s. 2; c. 814, s. 2; 1989 (Reg. Sess., 1990), c. 814, s. 27; 1991, c. 689, s. 297; 1993 (Reg. Sess., 1994), c. 600, s. 4; 1995, c. 360, s. 1(d); 1995 (Reg. Sess., 1996), c. 747, s. 2; 1998-98, s. 17; 2001-424, s. 34.22(a), (d), (e); 2001-487, s. 69(a); 2001-489, s. 2(a)-(d), (f), (g); 2003-284, s. 43.1; 2005-276, s. 38.4(a); 2005-435, s. 57(a); 2006-196, ss. 1-5.)

**G.S. 105-228.5(d)(2), (d)(3), (e) and (f) set out twice.** — The first version of subsection (d)(2) set out above is effective for taxable years beginning before January 1, 2007. The first version of subsections (d)(3), (e) and (f) set out above are effective for taxable years beginning before January 1, 2008. The second version of subsection (d)(2) set out above is effective for taxable years beginning on or after January 1, 2007. The second version of subsections (d)(3), (e) and (f) set out above are effective for taxable years beginning on or after January 1, 2008.

**Editor's Note.** —

Session Law 2006-196, s. 13, provides: "The Revenue Laws Study Committee shall study the following issues:

"(1) The simplification of the additional tax imposed on insurance contracts on property coverage, as enacted in Section 3 of this act, and the distribution of the revenue generated by the tax. The study of this issue may include a recommendation on the percentage of revenue to be distributed to the firemen's local relief funds and the formula for making this distribution. The study may also consider the increasing difference between the amount of revenue available in the Volunteer Fire Department Fund for matching grants to purchase equipment and make capital improvements and the amount of grant requests received.



“(2) The authority of the Secretary of Revenue to require taxpayers to file consolidated returns. The study of this issue may include consideration of whether the State should require some corporations or all corporations to file a consolidated return.

“(3) The feasibility of replacing the State’s current corporate income and franchise tax laws with a commercial activity tax based upon business gross receipts.

“(4) The administrative process for the review of disputed tax matters.”

**Effect of Amendments. —**

Session Laws 2006-196, s. 1, effective for taxable years beginning on or after January 1, 2006, rewrote paragraph (d)(3) which read: “Additional Statewide Fire and Lightning Rate. - An additional tax shall be applied to gross premiums on contracts of insurance applicable to fire and lightning coverage, except in the case of marine and automobile policies, at the rate of one and thirty-three hundredths percent (1.33%). Twenty-five percent (25%) of the net proceeds of this additional tax shall be deposited in the Volunteer Fire Department Fund established in Article 87 of Chapter 58 of the General Statutes. The remaining net proceeds

shall be credited to the General Fund.”; ss. 2 - 5, effective for taxable years beginning on or after January 1, 2008, deleted former paragraph (b)(2) which read: “Additional Local Fire and Lightning Rate. - The additional tax imposed by subdivision (d) (4) of this section shall be measured by gross premiums from business done in fire districts in this State during the preceding calendar year. For the purpose of this section, the term “fire district” has the meaning provided in G.S. 58-84-5”; in subsection (d), rewrote paragraph (d)(3); deleted paragraph (d)(4) which read: “Additional Local Fire and Lightning Rate. - An additional tax shall be applied to gross premiums on contracts of insurance applicable to fire and lightning coverage within fire districts at the rate of one-half of one percent ( $\frac{1}{2}$  of 1%). The net proceeds shall be credited to the Department of Insurance for disbursement pursuant to G.S. 58-84-25”; deleted the second paragraph of subsection (e) which read: “In the case of an insurer liable for the additional local fire and lightning tax, the report shall include the information required under G.S. 58-84.1”; and deleted “not including the additional local fire and lightning tax,” following “liability” in the middle of the first sentence of subsection (f).

## ARTICLE 9.

### *General Administration; Penalties and Remedies.*

#### **§ 105-228.90. Scope and definitions.**

(a) Scope. — This Article applies to Subchapters I, V, and VIII of this Chapter, to the annual report filing requirements of G.S. 55-16-22, to the primary forest product assessment levied under Article 12 of Chapter 113A of the General Statutes, and to inspection taxes levied under Article 3 of Chapter 119 of the General Statutes.

(b) Definitions. — The following definitions apply in this Article:

- (1) Charter school. — A nonprofit corporation that has a charter under G.S. 115C-238.29D to operate a charter school.
- (1a) City. — A city as defined by G.S. 160A-1(2). The term also includes an urban service district defined by the governing board of a consolidated city-county, as defined by G.S. 160B-2(1).
- (1b) Code. — The Internal Revenue Code as enacted as of January 1, 2006, including any provisions enacted as of that date which become effective either before or after that date.
- (1c) County. — Any one of the counties listed in G.S. 153A-10. The term also includes a consolidated city-county as defined by G.S. 160B-2(1).
- (2) Department. — The Department of Revenue.
- (3) Electronic Funds Transfer. — A transfer of funds initiated by using an electronic terminal, a telephone, a computer, or magnetic tape to instruct or authorize a financial institution or its agent to credit or debit an account.
- (4) Income tax return preparer. — Any person who prepares for compensation, or who employs one or more persons to prepare for compensation, any return of tax imposed by Article 4 of this Chapter or any

claim for refund of tax imposed by Article 4 of this Chapter. For purposes of this definition, the completion of a substantial portion of a return or claim for refund is treated as the preparation of the return or claim for refund. The term does not include a person merely because the person (i) furnishes typing, reproducing, or other mechanical assistance, (ii) prepares a return or claim for refund of the employer, or an officer or employee of the employer, by whom the person is regularly and continuously employed, (iii) prepares as a fiduciary a return or claim for refund for any person, or (iv) represents a taxpayer in a hearing regarding a proposed assessment.

- (4d) **Pass-through entity.** — An entity or business, including a limited partnership, a general partnership, a joint venture, a Subchapter S Corporation, or a limited liability company, all of which is treated as owned by individuals or other entities under the federal tax laws, in which the owners report their share of the income, losses, and credits from the entity or business on their income tax returns filed with this State. For the purpose of this section, an owner of a pass-through entity is an individual or entity who is treated as an owner under the federal tax laws.
- (5) **Person.** — An individual, a fiduciary, a firm, an association, a partnership, a limited liability company, a corporation, a unit of government, or another group acting as a unit. The term includes an officer or employee of a corporation, a member, a manager, or an employee of a limited liability company, and a member or employee of a partnership who, as officer, employee, member, or manager, is under a duty to perform an act in meeting the requirements of Subchapter I, V, or VIII of this Chapter, of G.S. 55-16-22, of Article 12 of Chapter 113A of the General Statutes, or of Article 3 of Chapter 119 of the General Statutes.
- (6) **Secretary.** — The Secretary of Revenue.
- (7) **Tax.** — A tax levied under Subchapter I, V, or VIII of this Chapter, the primary forest product assessment levied under Article 12 of Chapter 113A of the General Statutes, or an inspection tax levied under Article 3 of Chapter 119 of the General Statutes. Unless the context clearly requires otherwise, the terms “tax” and “additional tax” include penalties and interest as well as the principal amount.
- (8) **Taxpayer.** — A person subject to the tax or reporting requirements of Subchapter I, V, or VIII of this Chapter, of Article 12 of Chapter 113A of the General Statutes, or of Article 3 of Chapter 119 of the General Statutes. (1991 (Reg. Sess., 1992), c. 930, s. 13; 1993, c. 12, s. 1; c. 354, s. 18; c. 450, s. 1; 1993 (Reg. Sess., 1994), c. 662, s. 1; c. 745, s. 13; 1995, c. 17, s. 9; c. 461, s. 14; 1995 (Reg. Sess., 1996), c. 664, s. 1; 1997-55, s. 1; 1997-475, s. 6.9; 1998-171, s. 1; 1999-415, s. 1; 2000-72, s. 1; 2000-126, s. 1; 2000-140, s. 69; 2001-414, s. 23; 2001-427, s. 4(a); 2002-106, s. 1; 2002-126, s. 30C.1(a); 2003-25, s. 1; 2003-284, s. 37A.1; 2003-416, s. 4(d); 2004-110, s. 1.1; 2005-276, ss. 35.1(a), (d); 2006-18, s. 1.)

**Editor’s Note.** —

Session Laws 2006-18, s. 2, provides: “Notwithstanding Section 1 of this act, any amendments to the Internal Revenue Code enacted after January 1, 2005, that increase North Carolina taxable income for the 2005 taxable

year become effective for taxable years beginning on or after January 1, 2006.”

**Effect of Amendments.** —

Session Laws 2006-18, s. 1, effective June 21, 2006, substituted “2006” for “2005” in subdivision (b)(1b).



## CASE NOTES

**Penalties Collected for Failing to Comply with Statutory or Regulatory Tax Provisions.** — Monetary payments for a taxpayer's noncompliance with a mandate of Chapter 105 are penalties and, therefore, subject to N.C. Const. art. IX, § 7; thus, monies collected by

the North Carolina Department of Revenue for late filings, underpayments, and for failing to comply with statutory or regulatory tax provisions are payable to public schools. *N.C. Sch. Bds. Ass'n v. Moore*, 359 N.C. 474, 614 S.E.2d 504, 2005 N.C. LEXIS 694 (2005).

**§§ 105-233, 105-234:** Repealed by Session Laws 2006-162, s. 12(a), effective July 24, 2006.

**§ 105-236. Penalties; situs of violations; penalty disposition.**

- (a) Penalties. — The following civil penalties and criminal offenses apply:
- (1) Penalty for Bad Checks. — When the bank upon which any uncertified check tendered to the Department of Revenue in payment of any obligation due to the Department returns the check because of insufficient funds or the nonexistence of an account of the drawer, the Secretary shall assess a penalty equal to ten percent (10%) of the check, subject to a minimum of one dollar (\$1.00) and a maximum of one thousand dollars (\$1,000). This penalty does not apply if the Secretary finds that, when the check was presented for payment, the drawer of the check had sufficient funds in an account at a financial institution to pay the check and, by inadvertence, the drawer of the check failed to draw the check on the account that had sufficient funds.
  - (1a) Penalty for Bad Electronic Funds Transfer. — When an electronic funds transfer cannot be completed due to insufficient funds or the nonexistence of an account of the transferor, the Secretary shall assess a penalty equal to ten percent (10%) of the amount of the transfer, subject to a minimum of one dollar (\$1.00) and a maximum of one thousand dollars (\$1,000). This penalty may be waived by the Secretary in accordance with G.S. 105-237.
  - (1b) Making Payment in Wrong Form. — For making a payment of tax in a form other than the form required by the Secretary pursuant to G.S. 105-241(a), the Secretary shall assess a penalty equal to five percent (5%) of the amount of the tax, subject to a minimum of one dollar (\$1.00) and a maximum of one thousand dollars (\$1,000). This penalty may be waived by the Secretary in accordance with G.S. 105-237.
  - (2) Failure to Obtain a License. — For failure to obtain a license before engaging in a business, trade or profession for which a license is required, the Secretary shall assess a penalty equal to five percent (5%) of the amount prescribed for the license per month or fraction thereof until paid, not to exceed twenty-five percent (25%) of the amount so prescribed, but in any event shall not be less than five dollars (\$5.00). In cases in which the taxpayer fails to obtain a license as required under G.S. 105-449.65 or G.S. 105-449.131, the Secretary may assess a penalty of one thousand dollars (\$1,000).
  - (3) Failure to File Return. — In case of failure to file any return on the date it is due, determined with regard to any extension of time for filing, the Secretary shall assess a penalty equal to five percent (5%) of the amount of the tax if the failure is for not more than one month, with an additional five percent (5%) for each additional month, or fraction thereof, during which the failure continues, not exceeding



twenty-five percent (25%) in the aggregate, or five dollars (\$5.00), whichever is the greater.

- (4) **Failure to Pay Tax When Due.** — In the case of failure to pay any tax when due, without intent to evade the tax, the Secretary shall assess a penalty equal to ten percent (10%) of the tax, except that the penalty shall in no event be less than five dollars (\$5.00). This penalty does not apply in any of the following circumstances:
- a. When the amount of tax shown as due on an amended return is paid when the return is filed.
  - b. When a tax due but not shown on a return is assessed by the Secretary and is paid within 30 days after the date of the proposed notice of assessment of the tax.
- (5) **Negligence.** —
- a. **Finding of negligence.** — For negligent failure to comply with any of the provisions to which this Article applies, or rules issued pursuant thereto, without intent to defraud, the Secretary shall assess a penalty equal to ten percent (10%) of the deficiency due to the negligence.
  - b. **Large individual income tax deficiency.** — In the case of individual income tax, if a taxpayer understates taxable income, by any means, by an amount equal to twenty-five percent (25%) or more of gross income, the Secretary shall assess a penalty equal to twenty-five percent (25%) of the deficiency. For purposes of this subdivision, “gross income” means gross income as defined in section 61 of the Code.
  - c. **Other large tax deficiency.** — In the case of a tax other than individual income tax, if a taxpayer understates tax liability by twenty-five percent (25%) or more, the Secretary shall assess a penalty equal to twenty-five percent (25%) of the deficiency.
  - d. **No double penalty.** — If a penalty is assessed under subdivision (6) of this section, no additional penalty for negligence shall be assessed with respect to the same deficiency.
  - e. **Inheritance and gift tax deficiencies.** — This subdivision does not apply to inheritance, estate, and gift tax deficiencies that are the result of valuation understatements.
- (5a) **Misuse of Exemption Certificate.** — For misuse of an exemption certificate by a purchaser, the Secretary shall assess a penalty equal to two hundred fifty dollars (\$250.00). An exemption certificate is a certificate issued by the Secretary that authorizes a retailer to sell tangible personal property to the holder of the certificate and either collect tax at a preferential rate or not collect tax on the sale. Examples of an exemption certificate include a certificate of resale, a direct pay certificate, and a farmer’s certificate.
- (5b) **Road Tax Understatement.** — If a motor carrier understates its liability for the road tax imposed by Article 36B of this Chapter by twenty-five percent (25%) or more, the Secretary shall assess the motor carrier a penalty in an amount equal to two times the amount of the deficiency.
- (6) **Fraud.** — If there is a deficiency or delinquency in payment of any tax because of fraud with intent to evade the tax, the Secretary shall assess a penalty equal to fifty percent (50%) of the total deficiency.
- (7) **Attempt to Evade or Defeat Tax.** — Any person who willfully attempts, or any person who aids or abets any person to attempt in any manner to evade or defeat a tax or its payment, shall, in addition to other penalties provided by law, be guilty of a Class H felony.
- (8) **Willful Failure to Collect, Withhold, or Pay Over Tax.** — Any person required to collect, withhold, account for, and pay over any tax who

- willfully fails to collect or truthfully account for and pay over the tax shall, in addition to other penalties provided by law, be guilty of a Class 1 misdemeanor. Notwithstanding any other provision of law, no prosecution for a violation brought under this subdivision shall be barred before the expiration of six years after the date of the violation.
- (9) **Willful Failure to File Return, Supply Information, or Pay Tax.** — Any person required to pay any tax, to make a return, to keep any records, or to supply any information, who willfully fails to pay the tax, make the return, keep the records, or supply the information, at the time or times required by law, or rules issued pursuant thereto, shall, in addition to other penalties provided by law, be guilty of a Class 1 misdemeanor. Notwithstanding any other provision of law, no prosecution for a violation brought under this subdivision shall be barred before the expiration of six years after the date of the violation.
- (9a) **Aid or Assistance.** — Any person, pursuant to or in connection with the revenue laws, who willfully aids, assists in, procures, counsels, or advises the preparation, presentation, or filing of a return, affidavit, claim, or any other document that the person knows is fraudulent or false as to any material matter, whether or not the falsity or fraud is with the knowledge or consent of the person authorized or required to present or file the return, affidavit, claim, or other document, is guilty of a felony as follows:
- If the person who commits an offense under this subdivision is an income tax return preparer and the amount of all taxes fraudulently evaded on returns filed in one taxable year is one hundred thousand dollars (\$100,000) or more, the person is guilty of a Class C felony.
  - If the person who commits an offense under this subdivision is an income tax return preparer and the amount of all taxes fraudulently evaded on returns filed in one taxable year is less than one hundred thousand dollars (\$100,000), the person is guilty of a Class F felony.
  - If the person who commits an offense under this subdivision is not covered under sub-subdivision a. or b. of this subdivision, the person is guilty of a Class H felony.
- (10) **Failure to File Informational Returns.** —
- Repealed by Session Laws 1998-212, s. 29A.14(m), effective January 1, 1999.
  - The Secretary may request a person who fails to file timely statements of payment to another person with respect to wages, dividends, rents, or interest paid to that person to file the statements by a certain date. If the payer fails to file the statements by that date, the amounts claimed on the payer's income tax return as deductions for salaries and wages, or rents or interest shall be disallowed to the extent that the payer failed to comply with the Secretary's request with respect to the statements.
  - For failure to file an informational return required by Article 36C or 36D of this Chapter by the date the return is due, there shall be assessed a penalty of fifty dollars (\$50.00).
- (10a) **Filing a Frivolous Return.** — If a taxpayer files a frivolous return under Part 2 of Article 4 of this Chapter, the Secretary shall assess a penalty in the amount of up to five hundred dollars (\$500.00). A frivolous return is a return that meets both of the following requirements:
- It fails to provide sufficient information to permit a determination that the return is correct or contains information which positively indicates the return is incorrect, and



- b. It evidences an intention to delay, impede or negate the revenue laws of this State or purports to adopt a position that is lacking in seriousness.

(10b) Misrepresentation Concerning Payment. — A person who receives money from a taxpayer with the understanding that the money is to be remitted to the Secretary for application to the taxpayer's tax liability and who willfully fails to remit the money to the Secretary is guilty of a Class F felony.

(11) Repealed by Session Laws 2006-162, s. 12(b), effective July 24, 2006.

(12) Repealed by Session Laws 1991, c. 45, s. 27.

(b) Situs. — Violation of a tax law is considered an act committed in part at the office of the Secretary in Raleigh. The certificate of the Secretary that a tax has not been paid, a return has not been filed, or information has not been supplied, as required by law, is prima facie evidence that the tax has not been paid, the return has not been filed, or the information has not been supplied.

(c) Penalty Disposition. — Civil penalties assessed by the Secretary are assessed as an additional tax. The clear proceeds of civil penalties assessed by the Secretary must be credited to the Civil Penalty and Forfeiture Fund established in G.S. 115C-457.1. (1939, c. 158, s. 907; 1953, c. 1302, s. 7; 1959, c. 1259, s. 8; 1963, c. 1169, s. 6; 1967, c. 1110, s. 9; 1973, c. 476, s. 193; c. 1287, s. 13; 1979, c. 156, s. 2; 1985, c. 114, s. 11; 1985 (Reg. Sess., 1986), c. 983; 1987 (Reg. Sess., 1988), c. 1076; 1989, c. 557, ss. 7 to 10; 1989 (Reg. Sess., 1990), c. 1005, s. 9; 1991, c. 45, s. 27; 1991 (Reg. Sess., 1992), c. 914, s. 2; c. 1007, s. 10; 1993, c. 354, s. 22; c. 450, s. 10; c. 539, ss. 709, 710, 1292, 1293; 1994, Ex. Sess., c. 24, s. 14(c); 1995, c. 390, s. 36; 1995 (Reg. Sess., 1996), c. 646, s. 10; c. 647, s. 51; c. 696, s. 1; 1997-6, s. 8; 1997-109, s. 3; 1998-178, ss. 1, 2; 1998-212, s. 29A.14(m); 1999-415, ss. 2, 3; 1999-438, ss. 15, 16; 2000-119, s. 2; 2000-120, s. 7; 2000-140, s. 70; 2002-106, ss. 2, 4; 2005-276, s. 6.37(n); 2005-435, s. 1; 2006-162, s. 12(b).)

#### Effect of Amendments. —

Session Laws 2006-162, s. 12(b), effective July 24, 2006, added "situs of violations; penalty disposition" at the end of the section catchline; designated the existing provisions as subsection (a); rewrote the introductory paragraph of (a) which read: "Penalties assessed by the Secretary under this Subchapter are assessed as an additional tax. The clear proceeds of any civil penalties levied pursuant to subdivisions (3), (4), (5)a., and (6) of this section shall be remitted to the Civil Penalty and Forfeiture Fund in accordance with G.S. 115C-457.2. Except as otherwise provided by law, and subject to the provisions of G.S. 105-237, the following

penalties shall be applicable."; deleted "in this State" preceding "to pay" near the middle of the last sentence in subdivision (a)(1); deleted former (11) which read: "Any violation of Subchapter I, V, or VIII of this Chapter or of Article 3 of Chapter 119 of the General Statutes is considered an act committed in part at the office of the Secretary in Raleigh. The certificate of the Secretary that a tax has not been paid, a return has not been filed, or information has not been supplied, as required by law, is prima facie evidence that the tax has not been paid, the return has not been filed, or the information has not been supplied."; and added subsections (b) and (c).

#### CASE NOTES

##### Penalties. —

Monetary payments for a taxpayer's noncompliance with a mandate of Chapter 105 are penalties and, therefore, subject to N.C. Const. art. IX, § 7; thus, monies collected by the North Carolina Department of Revenue for late fil-

ings, underpayments, and for failing to comply with statutory or regulatory tax provisions are payable to public schools. *N.C. Sch. Bds. Ass'n v. Moore*, 359 N.C. 474, 614 S.E.2d 504, 2005 N.C. LEXIS 694 (2005).



## § 105-241.1. Additional taxes; assessment procedure.

### CASE NOTES

**Penalties Collected for Failing to Comply with Statutory or Regulatory Tax Provisions.** — Monetary payments for a taxpayer's noncompliance with a mandate of Chapter 105 are penalties and, therefore, subject to N.C. Const. art. IX, § 7; thus, monies collected by

the North Carolina Department of Revenue for late filings, underpayments, and for failing to comply with statutory or regulatory tax provisions are payable to public schools. N.C. Sch. Bds. Ass'n v. Moore, 359 N.C. 474, 614 S.E.2d 504, 2005 N.C. LEXIS 694 (2005).

## § 105-241.2. Administrative review.

### CASE NOTES

**Cited in** Morton Bldgs., Inc. v. Tolson, 172 N.C. App. 119, 615 S.E.2d 906, 2005 N.C. App. LEXIS 1579 (2005).

## § 105-241.3. Appeal without payment of tax from Tax Review Board decision.

### CASE NOTES

**Cited in** Morton Bldgs., Inc. v. Tolson, 172 N.C. App. 119, 615 S.E.2d 906, 2005 N.C. App. LEXIS 1579 (2005).

## § 105-242. Warrants for collection of taxes; garnishment and attachment; certificate or judgment for taxes.

### CASE NOTES

**Garnishee Not Liable.** — Because defendant payroll analyst simply complied with the facially valid notice of garnishment issued by North Carolina Department of Revenue, as required of him by North Carolina law, G.S.

105-242(b) specifically shielded the payroll analyst from liability. Gust v. Tolson, — F. Supp. 2d —, 2006 U.S. Dist. LEXIS 28994 (W.D.N.C. May 4, 2006).

## § 105-243.1. Collection of tax debts.

(a) Definitions.— The following definitions apply in this section:

(1) Overdue tax debt.— Any part of a tax debt that remains unpaid 90 days or more after the notice of final assessment was mailed to the taxpayer. The term does not include a tax debt, however, if the taxpayer entered into an installment agreement for the tax debt under G.S. 105-237 within 90 days after the notice of final assessment was mailed and has not failed to make any payments due under the installment agreement.

(2) Tax debt.— The total amount of tax, penalty, and interest due for which a notice of final assessment has been mailed to a taxpayer after the taxpayer no longer has the right to contest the debt.

(b) Outsourcing.— The Secretary may contract for the collection of tax debts owed by nonresidents and foreign entities. At least 30 days before the

Department submits a tax debt to a contractor for collection, the Department must notify the taxpayer by mail that the debt may be submitted for collection if payment is not received within 30 days after the notice was mailed.

(c) Secrecy.— A contract for the collection of tax debts is conditioned on compliance with G.S. 105-259. If a contractor violates G.S. 105-259, the contract is terminated, and the Secretary must notify the contractor of the termination. A contractor whose contract is terminated for violation of G.S. 105-259 is not eligible for an award of another contract under this section for a period of five years from the termination. These sanctions are in addition to the criminal penalties set out in G.S. 105-259.

(d) Fee. — A collection assistance fee is imposed on an overdue tax debt that remains unpaid 30 days or more after the fee notice required by this subsection is mailed to the taxpayer. In order to impose a collection assistance fee on a tax debt, the Department must notify the taxpayer that the fee will be imposed if the tax debt is not paid in full within 30 days after the date the fee notice was mailed to the taxpayer. The Department may not mail the fee notice earlier than 60 days after the notice of final assessment for the tax debt was mailed to the taxpayer. The fee is collectible as part of the debt. The Secretary may waive the fee pursuant to G.S. 105-237 to the same extent as if it were a penalty.

The amount of the collection assistance fee is twenty percent (20%) of the amount of the overdue tax debt. If a taxpayer pays only part of an overdue tax debt, the payment is credited proportionally to fee revenue and tax revenue.

(e) Use. — The fee is a receipt of the Department and must be applied to the costs of collecting overdue tax debts. The proceeds of the fee must be credited to a special account within the Department and may be expended only as provided in this subsection. The proceeds of the fee may not be used for any purpose that is not directly and primarily related to collecting overdue tax debts. The Department may apply the proceeds of the fee for the purposes listed in this subsection. The remaining proceeds of the fee may be spent only pursuant to appropriation by the General Assembly. The fee proceeds do not revert but remain in the special account until spent for the costs of collecting overdue tax debts. The Department and the Office of State Budget and Management must account for all expenditures using accounting procedures that clearly distinguish costs allocable to collecting overdue tax debts from costs allocable to other purposes and must demonstrate that none of the fee proceeds are used for any purpose other than collecting overdue tax debts.

The Department may apply the fee proceeds for the following purposes:

- (1) To pay contractors for collecting overdue tax debts under subsection (b) of this section.
- (2) To pay the fee the United States Department of the Treasury charges for setoff to recover tax owed to North Carolina.
- (3) To pay for taxpayer locator services, not to exceed one hundred fifty thousand dollars (\$150,000) a year.
- (4) To pay for postage or other delivery charges for correspondence directly and primarily relating to collecting overdue tax debts, not to exceed three hundred fifty-three thousand dollars (\$353,000) a year.
- (5) To pay for operating expenses for Project Collection Tax and the Taxpayer Assistance Call Center.
- (6) To pay for expenses of the Examination and Collection Division directly and primarily relating to collecting overdue tax debts.

(f) Reports. — The report of Department activities required by G.S. 105-256 contains information on the Department's efforts to collect tax debts and its use of the proceeds of the collection assistance fee. (2001-380, ss. 2, 8; 2002-126, s. 22.2; 2003-349, s. 3; 2004-124, ss. 23.2(a), 23.3(c); 2004-170, s. 22.5; 2005-276, ss. 22.1(a), 22.1(b), 22.6(a); 2006-66, ss. 19.2, 19.3(a).)

**Editor's Note. —**

Session Laws 2006-66, s. 1.2, provides: "This act shall be known as 'The Current Operations and Capital Improvements Appropriations Act of 2006'."

Session Laws 2006-66, s. 28.6 is a severability clause.

**Effect of Amendments. —**

Session Laws 2006-66, ss. 19.2 and 19.3(a), effective July 1, 2006, substituted "one hundred

fifty thousand dollars (\$150,000)" for "one hundred thousand dollars (\$100,000)" in subdivision (e)(3); and inserted "not to exceed three hundred fifty-three thousand dollars (\$353,000) a year" in subdivision (e)(4); and rewrote subsection (f), which detailed reporting requirements.

## **§ 105-249.2. Due date extended and penalties waived for certain military personnel or persons affected by a presidentially declared disaster.**

(a) **Combat.** — The Secretary may not assess interest or a penalty against a taxpayer for any period that is disregarded under section 7508 of the Code in determining the taxpayer's liability for a federal tax. A taxpayer is granted an extension of time to file a return or take another action concerning a State tax for any period during which the Secretary may not assess interest or a penalty under this section.

(b) **Disaster.** — The penalties in G.S. 105-236(2), (3), and (4) may not be assessed for any period in which the time for filing a federal return or report or for paying a federal tax is extended under section 7508A of the Code because of a presidentially declared disaster. For the purpose of this section, "presidentially declared disaster" has the same meaning as in section 1033(h) (3) of the Code. (1967, c. 706, s. 1; 1991, c. 439, s. 1; 1991 (Reg. Sess., 1992), c. 922, s. 10; 2001-87, s. 1; 2001-414, s. 24; 2006-162, s. 18.)

**Effect of Amendments.** — Session Laws 2006-162, s. 18, effective July 24, 2006, substi-

tuted "persons" for "individuals" in the middle of the section catchline.

## **§ 105-256. Reports prepared by Secretary of Revenue.**

(a) **Reports.** — The Secretary shall prepare and publish the following:

- (1) At least every two years, statistics concerning taxes imposed by this Chapter, including amounts collected, classifications of taxpayers, geographic distribution of taxes, and other facts considered pertinent and valuable.
- (2) At least every two years, a tax expenditure report that lists the tax expenditures made by a provision in this Chapter, other than a provision in Subchapter II, and gives an estimate of the amount by which revenue is reduced by each tax expenditure. A "tax expenditure" is an exemption, an exclusion, a deduction, an allowance, a credit, a refund, a preferential tax rate, or another device that reduces the amount of tax revenue that would otherwise be available to the State. An estimate of the amount by which revenue is reduced by a tax expenditure may be stated as ranging between two amounts if the Department does not have sufficient data to make a more specific estimate.
- (3) As often as required, a report that is not listed in this subsection but is required by another law.
- (4) As often as the Secretary determines is needed, other reports concerning taxes imposed by this Chapter.
- (5) At least once a year, a statement of the taxpayer's bill of rights, which sets forth in simple and nontechnical terms the following:



- a. The taxpayer's right to have the taxpayer's tax information kept confidential.
- b. The rights of a taxpayer and the obligations of the Department during an audit.
- c. The procedure for a taxpayer to appeal an adverse decision of the Department at each level of determination.
- d. The procedure for a taxpayer to claim a refund for an alleged overpayment.
- e. The procedure for a taxpayer to request information, assistance, and interpretations or to make complaints.
- f. Penalties and interest that may apply and the basis for requesting waiver of a penalty.
- g. The procedures the Department may use to enforce the collection of a tax, including assessment, jeopardy assessment, enforcement of liens, and garnishment and attachment.

(6) On an annual basis, a report on the quality of services provided to taxpayers through the Taxpayer Assistance Call Center, walk-in assistance, and taxpayer education. The report must be submitted to the Joint Legislative Commission on Governmental Operations.

(7) The reports required under G.S. 105-129.19 and G.S. 105-129.44.

(8) By January 1 and July 1 of each year, a semiannual report on the Department's activities listed in this subdivision. The report must be submitted to the Joint Legislative Commission on Governmental Operations and to the Revenue Laws Study Committee.

- a. Its efforts to increase compliance with the tax laws. The report must describe the Department's existing initiatives in this area as of July 1, 2006, and must estimate, by tax type and amount, the revenue expected in the fiscal year by the initiative. The report must describe any new initiative implemented since July 1, 2006, and estimate, by tax type and amount, the revenue expected in the fiscal year by the initiative.
- b. Its efforts to identify and address fraud and other abuses of the voluntary tax compliance system that result in unreported and underreported tax. The report must describe the Department's long-term plan for achieving greater voluntary compliance and must summarize the steps taken since the last report and their results.
- c. Its efforts to collect tax debts. The report must include a breakdown of the amount and age of tax debts collected through warning letters and by other means, must itemize collections by type of tax, must describe the Department's long-term collection plan, and must summarize the steps taken since the last report and their results.
- d. Its use of the proceeds of the collection assistance fee imposed by G.S. 105-243.1.

(b) Information. — The Secretary may require a unit of State or local government to furnish the Secretary statistical information the Secretary needs to prepare a report under this section. Upon request of the Secretary, a unit of government shall submit statistical information on one or more forms provided by the Secretary.

(c) Distribution. — The Secretary shall distribute reports prepared by the Secretary as follows without charge:

- (1) Five copies to the Division of State Library of the Department of Cultural Resources, as required by G.S. 125-11.7.
- (2) Five copies to the Legislative Services Commission for the use of the General Assembly.

- (3) Upon request, one copy to each entity and official to which a copy of the reports of the Appellate Division of the General Court of Justice is furnished under G.S. 7A-343.1.
- (4) One copy of the tax expenditure report to each member of the General Assembly and, upon request, one copy of any other report to each member of the General Assembly.
- (5) One copy of the taxpayer's bill of rights to each taxpayer the Department contacts regarding determination or collection of a tax, other than by providing a tax form.
- (6) Upon request, one copy of the taxpayer's bill of rights to each taxpayer.

The Secretary may charge a person not listed in this subsection a fee for a report prepared by the Secretary in an amount that covers publication or copying costs and mailing costs.

(d) Other Requirements. — The following requirements apply to the Secretary:

- (1) **(Repealed effective July 1, 2007 - see editor's note for applicability)** Video Poker. — G.S. 14-306.1(j) requires the Department to provide summary reports quarterly to the Joint Legislative Commission on Governmental Operations.
  - (2) Escheats. — G.S. 116B-60(g) requires the Secretary to furnish information to the Escheat Fund on October 1 of each year.
- (e) Repealed by Session Laws 2004-124, s. 23.3(b), effective July 1, 2004. (1939, c. 158, s. 926; 1955, c. 1350, s. 8; 1973, c. 476, s. 193; 1991, c. 10, s. 1; 1991 (Reg. Sess., 1992), c. 1007, s. 16; 1993, c. 433, s. 1; c. 532, s. 6; 2001-414, ss. 25, 26; 2002-87, s. 8; 2002-126, s. 22.5; 2004-124, s. 23.3(b); 2006-6, s. 10; 2006-66, s. 19.3(b).)

**Editor's Note. —**

Session Laws 2006-6, s. 10, provides, in part, that the repeal of subdivision (d)(1) does not affect reports for activities prior to July 1, 2007.

Session Laws 2006-6, s. 12, provides: "Prosecutions for offenses committed before the effective dates in this act are not abated or affected by this act, and the statutes that would be applicable but for this act remain applicable to those prosecutions. If a final Order by a court of competent jurisdiction prohibits possession or operation of video gaming machines by a federally recognized Indian tribe because that activity is not allowed elsewhere in this State, this act is void."

Session Laws 2006-66, s. 1.2, provides: "This act shall be known as 'The Current Operations and Capital Improvements Appropriations Act of 2006'."

Session Laws 2006-66, s. 19.3(c), provides: "The first report required under G.S. 105-

256(a)(8), as enacted by this section, is due by January 1, 2007."

Session Laws 2006-66, s. 28.3, provides: "Except for statutory changes or other provisions that clearly indicate an intention to have effects beyond the 2006 2007 fiscal year, the textual provisions of this act apply only to funds appropriated for, and activities occurring during, the 2006 2007 fiscal year."

Session Laws 2006-66, s. 28.6, is a severability clause.

**Effect of Amendments. —**

Session Laws 2006-6, s. 10, effective July 1, 2007, and applicable to offenses committed on or after that date, repealed subdivision (d)(1) relating to video poker.

Session Laws 2006-66, s. 19.3(b), effective July 1, 2006, substituted "through the Taxpayer Assistance Call Center" for "including telephone and walk-in assistance" in subdivision (a)(6); and added subdivision (a)(8).

## § 105-259. Secrecy required of officials; penalty for violation.

(a) Definitions. — The following definitions apply in this section:

- (1) Employee or officer. — The term includes a former employee, a former officer, and a current or former member of a State board or commission.



(2) Tax information. — Any information from any source concerning the liability of a taxpayer for a tax, as defined in G.S. 105-228.90. The term includes the following:

- a. Information contained on a tax return, a tax report, or an application for a license for which a tax is imposed.
- b. Information obtained through an audit of a taxpayer or by correspondence with a taxpayer.
- c. Information on whether a taxpayer has filed a tax return or a tax report.
- d. A list or other compilation of the names, addresses, social security numbers, or similar information concerning taxpayers.

The term does not include (i) statistics classified so that information about specific taxpayers cannot be identified, (ii) an annual report required to be filed under G.S. 55-16-22 or (iii) the amount of tax refunds paid to a governmental entity listed in G.S. 105-164.14(c) or to a State agency.

(b) Disclosure Prohibited. — An officer, an employee, or an agent of the State who has access to tax information in the course of service to or employment by the State may not disclose the information to any other person unless the disclosure is made for one of the following purposes:

- (1) To comply with a court order or a law.
- (2) Review by the Attorney General or a representative of the Attorney General.
- (3) Review by a tax official of another jurisdiction to aid the jurisdiction in collecting a tax imposed by this State or the other jurisdiction if the laws of the other jurisdiction allow it to provide similar tax information to a representative of this State.
- (4) To provide a governmental agency or an officer of an organized association of taxpayers with a list of taxpayers who have paid a privilege license tax under Article 2 of this Chapter.
- (5) To furnish to the chair of a board of county commissioners information on the county sales and use tax.
- (5a) Reserved.
- (5b) To furnish to the finance officials of a city a list of the utility taxable gross receipts and piped natural gas tax revenues attributable to the city under G.S. 105-116.1 and G.S. 105-187.44 or under former G.S. 105-116 and G.S. 105-120.
- (5c) To provide the following information to a regional public transportation authority or a regional transportation authority created pursuant to Article 26 or Article 27 of Chapter 160A of the General Statutes on an annual basis, when the information is needed to enable the authority to administer its tax laws:
  - a. The name, address, and identification number of retailers who collect the tax on leased vehicles imposed by G.S. 105-187.5.
  - b. The name, address, and identification number of a retailer audited by the Department of Revenue regarding the tax on leased vehicles imposed by G.S. 105-187.5, when the Department determines that the audit results may be of interest to the authority.
- (5d) To provide the following information to a county or city on an annual basis, when the county or city needs the information for the administration of its local prepared food and beverages tax or room occupancy tax:
  - a. The name, address, and identification number of retailers who collect the sales and use taxes imposed under Article 5 of this Chapter and may be engaged in a business subject to a local prepared food and beverages tax or room occupancy tax.



- b. The name, address, and identification number of a retailer audited by the Department of Revenue regarding the sales and use taxes imposed under Article 5 of this Chapter, when the Department determines that the audit results may be of interest to the county or city in the administration of its local prepared food and beverages tax or room occupancy tax.
- (6) To sort, process, or deliver tax information on behalf of the Department of Revenue.
- (6a) To furnish the county or city official designated under G.S. 105-164.14(f) a list of claimants that have received a refund of the county sales or use tax to the extent authorized in G.S. 105-164.14(f).
- (7) To exchange information with the Division of the State Highway Patrol of the Department of Crime Control and Public Safety, the Division of Motor Vehicles of the Department of Transportation, or the International Fuel Tax Association, Inc., when the information is needed to fulfill a duty imposed on the Department of Revenue, the Division of the State Highway Patrol of the Department of Crime Control and Public Safety, or the Division of Motor Vehicles of the Department of Transportation.
- (7a) To furnish the name and identifying information of motor carriers whose licenses have been revoked to the administrator of a national criminal justice system database that makes the information available only to criminal justice agencies and public safety organizations.
- (8) To furnish to the Department of State Treasurer, upon request, the name, address, and account and identification numbers of a taxpayer who may be entitled to property held in the Escheat Fund.
- (9) To furnish to the Employment Security Commission the name, address, and account and identification numbers of a taxpayer when the information is requested by the Commission in order to fulfill a duty imposed under Article 2 of Chapter 96 of the General Statutes.
- (9a) To furnish information to the Employment Security Commission to the extent required for its NC WORKS study of the working poor pursuant to G.S. 108A-29(r). The Employment Security Commission shall use information furnished to it under this subdivision only in a nonidentifying form for statistical and analytical purposes related to its NC WORKS study. The information that may be furnished under this subdivision is the following with respect to individual income taxpayers, as shown on the North Carolina income tax forms:
  - a. Name, social security number, spouse's name, spouse's social security number, and county of residence.
  - b. Filing status and federal personal exemptions.
  - c. Federal taxable income, additions to federal taxable income, and total of federal taxable income plus additional income.
  - d. Income while a North Carolina resident, total income from North Carolina sources while a nonresident, and total income from all sources.
  - e. Exemption for children, nonresidents' and part-year residents' exemption for children, and credit for children.
  - f. Expenses for child and dependent care, portion of expenses paid while a resident of North Carolina, portion of expenses paid while a resident of North Carolina that was incurred for dependents who were under the age of seven and dependents who were physically or mentally incapable of caring for themselves, credit for child and dependent care expenses, other qualifying expenses, credit for other qualifying expenses, total credit for child and dependent care expenses.

- (10) Review by the State Auditor to the extent authorized in G.S. 147-64.7.
- (11) To give a spouse who elects to file a joint tax return a copy of the return or information contained on the return.
- (11a) To provide a copy of a return to the taxpayer who filed the return.
- (11b) In the case of a return filed by a corporation, a partnership, a trust, or an estate, to provide a copy of the return or information on the return to a person who has a material interest in the return if, under the circumstances, section 6103(e)(1) of the Code would require disclosure to that person of any corresponding federal return or information.
- (11c) In the case of a return of an individual who is legally incompetent or deceased, to provide a copy of the return to the legal representative of the estate of the incompetent individual or decedent.
- (12) To contract with a financial institution for the receipt of withheld income tax payments under G.S. 105-163.6 or for the transmittal of payments by electronic funds transfer.
- (13) To furnish the Fiscal Research Division of the General Assembly, upon request, a sample, suitable in character, composition, and size for statistical analyses, of tax returns or other tax information from which taxpayers' names and identification numbers have been removed.
- (14) To exchange information concerning a tax imposed by Subchapter V of this Chapter with the Standards Division of the Department of Agriculture and Consumer Services when the information is needed to administer the Gasoline and Oil Inspection Act, Article 3 of Chapter 119 of the General Statutes.
- (15) To exchange information concerning a tax imposed by Articles 2A, 2C, or 2D of this Chapter with one of the following agencies when the information is needed to fulfill a duty imposed on the Department or the agency:
  - a. The North Carolina Alcoholic Beverage Control Commission.
  - b. The Division of Alcohol Law Enforcement of the Department of Crime Control and Public Safety.
  - c. The Bureau of Alcohol, Tobacco, and Firearms of the United States Treasury Department.
  - d. Law enforcement agencies.
  - e. The Division of Community Corrections of the Department of Correction.
- (15a) To furnish to the head of the appropriate State or federal law enforcement agency information concerning the commission of an offense under the jurisdiction of that agency discovered by the Department during a criminal investigation of the taxpayer.
- (16) To furnish to the Department of Secretary of State the name, address, tax year end, and account and identification numbers of a corporation liable for corporate income or franchise taxes or of a limited liability company liable for a corporate or a partnership tax return to enable the Secretary of State to notify the corporation or the limited liability company of the annual report filing requirement or that its articles of incorporation or articles of organization or its certificate of authority has been suspended.
- (16a) To provide the North Carolina Self-Insurance Security Association information on self-insurers' premiums as determined under G.S. 105-228.5(b), (b1), and (c) for the purpose of collecting the assessments authorized in G.S. 97-133(a).
- (17) To inform the Business License Information Office of the Department of Commerce of the status of an application for a license for which a



tax is imposed and of any information needed to process the application.

- (18) To furnish to the Office of the State Controller the name, address, and account and identification numbers of a taxpayer upon request to enable the State Controller to verify statewide vendor files or track debtors of the State.
- (19) To furnish to the North Carolina Industrial Commission information concerning workers' compensation reported to the Secretary under G.S. 105-163.7.
- (20) **(Repealed effective January 1, 2012)** To furnish to the Environmental Management Commission information concerning whether a person who is requesting certification of a dry-cleaning facility or wholesale distribution facility from the Commission is liable for privilege tax under Article 5D of this Chapter.
- (21) To exchange information concerning the tax on piped natural gas imposed by Article 5E of this Chapter with the North Carolina Utilities Commission or the Public Staff of that Commission.
- (22) To provide the Secretary of Administration pursuant to G.S. 143-59.1 a list of vendors and their affiliates who meet one or more of the conditions of G.S. 105-164.8(b) but refuse to collect the use tax levied under Article 5 of this Chapter on their sales delivered to North Carolina.
- (23) To provide public access to a database containing the names and account numbers of taxpayers who are not required to pay sales and use taxes under Article 5 of this Chapter to a retailer because of an exemption or because they are authorized to pay the tax directly to the Department of Revenue.
- (24) To furnish the Department of Commerce and the Employment Security Commission a copy of the qualifying information required in G.S. 105-129.7(b) or G.S. 105-129.86(b).
- (25) To provide public access to a database containing the names of retailers who are registered to collect sales and use taxes under Article 5 of this Chapter.
- (26) To contract for the collection of tax debts pursuant to G.S. 105-243.1.
- (27) To provide a report required under this Chapter.  
105-129.85
- (28) To exchange information concerning a tax credit claimed under Article 3E of this Chapter with the North Carolina Housing Finance Agency.
- (29) To provide to the Economic Investment Committee established pursuant to G.S. 143B-437.48 information necessary to implement Part 2F of Article 10 of Chapter 143B of the General Statutes.
- (30) To prove that a business does not meet the definition of "small business" under Article 3F of this Chapter because the annual receipts of the business, combined with the annual receipts of all related persons, exceeds the applicable amount.
- (31) **(Repealed for business activities occurring in taxable years beginning on or after January 1, 2020)** To verify with a related entity or strategic partner information relating to that entity provided by a taxpayer claiming a credit under Article 3G of this Chapter.
- (32) Repealed by Session Laws 2006-162, s. 4(c), effective for taxable years beginning on or after January 1, 2006.
- (33) To provide to the North Carolina State Lottery Commission the information required under G.S. 18C-141.
- (34) To exchange information concerning a tax credit claimed under G.S. 105-130.47 or G.S. 105-151.29 with the North Carolina Film Office of the Department of Commerce and with the regional film commissions.



- (35) To furnish to a taxpayer claiming a credit under Article 3G of this Chapter information from a related entity or strategic partner to the extent that information was used by the Secretary to adjust the amount of tax credit claimed by the taxpayer.
- (36) To furnish to a taxpayer claiming a credit under G.S. 105-130.47 or G.S. 105-151.29 information used by the Secretary to adjust the amount of the credit claimed by the taxpayer.
- (37) To furnish the Department of Commerce with the information needed to complete the studies required under G.S. 105-129.2A and G.S. 105-129.82.

(c) Punishment. — A person who violates this section is guilty of a Class 1 misdemeanor. If the person committing the violation is an officer or employee, that person shall be dismissed from public office or public employment and may not hold any public office or public employment in this State for five years after the violation. (1939, c. 158, s. 928; 1951, c. 190, s. 2; 1973, c. 476, s. 193; c. 903, s. 4; c. 1287, s. 13; 1975, c. 19, s. 29; c. 275, s. 7; 1977, c. 657, s. 6; 1979, c. 495; 1983, c. 7; 1983 (Reg. Sess., 1984), c. 1004, s. 3; c. 1034, s. 125; 1987, c. 440, s. 4; 1989, c. 628; c. 728, s. 1.47; 1989 (Reg. Sess., 1990), c. 945, s. 15; 1993, c. 485, s. 31; c. 539, s. 712; 1994, Ex. Sess., c. 14, s. 51; c. 24, s. 14(c); 1993 (Reg. Sess., 1994), c. 679, s. 8.4; 1995, c. 17, s. 11; c. 21, s. 2; 1997-118, s. 6; 1997-261, s. 14; 1997-340, s. 2; 1997-392, s. 4.1; 1997-475, s. 6.11; 1998-22, ss. 10, 11; 1998-98, ss. 13.1(b), 20; 1998-139, s. 1; 1998-212, s. 12.27A(o); 1999-219, s. 7.1; 1999-340, s. 8; 1999-341, s. 8; 1999-360, s. 2.1; 1999-438, s. 18; 1999-452, s. 28.1; 2000-120, s. 8; 2000-173, s. 11; 2001-205, s. 1; 2001-380, s. 5; 2001-476, s. 8(b); 2001-487, ss. 47(d), 123; 2002-87, s. 7; 2002-106, s. 5; 2002-172, s. 2.3; 2003-349, s. 4; 2003-416, s. 2; 2004-124, s. 32D.3; 2004-170, s. 23; 2004-204, 1st Ex. Sess., s. 4; 2005-276, ss. 31.1(cc), 39.1(c), 7.27(b); 2005-400, s. 20; 2005-429, s. 2.13; 2005-435, ss. 32(b), 32(c), 37, 48; 2006-162, s. 4(c); 2006-196, s. 11; 2006-252, s. 2.21.)

#### Editor's Note. —

Subdivision (b)(37) was added by Session Laws 2006-252, s. 2.21, as subdivision (b)(36), and was redesignated at the direction of the Revisor of Statutes.

Subdivision (b)(27) of this section was amended twice in 2006 in the code bill drafting format provided in G.S. 120-1. Session Laws 2006-162, s. 4(c), rewrote subdivision (b)(27). Session Laws 2006-252, s. 2.21, amended subdivision (b)(27) by inserting "105-129.85," without referring to changes made by Session Laws 2006-162. Subdivision (b)(27) has been set out in the form above at the direction of the Revisor of Statutes.

Session Laws 2006-196, s. 13, provides: "The Revenue Laws Study Committee shall study the following issues:

"(1) The simplification of the additional tax imposed on insurance contracts on property coverage, as enacted in Section 3 of this act, and the distribution of the revenue generated by the tax. The study of this issue may include a recommendation on the percentage of revenue to be distributed to the firemen's local relief funds and the formula for making this distribution. The study may also consider the increasing difference between the amount of revenue available in the Volunteer Fire

Department Fund for matching grants to purchase equipment and make capital improvements and the amount of grant requests received.

"(2) The authority of the Secretary of Revenue to require taxpayers to file consolidated returns. The study of this issue may include consideration of whether the State should require some corporations or all corporations to file a consolidated return.

"(3) The feasibility of replacing the State's current corporate income and franchise tax laws with a commercial activity tax based upon business gross receipts.

"(4) The administrative process for the review of disputed tax matters."

#### Effect of Amendments. —

Session Laws 2006-162, s. 4(c), and applicable to taxable years beginning on or after January 1, 2006, in subsection (b), rewrote subdivision (b)(27) which read: "To publish the information required under G.S. 105-129.6, 105-129.19, 105-129.26, 105-129.38, 105-129.44, 105-129.65A, 105-130.41, 105-130.45, 105-151.22, and 105-164.14."; deleted "publish the information required under G.S. 105-129.52 and to" preceding "prove that" in subdivision (b)(30); deleted former subdivision (b)(32) which read: "To provide the report re-

quired under G.S. 105-164.14(c) to the Department of Public Information and the Fiscal Research Division of the General Assembly.”; deleted “and to publish the reports required under those sections” following “commissions” at the end of subdivision (b)(34); and added subdivision (b)(36).

Session Laws 2006-196, s. 11, effective August 3, 2006, in paragraph (b)(5d), substituted “prepared food and beverages tax or room occupancy tax” for “tax on prepared food and beverages” at the end of the introductory paragraph, substituted “a business subject to a local pre-

pared food and beverages tax or room occupancy tax” for “the business of selling prepared food and beverages” at the end of paragraph (b)(5d)a and substituted “local prepared food and beverages tax or room occupancy tax” for “local tax on prepared food and beverages” at the end of paragraph (b)(5d)b.

Session Laws 2006-252, s. 2.21, effective January 1, 2007, added “or G.S. 105-129.86(b)” at the end of subdivision (b)(24); inserted “105-129.85” in subdivision (b)(27); and added subdivision (b)(37).

## § 105-266.1. Refunds of overpayment of taxes.

### CASE NOTES

**Statutory Procedure Under G.S. 105-267 Must Be Followed.** — The appropriate method for obtaining review of a decision of the North Carolina Augmented Tax Board was by filing a civil action pursuant to G.S. 105-267; absent such a review overturning the decision of the Augmented Board, the Board lacked

subject matter jurisdiction to order a refund based on factors contrary to that decision. *Cent. Tel. Co. v. Tolson*, — N.C. App., 621 S.E.2d 186, 2005 N.C. App. LEXIS 2488 (2005).

**Cited** in *Morton Bldgs., Inc. v. Tolson*, 172 N.C. App. 119, 615 S.E.2d 906, 2005 N.C. App. LEXIS 1579 (2005).

## § 105-267. Taxes to be paid; suits for recovery of taxes.

### CASE NOTES

#### **Statutory Procedure Must Be Followed.**

— The appropriate method for obtaining review of a decision of the North Carolina Augmented Tax Board was by filing a civil action pursuant to G.S. 105-267; absent such a review overturning the decision of the Augmented Board, the

Board lacked subject matter jurisdiction to order a refund based on factors contrary to that decision. *Cent. Tel. Co. v. Tolson*, — N.C. App., 621 S.E.2d 186, 2005 N.C. App. LEXIS 2488 (2005).

**Applied** in *Coley v. State*, 360 N.C. 493, 631 S.E.2d 121, 2006 N.C. LEXIS 594 (2006).

## § 105-269.15. Income tax credits of partnerships.

**Cross References.** — As to tax credits for rehabilitated mill property, see G.S. 105-129.71 and 105-129.72.

## SUBCHAPTER II. LISTING, APPRAISAL, AND ASSESSMENT OF PROPERTY AND COLLECTION OF TAXES ON PROPERTY.

### ARTICLE 11.

#### *Short Title, Purpose, and Definitions.*

## § 105-273. Definitions.

When used in this Subchapter (unless the context requires a different meaning):



- (1) "Abstract" means the document on which the property of a taxpayer is listed for ad valorem taxation and on which the appraised and assessed values of the property are recorded.
- (2) "Appraisal" means both the true value of property and the process by which true value is ascertained.
- (3) "Assessment" means both the tax value of property and the process by which the assessment is determined.
- (4) Repealed by Session Laws 1973, c. 695, s. 15, effective January 1, 1974.
- (4a) "Code" [is] defined in G.S. 105-228.90.
- (5) "Collector" or "tax collector" means any person charged with the duty of collecting taxes for a county or municipality.
- (5a) "Contractor" means a taxpayer who is regularly engaged in building, installing, repairing, or improving real property.
- (6) "Corporation" includes nonprofit corporation and every type of organization having capital stock represented by shares.
- (6a) "Discovered property" includes all of the following:
  - a. Property that was not listed during a listing period.
  - b. Property that was listed but the listing included a substantial understatement.
  - c. Property that has been granted an exemption or exclusion and does not qualify for the exemption or exclusion.
- (6b) "To discover property" means to determine any of the following:
  - a. Property has not been listed during a listing period.
  - b. A taxpayer made a substantial understatement of listed property.
  - c. Property was granted an exemption or exclusion and the property does not qualify for an exemption or exclusion.
- (7) "Document" includes book, paper, record, statement, account, map, plat, film, picture, tape, object, instrument, and any other thing conveying information.
- (7a) "Failure to list property" includes all of the following:
  - a. Failure to list property during a listing period.
  - b. A substantial understatement of listed property.
  - c. Failure to notify the assessor that property granted an exemption or exclusion under an application for exemption or exclusion does not qualify for the exemption or exclusion.
- (8) "Intangible personal property" means patents, copyrights, secret processes, formulae, good will, trademarks, trade brands, franchises, stocks, bonds, cash, bank deposits, notes, evidences of debt, leasehold interests in exempted real property, bills and accounts receivable, and other like property.
- (8a) "Inventories" means (i) goods held for sale in the regular course of business by manufacturers, retail and wholesale merchants, and contractors, and (ii) goods held by contractors to be furnished in the course of building, installing, repairing, or improving real property. As to manufacturers, the term includes raw materials, goods in process, and finished goods, as well as other materials or supplies that are consumed in manufacturing or processing, or that accompany and become a part of the sale of the property being sold. The term also includes a modular home as defined in G.S. 105-164.3(21b) that is used exclusively as a display model and held for eventual sale at the retail merchant's place of business. The term also includes crops, livestock, poultry, feed used in the production of livestock and poultry, and other agricultural or horticultural products held for sale, whether in process or ready for sale. The term does not include fuel used in manufacturing or processing, nor does it include materials or supplies not used directly in manufacturing or processing. As to retail and



wholesale merchants and contractors, the term includes, in addition to articles held for sale, packaging materials that accompany and become a part of the sale of the property being sold.

- (9) "List" or "listing," when used as a noun, means abstract.
- (10) Repealed by Session Laws 1987, c. 43, s. 1.
- (10a) "Local tax official" includes a county assessor, an assistant county assessor, a member of a county board of commissioners, a member of a county board of equalization and review, a county tax collector, and the municipal equivalents of these officials.
- (10b) "Manufacturer" means a taxpayer who is regularly engaged in the mechanical or chemical conversion or transformation of materials or substances into new products for sale or in the growth, breeding, raising, or other production of new products for sale. The term does not include delicatessens, cafes, cafeterias, restaurants, and other similar retailers that are principally engaged in the retail sale of foods prepared by them for consumption on or off their premises.
- (11) "Municipal corporation" and "municipality" mean city, town, incorporated village, sanitary district, rural fire protection district, rural recreation district, mosquito control district, hospital district, metropolitan sewerage district, watershed improvement district, or other district or unit of local government by or for which ad valorem taxes are levied. The terms also include a consolidated city-county as defined by G.S. 160B-2(1).
- (12) "Person" and "he" include any individual, trustee, executor, administrator, other fiduciary, corporation, limited liability company, unincorporated association, partnership, sole proprietorship, company, firm, or other legal entity.
- (13) "Real property," "real estate," and "land" mean not only the land itself, but also buildings, structures, improvements, and permanent fixtures on the land, and all rights and privileges belonging or in any way appertaining to the property. These terms also mean a manufactured home as defined in G.S. 143-143.9(6) if it is a residential structure; has the moving hitch, wheels, and axles removed; and is placed upon a permanent foundation either on land owned by the owner of the manufactured home or on land in which the owner of the manufactured home has a leasehold interest pursuant to a lease with a primary term of at least 20 years for the real property on which the manufactured home is affixed and where the lease expressly provides for disposition of the manufactured home upon termination of the lease. A manufactured home as defined in G.S. 143-143.9(6) that does not meet all of these conditions is considered tangible personal property.
- (13a) "Retail Merchant" means a taxpayer who is regularly engaged in the sale of tangible personal property, acquired by a means other than manufacture, processing, or producing by the merchant, to users or consumers.
- (13b) "Substantial understatement" means the omission of a material portion of the value, quantity, or other measurement of taxable property. The determination of materiality in each case shall be made by the assessor, subject to the taxpayer's right to review of the determination by the county board of equalization and review or board of commissioners and appeal to the Property Tax Commission.
- (14) "Tangible personal property" means all personal property that is not intangible and that is not permanently affixed to real property.
- (15) "Tax" and "taxes" include the principal amount of any tax, costs, penalties, and interest imposed upon property tax or dog license tax.
- (16) "Taxing unit" means a county or municipality authorized to levy ad valorem property taxes.

- (17) “Taxpayer” means any person whose property is subject to ad valorem property taxation by any county or municipality and any person who, under the terms of this Subchapter, has a duty to list property for taxation. For purposes of collecting delinquent ad valorem taxes assessed on real property under G.S. 105-366 through G.S. 105-375, “taxpayer” means the owner of record on the date the taxes become delinquent and any subsequent owner of record of the real property if conveyed after that date.
- (18) “Valuation” means appraisal and assessment.
- (19) “Wholesale Merchant” means a taxpayer who is regularly engaged in the sale of tangible personal property, acquired by a means other than manufacture, processing, or producing by the merchant, to other retail or wholesale merchants for resale or to manufacturers for use as ingredient or component parts of articles being manufactured for sale. (1939, c. 310, s. 2; 1971, c. 806, s. 1; 1973, c. 695, ss. 14, 15; 1985, c. 656, s. 20; 1985 (Reg. Sess., 1986), c. 947, ss. 3, 4; 1987, c. 43, s. 1; c. 440, s. 2; c. 805, s. 3; c. 813, ss. 1-4; 1991, c. 34, s. 3; 1991 (Reg. Sess., 1992), c. 975, s. 1; c. 1004, s. 1; 1993, c. 354, s. 23; c. 459, s. 1; 1995, c. 461, s. 15; 1998-212, s. 29A.18(c); 2001-506, s. 1; 2002-156, s. 4; 2003-400, s. 4; 2006-106, ss. 1, 8.)

**Effect of Amendments. —**

Session Laws 2006-106, ss. 1 and 8, effective for taxes imposed for taxable years beginning

on or after July 1, 2006, added the last sentence in subdivision (17) and added the third sentence in subdivision (8a).

**CASE NOTES**

**Mobile Homes.** — Mobile home that was placed on real property with the wheels and axles removed and affixed to a concrete foundation became realty. The creditor’s claim was thus secured only by the real property that was

the debtor’s principal residence, and the claim could not be modified pursuant to 11 U.S.C.S. § 1322(b)(2). *In re McNeill*, — Bankr. —, 2006 Bankr. LEXIS 871 (Bankr. M.D.N.C. May 12, 2006).

**ARTICLE 12.**

*Property Subject to Taxation.*

**§ 105-277.2. Agricultural, horticultural, and forestland — Definitions.**

**Editor’s Note.** — Session Laws 2006-106, s. 9, provides: “The Revenue Laws Study Committee shall study and recommend any changes to the special class of property taxed on the basis of the value of the property at its present use. The study shall include an evaluation of the following:

“(1) Expanding the present-use value system to include wildlife land and other conservation land.

“(2) Adding more specific land resource management criteria to the sound management programs required for lands enrolled in the present-use value system.

“The Committee shall make a report of its findings and recommendations to the 2007 General Assembly.”

**§ 105-277.4. Agricultural, horticultural and forestland — Application; appraisal at use value; appeal; deferred taxes.**

(a) Application. — Property coming within one of the classes defined in G.S.



105-277.3 is eligible for taxation on the basis of the value of the property in its present use if a timely and proper application is filed with the assessor of the county in which the property is located. The application must clearly show that the property comes within one of the classes and must also contain any other relevant information required by the assessor to properly appraise the property at its present-use value. An initial application must be filed during the regular listing period of the year for which the benefit of this classification is first claimed, or within 30 days of the date shown on a notice of a change in valuation made pursuant to G.S. 105-286 or G.S. 105-287. A new application is not required to be submitted unless the property is transferred or becomes ineligible for use-value appraisal because of a change in use or acreage. An application required due to transfer of the land may be submitted at any time during the calendar year but must be submitted within 60 days of the date of the property's transfer.

(a1) Late Application. — Upon a showing of good cause by the applicant for failure to make a timely application as required by subsection (a) of this section, an application may be approved by the board of equalization and review or, if that board is not in session, by the board of county commissioners. An untimely application approved under this subsection applies only to property taxes levied by the county or municipality in the calendar year in which the untimely application is filed. Decisions of the county board may be appealed to the Property Tax Commission.

(b) Appraisal at Present-use Value. — Upon receipt of a properly executed application, the assessor must appraise the property at its present-use value as established in the schedule prepared pursuant to G.S. 105-317. In appraising the property at its present-use value, the assessor must appraise the improvements located on qualifying land according to the schedules and standards used in appraising other similar improvements in the county. If all or any part of a qualifying tract of land is located within the limits of an incorporated city or town, or is property annexed subject to G.S. 160A-37(f1) or G.S. 160A-49(f1), the assessor must furnish a copy of the property record showing both the present-use appraisal and the valuation upon which the property would have been taxed in the absence of this classification to the collector of the city or town. The assessor must also notify the tax collector of any changes in the appraisals or in the eligibility of the property for the benefit of this classification. Upon a request for a certification pursuant to G.S. 160A-37(f1) or G.S. 160A-49(f1), or any change in the certification, the assessor for the county where the land subject to the annexation is located must, within 30 days, determine if the land meets the requirements of G.S. 160A-37(f1)(2) or G.S. 160A-49(f1)(2) and report the results of its findings to the city.

(b1) Appeal. — Decisions of the assessor regarding the qualification or appraisal of property under this section may be appealed to the county board of equalization and review or, if that board is not in session, to the board of county commissioners. An appeal must be made within 60 days after the decision of the assessor. If an owner submits additional information to the assessor pursuant to G.S. 105-296(j), the appeal must be made within 60 days after the assessor's decision based on the additional information. Decisions of the county board may be appealed to the Property Tax Commission.

(c) Deferred Taxes. — Land meeting the conditions for classification under G.S. 105-277.3 must be taxed on the basis of the value of the land for its present use. The difference between the taxes due on the present-use basis and the taxes that would have been payable in the absence of this classification, together with any interest, penalties, or costs that may accrue thereon, are a lien on the real property of the taxpayer as provided in G.S. 105-355(a). The difference in taxes must be carried forward in the records of the taxing unit or units as deferred taxes. The taxes become due and payable when the land fails



to meet any condition or requirement for classification. Failure to have an application approved is ground for disqualification. The tax for the fiscal year that opens in the calendar year in which deferred taxes become due is computed as if the land had not been classified for that year, and taxes for the preceding three fiscal years that have been deferred are immediately payable, together with interest as provided in G.S. 105-360 for unpaid taxes. Interest accrues on the deferred taxes due as if they had been payable on the dates on which they originally became due. If only a part of the qualifying tract of land fails to meet a condition or requirement for classification, the assessor must determine the amount of deferred taxes applicable to that part and that amount becomes payable with interest as provided above. Upon the payment of any taxes deferred in accordance with this section for the three years immediately preceding a disqualification, all liens arising under this subsection are extinguished. The deferred taxes for any given year may be paid in that year without the qualifying tract of land becoming ineligible for deferred status.

(d) Exceptions. — Notwithstanding the provisions of subsection (c) of this section, if property loses its eligibility for present use value classification solely due to one of the following reasons, no deferred taxes are due and the lien for the deferred taxes is extinguished:

- (1) There is a change in income caused by enrollment of the property in the federal conservation reserve program established under 16 U.S.C. Chapter 58.
- (2) The property is conveyed by gift to a nonprofit organization and qualifies for exclusion from the tax base pursuant to G.S. 105-275(12) or G.S. 105-275(29).
- (3) The property is conveyed by gift to the State, a political subdivision of the State, or the United States.

(e) Repealed by Session Laws 1997-270, s. 3, effective July 3, 1997. (1973, c. 709, s. 1; c. 905; c. 906, ss. 1, 2; 1975, c. 62; c. 746, ss. 3-7; 1981, c. 835; 1985, c. 518, s. 1; c. 667, ss. 5, 6; 1987, c. 45, s. 1; c. 295, s. 5; c. 698, s. 6; 1987 (Reg. Sess., 1988), c. 1044, s. 13.2; 1995, c. 443, s. 4; c. 454, s. 3; 1997-270, s. 3; 1998-98, s. 23; 1998-150, s. 1; 2001-499, s. 2; 2002-184, s. 3; 2005-313, s. 4; 2006-30, s. 4.)

**Effect of Amendments. —**

Session Laws 2006-30, s. 4, effective June 29, 2006, added subsection (a1).

## § 105-278. Historic properties.

(a) Real property designated as a historic property by a local ordinance adopted pursuant to former G.S. 160A-399.4 or designated as a historic landmark by a local ordinance adopted pursuant to G.S. 160A-400.5 is designated a special class of property under authority of Article V, Sec. 2(2) of the North Carolina Constitution. Property so classified shall be taxed uniformly as a class in each local taxing unit on the basis of fifty percent (50%) of the true value of the property as determined pursuant to G.S. 105-285 and 105-286, or 105-287.

(b) The difference between the taxes due on the basis of fifty percent (50%) of the true value of the property and the taxes that would have been payable in the absence of the classification provided for in subsection (a) shall be a lien on the property of the taxpayer as provided in G.S. 105-355(a) and shall be carried forward in the records of the taxing unit or units as deferred taxes, but shall not be payable until the property loses its eligibility for the benefit of this classification because of a change in an ordinance designating a historic property or a change in the property, except by fire or other natural disaster,

which causes its historical significance to be lost or substantially impaired. The tax for the fiscal year that opens in the calendar year in which a disqualification occurs shall be computed as if the property had not been classified for that year, and taxes for the preceding three fiscal years that have been deferred as provided herein shall be payable immediately, together with interest thereon as provided in G.S. 105-360 for unpaid taxes, which shall accrue on the deferred taxes as if they had been payable on the dates on which they originally became due. If only a part of the historic property loses its eligibility for the classification, a determination shall be made of the amount of deferred taxes applicable to that part, and the amount shall be payable with interest as provided above. (1977, c. 869, s. 2; 1981, c. 501; 1989, c. 706, s. 3.1; 2005-435, s. 38; 2006-162, s. 28.)

**Effect of Amendments.** —

Session Laws 2006-162, s. 28, effective July 24, 2006, in the first sentence of subsection (a), substituted “property” for “structure or site”

near the beginning and substituted “former G.S. 160A-399.4” for “G.S. 160A-400.7” near the middle.

## ARTICLE 13.

### *Standards for Appraisal and Assessment.*

#### § 105-283. Uniform appraisal standards.

##### CASE NOTES

**Valuation by Property Tax Commission.**

— Taxpayer did not show that county used an arbitrary and illegal valuation method or that the assessment of its personal property for a prior, six-year period substantially exceeded that property’s true value in money; thus, the

assessment was upheld because the taxpayer failed to meet its initial burden of presenting material, competent, and substantial evidence that the assessment was arbitrary and illegal. In re Appeal of Westmoreland-LG&E, — N.C. App. —, 622 S.E.2d 124, 2005 N.C. App. LEXIS 2611 (2005).

## ARTICLE 15.

### *Duties of Department and Property Tax Commission as to Assessments.*

#### § 105-291. Powers of Department and Commission.

##### CASE NOTES

**Costs Included in Assessment.** — County’s discovery used to determine the valuation of the personal property of the business for a six-year period was not arbitrary and illegal for including the cost of water treatment plant that the taxpayer built, as the county was permitted

to include under its own guidelines all costs incurred in obtaining property and making it ready for its intended use, which included the cost of the water treatment plant. In re Appeal of Westmoreland-LG&E, — N.C. App. —, 622 S.E.2d 124, 2005 N.C. App. LEXIS 2611 (2005).

## ARTICLE 17.

### *Administration of Listing.*

#### § 105-304. Place for listing tangible personal property.

(a) Listing Instructions. — This section applies to all taxable tangible



personal property that has a tax situs in this State and that is not required by this Subchapter to be appraised originally by the Department of Revenue. The place in this State at which this property is taxable is determined according to the rules provided in this section. The person whose duty it is to list property must list it in the county in which the place of taxation is located, indicating on the abstract the information required by G.S. 105-309(d). If the place of taxation lies within a city or town that requires separate listing under G.S. 105-326(a), the person whose duty it is to list must also list the property for taxation in the city or town.

(a1) **Electronic Listing.** — The board of county commissioners may, by resolution, provide for electronic listing of personal property in accordance with procedures prescribed by the board. If the board of county commissioners allows electronic listing of personal property, the assessor must publish this information, including the timetable and procedures for electronic listing, in the notice required by G.S. 105-296(c).

(b) **Definitions.** — The following definitions apply in this section:

(1) **Situated.** — More or less permanently located.

(2) **Business premises.** — The term includes, for purposes of illustration, the following: Store, mill, dockyard, piling ground, shop, office, mine, farm, factory, warehouse, rental real estate, place for the sale of property (including the premises of a consignee), and place for storage (including a public warehouse).

(3) **Electronic.** — Defined in G.S. 66-312.

(c) **General Rule.** — Except as otherwise provided in subsections (d) through (h) of this section, tangible personal property is taxable at the residence of the owner. For purposes of this section:

(1) The residence of an individual person who has two or more places in this State at which the individual occasionally dwells is the place at which the individual dwelt for the longest period of time during the calendar year immediately preceding the date as of which property is to be listed for taxation.

(2) The residence of a domestic or foreign taxpayer other than an individual person is the place at which its principal North Carolina place of business is located.

(d) **Property of Taxpayers With No Fixed Residence in This State.** —

(1) Tangible personal property owned by an individual nonresident of this State is taxable at the place in this State at which the property is situated.

(2) Tangible personal property owned by a domestic or foreign taxpayer (other than an individual person) that has no principal office in this State is taxable at the place in this State at which the property is situated.

(e) **Farm Products.** — Farm products produced in this State, if owned by their producer, are taxable at the place in this State at which they were produced.

(f) **Property Situated or Commonly Used at Premises Other Than Owner's Residence.** — Subject to the provisions of subsection (e) of this section:

(1) Tangible personal property situated at or commonly used in connection with a temporary or seasonal dwelling owned or leased by the owner of the personal property is taxable at the place at which the temporary or seasonal dwelling is situated.

(2) Tangible personal property situated at or commonly used in connection with a business premises hired, occupied, or used by the owner of the personal property (or by the owner's agent or employee) is taxable at the place at which the business premises is situated. Tangible personal property that may be used by the public generally or that is



used to sell or vend merchandise to the public falls within the provisions of this subdivision.

- (3) Tangible personal property situated at or commonly used in connection with a premise owned, hired, occupied, or used by a person who is in possession of the personal property under a business agreement with the property's owner is taxable at the place at which the possessor's premise is situated. For purposes of this subdivision, the term "business agreement means a commercial lease, a bailment for hire, a consignment, or a similar business arrangement.
- (4) In applying the provisions of subdivisions (1), (2), and (3) of this subsection, the temporary absence of tangible personal property from the place at which it is taxable under one of those subdivisions on the day as of which property is to be listed does not affect the application of the rules established in those subdivisions. The presence of tangible personal property at a location specified in subdivision (1), (2), or (3) of this subsection on the day as of which property is to be listed is prima facie evidence that it is situated at or commonly used in connection with that location.

(g) Decedents. — The tangible personal property of a decedent whose estate is in the process of administration or has not been distributed is taxable at the place at which it would be taxable if the decedent were still alive and still residing at the place at which the decedent resided at the time of death.

(h) Beneficial Ownership. — Tangible personal property within the jurisdiction of the State held by a resident or nonresident trustee, guardian, or other fiduciary having legal title to the property is taxable in accordance with the following rules:

- (1) If any beneficiary is a resident of the State, an amount representing that beneficiary's portion of the property is taxable at the place at which it would be taxable if the beneficiary owned that portion.
- (2) If any beneficiary is a nonresident of the State, an amount representing that beneficiary's portion of the property is taxable at the place at which it would be taxable if the fiduciary were the beneficial owner of the property. (1939, c. 310, s. 800; 1947, c. 836; 1951, c. 1102, s. 1; 1955, c. 1012, ss. 2, 3; 1969, c. 940; 1971, c. 806, s. 1; 1973, c. 476, s. 193; c. 1180; 2001-279, s. 1; 2006-30, s. 1.)

**Effect of Amendments.** — Session Laws 2006-30, s. 1, effective June 29, 2006, deleted "business" preceding "personal property" in the first and second sentences of subsection (a1).

## § 105-307. Length of listing period; extension; preliminary work.

(a) Listing Period. — Unless extended as provided in this section, the period during which property is to be listed for taxation each year begins on the first business day of January and ends on January 31.

(b) General Extensions. — The board of county commissioners may, by resolution, extend the time during which property is to be listed for taxation as provided in this subsection. Any action by the board of county commissioners extending the listing period must be recorded in the minutes of the board, and notice of the extensions must be published as required by G.S. 105-296(c). The entire period for listing, including any extension of time granted, is considered the regular listing period for the particular year within the meaning of this Subchapter.

- (1) In nonrevaluation years, the listing period may be extended for up to 30 additional days.

- (2) In years of octennial appraisal of real property, the listing period may be extended for up to 60 additional days.
- (3) If the county has provided for electronic listing of personal property under G.S. 105-304, the period for electronic listing of business personal property may be extended up to June 1.
- (c) Individual Extensions. — The board of county commissioners shall grant individual extensions of time for the listing of real and personal property upon written request and for good cause shown. The request must be filed with the assessor no later than the ending date of the regular listing period. The board may delegate the authority to grant extensions to the assessor. Extensions granted under this subsection shall not extend beyond April 15. If the county has provided for electronic listing of personal property under G.S. 105-304, the period for electronic listing of business personal property is as provided in subsection (b) of this section.
- (d) Preliminary Work. — The assessor may conduct preparatory work before the listing period begins, but may not make a final appraisal of property before the day as of which the value of the property is to be determined under G.S. 105-285. (1939, c. 310, s. 905; 1971, c. 806, s. 1; 1973, cc. 141, 706; 1975, c. 49; 1977, c. 360; 1987, c. 43, s. 5; c. 45, s. 1; 2001-279, s. 2; 2006-30, s. 2.)

**Effect of Amendments. —**  
Session Laws 2006-30, s. 2, effective June 29, 2006, in subdivision (b)(3) and subsection (c), deleted “business” preceding “personal property

under G.S. 105-304, the period for electronic listing” and added “of business personal property” thereafter.

ARTICLE 20.

*Approval, Preparation, Disposition of Records.*

**§ 105-321. Disposition of tax records and receipts; order of collection.**

- (a) County tax records shall be filed in the office of the assessor unless the board of county commissioners shall require them to be filed in some other public office of the county. City and town tax records shall be filed in some public office of the municipality designated by the governing body of the city or town. In the discretion of the governing body, a duplicate copy of the tax records may be delivered to the tax collector at the time he is charged with the collection of taxes.
- (b) Before delivering the tax receipts to the tax collector in any year, the board of county commissioners or municipal governing body shall adopt and enter in its minutes an order directing the tax collector to collect the taxes charged in the tax records and receipts. A copy of this order shall be delivered to the tax collector at the time the tax receipts are delivered to him, but the failure to do so shall not affect the tax collector’s rights and duties to employ the means of collecting taxes provided by this Subchapter. The order of collection shall have the force and effect of a judgment and execution against the taxpayers’ real and personal property and shall be drawn in substantially the following form:

State of North Carolina  
County (or City or Town) of \_\_\_\_\_  
To the Tax Collector of the County (or City or Town) of \_\_\_\_\_  
\_\_\_\_\_:

You are hereby authorized, empowered, and commanded to collect the taxes set forth in the tax records filed in the office of \_\_\_\_\_ and in the tax



receipts herewith delivered to you, in the amounts and from the taxpayers likewise therein set forth. Such taxes are hereby declared to be a first lien upon all real property of the respective taxpayers in the County (or City or Town) of \_\_\_\_\_, and this order shall be a full and sufficient authority to direct, require, and enable you to levy on and sell any real or personal property of such taxpayers, for and on account thereof, in accordance with law.

Witness my hand and official seal, this \_\_\_\_\_ day of \_\_\_\_\_,

\_\_\_\_\_  
Chairman, Board of Commissioners of \_\_\_\_\_ County  
(Mayor, City (or Town) of \_\_\_\_\_)

Attest:

\_\_\_\_\_  
Clerk of Board of Commissioners of \_\_\_\_\_ County  
(Clerk of the City (or Town) of \_\_\_\_\_)

(c) The original tax receipts, together with any duplicate copies that may have been prepared, shall be delivered to the tax collector by the governing body on or before the first day of September each year if the tax collector has made settlement as required by G.S. 105-352. The tax collector shall give his receipt for the tax receipts and duplicates delivered to him for collection.

(d) Repealed by Session Laws 2006-30, s. 5, effective June 29, 2006.

(e) The governing body of a taxing unit may contract with a bank or other financial institution for receipt of payment of taxes payable at par and of delinquent taxes and interest for the current tax year. A financial institution may not issue a receipt for any tax payments received by it, however. Discount for early payment of taxes shall be allowed by a financial institution that contracts with a taxing unit pursuant to this subsection to the same extent as allowed by the tax collector. A financial institution that contracts with a taxing unit for receipt of payment of taxes shall furnish a bond to the taxing unit conditioned upon faithful performance of the contract in a form and amount satisfactory to the governing body of the taxing unit. A governing body of a taxing unit that contracts with a financial institution pursuant to this subsection shall publish a timely notice of the institution at which taxpayers may pay their taxes in a newspaper having circulation within the taxing unit. No notice is required, however, if the financial institution receives payments only through the mail.

(f) Minimal Taxes. — Notwithstanding the provisions of G.S. 105-380, the governing body of a taxing unit that collects its own taxes may, by resolution, direct its assessor and tax collector not to collect minimal taxes charged on the tax records and receipts. Minimal taxes are the combined taxes and fees of the taxing unit and any other units for which it collects taxes, due on a tax receipt prepared pursuant to G.S. 105-320 or on a tax notice prepared pursuant to G.S. 105-330.5, in a total original principal amount that does not exceed an amount, up to five dollars (\$5.00), set by the governing body. The amount set by the governing body should be the estimated cost to the taxing unit of billing the taxpayer for the amounts due on a tax receipt or tax notice. Upon adoption of a resolution pursuant to this subsection, the tax collector shall not bill the taxpayer for, or otherwise collect, minimal taxes but shall keep a record of all minimal taxes by receipt number and amount and shall make a report of the amount of these taxes to the governing body at the time of the settlement. These minimal taxes shall not be a lien on the taxpayer's real property and shall not be collectible under Article 26 of this Subchapter. A resolution adopted pursuant to this subsection must be adopted on or before June 15 preceding the first taxable year to which it applies and remains in effect until amended or repealed by resolution of the taxing unit. (1939, c. 310, s. 1103;



1971, c. 806, s. 1; 1973, c. 476, s. 193; c. 615; 1987, c. 45, s. 1; 1989, c. 578, s. 1; 1991, c. 584, s. 1; 1995, c. 24, s. 1; c. 329, ss. 1, 2; 1999-456, s. 59; 2006-30, s. 5.)

**Effect of Amendments.** — Session Laws 2006-30, s. 5, effective June 29, 2006, repealed subsection (d), which read: “No tax receipt shall be delivered to the tax collector for any assessment appealed to the Property Tax Commission until such appeal has been finally adjudicated.”

ARTICLE 22A.

*Motor Vehicles.*

§ 105-330. Definitions.

The following definitions apply in this Article:

- (1) Classified motor vehicle. — A motor vehicle classified under this Article.
- (1a) **(For effective date, see note)** Collecting authority. — The Division of Motor Vehicles or an agent contracting with the Division of Motor Vehicles.
- (2) Motor vehicle. — Defined in G.S. 20-4.01(23).
- (2a) **(For effective date, see note)** Municipal corporation. — Defined in G.S. 105-273(11).
- (3) Public service company. — Defined in G.S. 105-333(14). (1991, c. 624, s. 1; 2005-294, s. 1; 2006-259, s. 31.5.)

**Editor’s Note.** —

Session Laws 2005-294, s. 13, as amended by Session Laws 2006-259, s. 31.5, provides: “Sections 4 and 8 of this act become effective January 1, 2006. Sections 1, 2, 3, 5, 6, 7, 9, 10, and 11 of this act become effective July 1, 2010, or when the Division of Motor Vehicles and the Department of Revenue certify that the inte-

grated computer system for registration renewal and property tax collection for motor vehicles is in operation, whichever occurs first. Sections 12 and 13 of this act are effective when they become law. Nothing in this act shall require the General Assembly to appropriate funds to implement it for the biennium ending June 30, 2007.”

§ 105-330.2. Appraisal, ownership, and situs.

(a) Date Determined. — The value of a classified motor vehicle listed pursuant to G.S. 105-330.3(a)(1) (registered vehicles) shall be determined as of January 1 of the year the taxes are due. If the value of a new motor vehicle cannot be determined as of that date, the value of that vehicle shall be determined for that year as of the date that model vehicle is first offered for sale at retail in this State.

The ownership, situs, and taxability of a classified motor vehicle listed pursuant to G.S. 105-330.3(a)(1) (registered vehicles) shall be determined annually as of the day on which a new registration is applied for or the day on which the current vehicle registration is renewed, regardless of whether the registration is renewed after it has expired.

The value of a classified motor vehicle listed pursuant to G.S. 105-330.3(a)(2) (unregistered vehicles) shall be determined as of January 1 of the year in which the motor vehicle is required to be listed pursuant to G.S. 105-330.3(a)(2). The ownership, situs, and taxability of a classified motor vehicle listed or discovered pursuant to G.S. 105-330.3(a)(2) (unregistered vehicles) shall be determined as of January 1 of the year in which the motor vehicle is required to be listed.

(b) **(Effective until July 1, 2010, see note)** Value; Appeal. — A classified motor vehicle shall be appraised by the assessor at its true value in money as

**G.S. 105-330.2(b) is set out twice. See note.**

prescribed by G.S. 105-283. If the assessor considers the sales price of the motor vehicle in determining the true value of the motor vehicle, the assessor must not include any amount for which the taxpayer is liable under Article 5A of this Chapter. The owner of a classified motor vehicle may appeal the appraised value of the vehicle in the manner provided by G.S. 105-312(d) for appeals in the case of discovered property and may appeal the situs or taxability of the vehicle in the manner provided by G.S. 105-381. The owner of a classified motor vehicle must file an appeal of appraised value with the assessor within 30 days after the date of the tax notice prepared pursuant to G.S. 105-330.5. Notwithstanding G.S. 105-312(d), an owner who appeals the appraised value of a classified motor vehicle shall pay the tax on the vehicle when due, subject to a full or partial refund if the appeal is decided in the owner's favor.

(b) **(Effective July 1, 2010, see note)** Value; Appeal. — A classified motor vehicle shall be appraised by the assessor at its true value in money as prescribed by G.S. 105-283. If the assessor considers the sales price of the motor vehicle in determining the true value of the motor vehicle, the assessor must not include any amount for which the taxpayer is liable under Article 5A of this Chapter. The Property Tax Division of the Department of Revenue shall annually adopt a schedule of values, standards, and rules to be used in the valuation of motor vehicles to ensure equitable statewide valuations, taking into account local market conditions and allowing adjustments for mileage and the condition of the vehicles. The owner of a classified motor vehicle may appeal the appraised value of the vehicle in the manner provided by G.S. 105-312(d) for appeals in the case of discovered property and may appeal the situs or taxability of the vehicle in the manner provided by G.S. 105-381. The owner of a classified motor vehicle must file an appeal of appraised value with the assessor before the taxes become delinquent pursuant to G.S. 105-330.4. Notwithstanding G.S. 105-312(d), an owner who appeals the appraised value of a classified motor vehicle shall pay the tax on the vehicle when due, subject to a full or partial refund if the appeal is decided in the owner's favor.

(c) Administration. — The Department of Revenue, acting through the Property Tax Division, and the Department of Transportation, acting through the Division of Motor Vehicles, shall enter into a memorandum of understanding concerning the vehicle identification information, name and address of the owner, and other information that will be required on the motor vehicle registration forms to implement the tax listing and collection provisions of this Article. The memorandum of understanding shall also include a procedure for the administration of the listing, appraisal, and assessment of classified motor vehicles. (1991, c. 624, s. 1; 1991 (Reg. Sess., 1992), c. 961, s. 4; 1995, c. 510, s. 1; 1995 (Reg. Sess., 1996), c. 646, s. 24; 1997-6, s. 10; 1999-353, s. 1; 2005-294, s. 2; 2005-303, s. 1; 2006-259, s. 31.5.)

**Subsection (b) Set Out Twice.** — The first version of subsection (b) set out above is effective until July 1, 2010, or until the Division of Motor Vehicles and the Department of Revenue certify that the integrated computer system for registration renewal and property tax collection for motor vehicles is in operation, whichever occurs first. The second version of subsection (b) set out above is effective July 1, 2010, or when the Division of Motor Vehicles and the Department of Revenue certify that the integrated computer system for registration renewal and property tax collection for motor

vehicles is in operation, whichever occurs first.

**Editor's Note.** — Session Laws 2005-294, s. 13, as amended by Session Laws 2006-259, s. 31.5, provides: "Sections 4 and 8 of this act become effective January 1, 2006. Sections 1, 2, 3, 5, 6, 7, 9, 10, and 11 of this act become effective July 1, 2010, or when the Division of Motor Vehicles and the Department of Revenue certify that the integrated computer system for registration renewal and property tax collection for motor vehicles is in operation, whichever occurs first. Sections 12 and 13 of this act are effective when they become law. Nothing in



this act shall require the General Assembly to appropriate funds to implement it for the bien-nium ending June 30, 2007.”

### **§ 105-330.4. Due date, interest, and enforcement remedies.**

(a) **(Effective until July 1, 2010)** Taxes on a classified motor vehicle listed pursuant to G.S. 105-330.3(a)(2) shall be due on September 1 following the date by which the vehicle was required to be listed. Taxes on a classified motor vehicle listed pursuant to G.S. 105-330.3(a)(1) shall be due each year on the following dates:

- (1) For a vehicle registered under the staggered system, taxes shall be due on the first day of the fourth month following the date the registration expires or on the first day of the fourth month following the last day of the month in which the new registration is applied for.
- (2) For a vehicle newly registered under the annual system, taxes shall be due on the first day of the fourth month following the date the new registration is applied for. For a vehicle whose registration is renewed under the annual system, taxes shall be due on May 1 following the date the registration expired.

(a) **(Effective July 1, 2010, or when the Division of Motor Vehicles and the Department of Revenue certify that the integrated computer system for registration renewal and property tax collection for motor vehicles is in operation, whichever occurs first)** Taxes on a classified motor vehicle listed pursuant to G.S. 105-330.3(a)(2) are due on September 1 following the date by which the vehicle was required to be listed. Taxes on a classified motor vehicle listed pursuant to G.S. 105-330.3(a)(1) are due each year on the date a new registration is applied for or the fifteenth day of the month following the month in which the registration renewal sticker expired pursuant to G.S. 20-66(g).

(b) **(Effective until July 1, 2010)** Subject to the provisions of G.S. 105-395.1, interest on unpaid taxes on classified motor vehicles listed pursuant to G.S. 105-330.3(a)(1) accrues at the rate of five percent (5%) for the first month following the date the taxes were due and three-fourths percent ( $\frac{3}{4}$  %) for each month thereafter until the taxes are paid, unless the notice required by G.S. 105-330.5 is prepared after the date the taxes are due. In that circumstance, the interest accrues beginning the second month following the date of the notice until the taxes are paid. Subject to the provisions of G.S. 105-395.1, interest on delinquent taxes on classified motor vehicles listed pursuant to G.S. 105-330.3(a)(2) accrues as provided in G.S. 105-360(a) and discounts shall be allowed as provided in G.S. 105-360(c).

(b) **(Effective July 1, 2010, or when the Division of Motor Vehicles and the Department of Revenue certify that the integrated computer system for registration renewal and property tax collection for motor vehicles is in operation, whichever occurs first)** Subject to the provisions of G.S. 105-395.1, interest on unpaid taxes and registration fees on classified motor vehicles listed pursuant to G.S. 105-330.3(a)(1) accrues at the rate of five percent (5%) for the remainder of the month following the month in which the registration renewal sticker expired pursuant to G.S. 20-66(g). Interest accrues at the rate of three-fourths percent ( $\frac{3}{4}$  %) for each month thereafter until the taxes and fees are paid, unless the notice required by G.S. 105-330.5 is prepared after the date the taxes and fees are due. In that circumstance, the interest accrues beginning the second month following the date of the notice until the taxes and fees are paid. Subject to the provisions of G.S. 105-395.1, interest on delinquent taxes on classified motor vehicles listed pursuant to G.S.



**G.S. 105-330.4(a) and (b) are set out twice. See note.**

105-330.3(a)(2) accrues as provided in G.S. 105-360(a) and discounts shall be allowed as provided in G.S. 105-360(c).

(c) Unpaid taxes on classified motor vehicles may be collected by levying on the motor vehicle taxed or on any other personal property of the taxpayer pursuant to G.S. 105-366 and G.S. 105-367, or by garnishment of the taxpayer's property pursuant to G.S. 105-368. Notwithstanding the provisions of G.S. 105-366(b), the enforcement measures of levy, attachment, and garnishment may be used to collect unpaid taxes on classified motor vehicles listed pursuant to G.S. 105-330.3(a)(1) at any time after interest accrues. Notwithstanding the provisions of G.S. 105-355, taxes on classified motor vehicles listed pursuant to G.S. 105-330.3(a)(1) do not become a lien on real property owned by the taxpayer. (1991, c. 624, s. 1; 1991 (Reg. Sess., 1992), c. 961, s. 5; 1995, c. 510, s. 2; 2001-139, s. 8; 2005-294, ss. 3, 4, 5; 2006-259, s. 31.5.)

**Subsections (a) and (b) Set Out Twice. —**

The first versions of subsections (a) and (b) set out above are effective until July 1, 2010. The second versions of subsections (a) and (b) set out above are effective July 1, 2010, or when the Division of Motor Vehicles and the Department of Revenue certify that the integrated computer system for registration renewal and property tax collection for motor vehicles is in operation, whichever occurs first.

**Editor's Note. —**

Session Laws 2005-294, s. 13, as amended by Session Laws 2006-259, s. 31.5, provides: "Sec-

tions 4 and 8 of this act become effective January 1, 2006. Sections 1, 2, 3, 5, 6, 7, 9, 10, and 11 of this act become effective July 1, 2010, or when the Division of Motor Vehicles and the Department of Revenue certify that the integrated computer system for registration renewal and property tax collection for motor vehicles is in operation, whichever occurs first. Sections 12 and 13 of this act are effective when they become law. Nothing in this act shall require the General Assembly to appropriate funds to implement it for the biennium ending June 30, 2007."

**§ 105-330.5. (For effective date, see note) Listing and collecting procedures.**

(a) For classified motor vehicles listed pursuant to G.S. 105-330.3(a)(1), upon receiving the registration lists from the Division of Motor Vehicles each month, the Property Tax Division of the Department of Revenue shall prepare a combined tax and registration notice for each vehicle. The combined tax and registration notice shall contain all county and municipal corporation taxes and fees due on the motor vehicle as computed by the assessor in the county of registration. In computing the taxes, the assessor shall appraise the motor vehicle in accordance with G.S. 105-330.2 and shall use the tax rates of the various taxing units in effect on the first day of the month in which the current vehicle registration expires or the new registration is applied for. The tax on the motor vehicle is the product of a fraction and the number of months in the motor vehicle tax year. The numerator of the fraction is the product of the appraised value of the motor vehicle and the tax rate of the various taxing units. The denominator of the fraction is 12. This procedure shall constitute the listing and assessment of each classified motor vehicle for taxation. The combined tax and registration notice shall contain:

- (1) The date of the combined tax and registration notice.
- (2) The appraised value of the motor vehicle.
- (3) The tax rate of the taxing units.
- (4) A statement that the appraised value of the motor vehicle may be appealed to the assessor before the taxes and fees become delinquent.
- (5) The registration fee imposed by the Division of Motor Vehicles and any other information required by the Division of Motor Vehicles to comply with the provisions of Chapter 20 of the General Statutes.

**G.S. 105-330.5 is set out twice. See notes.**

(a1) When a new registration is obtained for a vehicle registered under the annual system in a month other than December, the taxes shall be prorated for the remainder of the calendar year. The amount of prorated taxes due is the product of the proration fraction and the taxes computed according to subsection (a). The numerator of the proration fraction is the number of full months remaining in the calendar year following the date the registration is applied for and the denominator of the fraction is 12.

(b) When the combined tax and registration notice required by subsection (a) is prepared, the Property Tax Division of the Department of Revenue or a third-party contractor shall mail a copy of the notice, with appropriate instructions for payment, to the motor vehicle owner. The Department shall establish a fee equal to the actual cost of printing and sending the notice. The Department may receive a fee for each notice generated for a vehicle registered in a county or municipal corporation from the taxes and fees remitted to the county or municipal corporation in which the vehicle is registered. The collecting authority is responsible for collecting county and municipal taxes and fees assessed under this Article and may retain a fee for collecting these taxes and fees. The fee retained by the collecting authority shall be an amount equal to at least one-third of the compensation paid for registration renewals conducted by contract agents under G.S. 20-63(h). The Property Tax Division shall establish procedures to ensure that tax payments and fees received pursuant to this Article and Chapter 20 of the General Statutes are properly accounted for and taxes and fees due other taxing units and the Division of Motor Vehicles are remitted at least once each month. Each collecting authority shall provide a weekly financial report containing information required by the Property Tax Division to the taxing units and Division of Motor Vehicles to enable them to account for payments received.

(b1) Repealed by Session Laws 1995, c. 329, s. 2.

(c) For classified motor vehicles listed pursuant to G.S. 105-330.3(a)(2), the assessor shall appraise each vehicle in accordance with G.S. 105-330.2. The assessor shall prepare a tax notice for each vehicle before September 1 following the January 31 listing date; the tax notice shall include all county and special district taxes due on the motor vehicle. In computing the taxes, the assessor shall use the tax rates of the taxing units in effect for the fiscal year that begins on July 1 following the January 31 listing date. Municipalities shall list, assess, and tax classified motor vehicles listed pursuant to G.S. 105-330.3(a)(2) as provided in G.S. 105-326, 105-327, and 105-328 and shall send tax notices as provided in this section.

(d) The county shall include taxes on classified motor vehicles listed pursuant to G.S. 105-330.3(a)(1) in the tax levy for the fiscal year in which the taxes become due and shall charge the taxes to the tax collector for that year, unless the tax notice required by subsection (a) is prepared after the date the taxes are due. If that occurs, the county shall include the taxes from that notice in the tax levy for the current fiscal year and shall charge the taxes to the tax collector for that year. (1991, c. 624, s. 1; 1991 (Reg. Sess., 1992), c. 961, s. 6; 1995, c. 24, s. 1; c. 329, s. 2; c. 510, s. 3; 2005-294, s. 6; 2005-313, s. 8; 2006-259, s. 31.5.)

**Section Set Out Twice.** — The section above is effective July 1, 2010, or when the Division of Motor Vehicles and the Department of Revenue certify that the integrated computer system for registration renewal and property tax collection for motor vehicles is in operation, whichever occurs first. For the section as in

effect until July 1, 2010, see the main volume.

**Editor's Note.** — Session Laws 2005-294, s. 13, as amended by Session Laws 2006-259, s. 31.5, provides, in part, that s. 6 of the act becomes effective July 1, 2010, or when the Division of Motor Vehicles and the Department of Revenue certify that the integrated computer



system for registration renewal and property tax collection for motor vehicles is in operation, whichever occurs first. Nothing in this act shall

require the General Assembly to appropriate funds to implement it for the biennium ending June 30, 2007.

### **§ 105-330.7. (For repeal, see note) List of delinquents sent to Division of Motor Vehicles.**

On the tenth day of each month the county tax collector shall prepare a list with the name and address of the owner and the vehicle identification number of every classified motor vehicle listed pursuant to G.S. 105-330.3(a)(1) on which taxes remain unpaid on that date and on which taxes became due on the first day of the fourth month preceding that date. The tax collector shall mail that list to the Division of Motor Vehicles. The list shall be in the form and contain the information required by the Division of Motor Vehicles. (1991, c. 624, s. 1; 1991 (Reg. Sess., 1992), c. 961, s. 8; 2005-294, s. 7; 2006-259, s. 31.5.)

**Delayed repeal of this section.** — Session Laws 2005-294, s. 13, as amended by Session Laws 2006-259, s. 31.5, provides, in part, that this section is repealed effective July 1, 2010, or when the Division of Motor Vehicles and the Department of Revenue certify that the inte-

grated computer system for registration renewal and property tax collection for motor vehicles is in operation, whichever occurs first. Nothing in this act shall require the General Assembly to appropriate funds to implement it for the biennium ending June 30, 2007.

### **§ 105-330.10. (Effective until July 1, 2010) Disposition of interest.**

Sixty percent (60%) of the first month's interest collected on unpaid taxes pursuant to G.S. 105-330.4 shall be transferred on a monthly basis to the Combined Motor Vehicle and Registration Account created within the Treasurer's Office. The North Carolina Association of County Commissioners shall direct the Treasurer to distribute the funds in the Account to the Division of Motor Vehicles for the purpose of developing and implementing an integrated computer system within the Division of Motor Vehicles that would allow for the combined assessment, billing, and collection of property taxes on motor vehicles and the issuance of registration plates. The Treasurer shall report to the Revenue Laws Study Committee semiannually with the first report due by April 30, 2006. The report shall contain a detailed description of the amount of moneys transferred to the Account and distributed from the Account. (2005-294, s. 8; 2006-30, s. 3; 2006-259, s. 31.5.)

**Section Set Out Twice.** — The section above is effective until July 1, 2010. For the section as amended effective July 1, 2010, or when the Division of Motor Vehicles and the Department of Revenue certify that the integrated computer system for registration renewal and property tax collection for motor vehicles is in operation, whichever occurs first, see the following section, also numbered G.S. 105-330.10.

#### **Editor's Note.** —

Session Laws 2005-294, s. 13, as amended by Session Laws 2006-259, s. 31.5, provides: "Sections 4 and 8 of this act become effective January 1, 2006. Sections 1, 2, 3, 5, 6, 7, 9, 10, and 11

of this act become effective July 1, 2010, or when the Division of Motor Vehicles and the Department of Revenue certify that the integrated computer system for registration renewal and property tax collection for motor vehicles is in operation, whichever occurs first. Sections 12 and 13 of this act are effective when they become law. Nothing in this act shall require the General Assembly to appropriate funds to implement it for the biennium ending June 30, 2007."

**Effect of Amendments.** — Session Laws 2006-30, s. 3, effective June 29, 2006, inserted "first month's" preceding "interest collected" in the first sentence.



## § 105-330.10. (Effective July 1, 2010) Disposition of interest.

The interest collected on unpaid registration fees pursuant to G.S. 105-330.4 shall be transferred on a monthly basis to the North Carolina Highway Fund for technology improvements within the Division of Motor Vehicles. (2005-294, ss. 8, 9; 2006-30, s. 3; 2006-259, s. 31.5.)

**Section Set Out Twice.** — The section above is effective July 1, 2010, or when the Division of Motor Vehicles and the Department of Revenue certify that the integrated computer system for registration renewal and property tax collection for motor vehicles is in operation, whichever occurs first. For the section as in effect until July 1, 2010, see the preceding section, also numbered G.S. 105-330.10.

**Editor's Note.** — Session Laws 2005-294, s. 13, as amended by Session Laws 2006-259, s. 31.5, provides: "Sections 4 and 8 of this act

become effective January 1, 2006. Sections 1, 2, 3, 5, 6, 7, 9, 10, and 11 of this act become effective July 1, 2010, or when the Division of Motor Vehicles and the Department of Revenue certify that the integrated computer system for registration renewal and property tax collection for motor vehicles is in operation, whichever occurs first. Sections 12 and 13 of this act are effective when they become law. Nothing in this act shall require the General Assembly to appropriate funds to implement it for the biennium ending June 30, 2007."

## ARTICLE 24.

### *Review and Enforcement of Orders.*

## § 105-345.2. Record on appeal; extent of review.

### CASE NOTES

#### **Commission's Valuation Upheld.** —

Taxpayer did not show that county used an arbitrary and illegal valuation method or that the assessment of its personal property for a prior, six-year period substantially exceeded that property's true value in money; thus, the assessment was upheld because the taxpayer

failed to meet its initial burden of presenting material, competent, and substantial evidence that the assessment was arbitrary and illegal. In re Appeal of Westmoreland-LG&E, — N.C. App. —, 622 S.E.2d 124, 2005 N.C. App. LEXIS 2611 (2005).

## ARTICLE 26.

### *Collection and Foreclosure of Taxes.*

## § 105-360. Due date; interest for nonpayment of taxes; discounts for prepayment.

#### **Editor's Note.** —

Session Laws 2006-72, s. 1, provides: "A taxing unit's governing body may by resolution provide that, notwithstanding the provisions of G.S. 105-360 regarding the due date and accrual of interest, G.S. 105-380 and G.S. 105-381

regarding the release, refund, and compromise of taxes, and G.S. 160A-58.10 regarding the taxation of newly annexed property, property taxes for the partial fiscal year October 1, 2005, through June 30, 2006, shall be collected over a three-year period with one-third due and pay-

able on September 1, 2006, one-third due and payable on September 1, 2007, and the remaining one-third due and payable on September 1, 2008. The resolution may provide that interest accrues on unpaid property taxes only to the extent that the property taxes have become due and payable under the payment schedule set out in the resolution. To the extent property taxes are due and payable pursuant to a resolution adopted under this act, interest accruing on taxes that remain unpaid shall be computed according to the schedule stated in G.S. 105-360. A resolution adopted pursuant to this act

applies only to taxes for the partial fiscal year October 1, 2005, through June 30, 2006, on property located in an area that was annexed between January 1, 2003, and January 1, 2006, and for which effective date of the annexation was set by judicial order."

Session Laws 2006-72, s. 2, provides: "If a resolution adopted by a taxing unit's governing body pursuant to this act delays the due date, accrual of interest, or both for any property taxes, the tax collector's obligations under G.S. 160A-58.10 and G.S. 105-360 with respect to those taxes are delayed to the same extent."

## **§ 105-369. Advertisement of tax liens on real property for failure to pay taxes.**

(a) Report of Unpaid Taxes That Are Liens on Real Property. — In February of each year, the tax collector must report to the governing body the total amount of unpaid taxes for the current fiscal year that are liens on real property. A county tax collector's report is due the first Monday in February, and a municipal tax collector's report is due the second Monday in February. Upon receipt of the report, the governing body must order the tax collector to advertise the tax liens. For purposes of this section, district taxes collected by county tax collectors shall be regarded as county taxes and district taxes collected by municipal tax collectors shall be regarded as municipal taxes.

(b) Repealed by Session Laws 1983 (Regular Session, 1984), c. 1013.

(b1) Notice to Owner. — After the governing body orders the tax collector to advertise the tax liens, the tax collector must send a notice to the record owner of each affected parcel of property, as determined as of the date the taxes became delinquent. The notice must be sent to the owner's last known address by first-class mail at least 30 days before the date the advertisement is to be published. The notice must state the principal amount of unpaid taxes that are a lien on the parcel to be advertised and inform the owner that the name of the record owner as of the date the taxes became delinquent will appear in a newspaper advertisement of delinquent taxes if the taxes are not paid before the publication date. Failure to mail the notice required by this section to the correct record owner does not affect the validity of the tax lien or of any foreclosure action.

(c) Time and Contents of Advertisement. — A tax collector's failure to comply with this subsection does not affect the validity of the taxes or tax liens. The county tax collector shall advertise county tax liens by posting a notice of the liens at the county courthouse and by publishing each lien at least one time in one or more newspapers having general circulation in the taxing unit. The municipal tax collector shall advertise municipal tax liens by posting a notice of the liens at the city or town hall and by publishing each lien at least one time in one or more newspapers having general circulation in the taxing unit. Advertisements of tax liens shall be made during the period March 1 through June 30. The costs of newspaper advertising shall be paid by the taxing unit. If the taxes of two or more taxing units are collected by the same tax collector, the tax liens of each unit shall be advertised separately unless, under the provisions of a special act or contractual agreement between the taxing units, joint advertisement is permitted.

The posted notice and newspaper advertisement shall set forth the following information:

(1) Repealed by Session Laws 2006-106, s. 2, effective for taxes imposed for taxable years beginning on or after July 1, 2006.

(1a) The name of the record owner as of the date the taxes became delinquent for each parcel on which the taxing unit has a lien for unpaid taxes, in alphabetical order.

(1b) After the information required by subdivision (1a) of this subsection for each parcel, a brief description of each parcel of land to which a lien has attached and a statement of the principal amount of the taxes constituting a lien against the parcel.

(2) A statement that the amounts advertised will be increased by interest and costs and that the omission of interest and costs from the amounts advertised will not constitute waiver of the taxing unit's claim for those items.

(3) In the event the list of tax liens has been divided for purposes of advertisement in more than one newspaper, a statement of the names of all newspapers in which advertisements will appear and the dates on which they will be published.

(4) A statement that the taxing unit may foreclose the tax liens and sell the real property subject to the liens in satisfaction of its claim for taxes.

(d) Costs. — Each parcel of real property advertised pursuant to this section shall be assessed an advertising fee to cover the actual cost of the advertisement. Actual advertising costs per parcel shall be determined by the tax collector on any reasonable basis. Advertising costs assessed pursuant to this subsection are taxes.

(e) Payments during Advertising Period. — At any time during the advertisement period, any parcel may be withdrawn from the list by payment of the taxes plus interest that has accrued to the time of payment and a proportionate part of the advertising fee to be determined by the tax collector. Thereafter, the tax collector shall delete that parcel from any subsequent advertisement, but the tax collector is not liable for failure to make the deletion.

(f) Listing and Advertising in Wrong Name. — No tax lien is void because the real property to which the lien attached was listed or advertised in the name of a person other than the person in whose name the property should have been listed for taxation if the property was in other respects correctly described on the abstract or in the advertisement.

(g) Wrongful Advertisement. — Any tax collector or deputy tax collector who willfully advertises any tax lien knowing that the property is not subject to taxation or that the taxes advertised have been paid is guilty of a Class 3 misdemeanor, and shall be required to pay the injured party all damages sustained in consequence. (1939, c. 310, s. 1715; 1955, c. 993; 1971, c. 806, s. 1; 1983, c. 808, s. 1; 1983 (Reg. Sess., 1984), c. 1013; 1993, c. 539, s. 725; 1994, Ex. Sess., c. 24, s. 14(c); 1999-439, s. 1; 2000-140, s. 73; 2006-106, s. 2.)

**Effect of Amendments.** — Session Laws 2006, rewrote subsection (b1); repealed subdivision (c)(1); and rewrote subdivision (c)(1a).

## § 105-373. Settlements.

(a) Annual Settlement of Tax Collector. —

(1) Preliminary Report. — After July 1 and before he is charged with taxes for the current fiscal year, the tax collector shall make a sworn report to the governing body of the taxing unit showing:



- a. A list of the persons owning real property whose taxes for the preceding fiscal year remain unpaid and the principal amount owed by each person; and
  - b. A list of the persons not owning real property whose personal property taxes for the preceding fiscal year remain unpaid and the principal amount owed by each person. (To this list the tax collector shall append his statement under oath that he has made diligent efforts to collect the taxes due from the persons listed out of their personal property and by other means available to him for collection, and he shall report such other information concerning these taxpayers as may be of interest to or required by the governing body, including a report of his efforts to make collection outside the taxing unit under the provisions of G.S. 105-364.) The governing body of the taxing unit may publish this list in any newspaper in the taxing unit. The cost of publishing this list shall be paid by the taxing unit.
- (2) Insolvents. — Upon receiving the report required by subdivision (a)(1), above the governing body of the taxing unit shall enter upon its minutes the names of persons owing taxes (but who listed no real property) whom it finds to be insolvent, and it shall by resolution designate the list entered in its minutes as the insolvent list to be credited to the tax collector in his settlement.
- (3) Settlement for Current Taxes. — After July 1 and before he is charged with taxes for the current fiscal year, the tax collector shall make full settlement with the governing body of the taxing unit for all taxes in his hands for collection for the preceding fiscal year.
- a. In the settlement the tax collector shall be charged with:
    1. The total amount of all taxes in his hands for collection for the year, including amounts originally charged to him and all amounts subsequently charged on account of discoveries;
    2. All penalties, interest, and costs collected by him in connection with taxes for the current year; and
    3. All other sums collected by him.
  - b. The tax collector shall be credited with:
    1. All sums representing taxes for the year deposited by him to the credit of the taxing unit or receipted for by a proper official of the unit;
    2. Releases duly allowed by the governing body;
    3. The principal amount of taxes constituting liens on real property;
    4. The principal amount of taxes included in the insolvent list determined in accordance with subdivision (a)(2), above;
    5. Discounts allowed by law;
    6. Commissions (if any) lawfully payable to the tax collector as compensation; and
    7. The principal amount of taxes for any assessment appealed to the Property Tax Commission when the appeal has not been finally adjudicated.
- The tax collector shall be liable on his bond for both honesty and faithful performance of duty; for any deficiencies; and, in addition, for all criminal penalties provided by law.
- The settlement, together with the action of the governing body with respect thereto, shall be entered in full upon the minutes of the governing body.
- (4) Disposition of Tax Receipts after Settlement. — Uncollected taxes allowed as credits in the settlement prescribed in subdivision (a)(3),

above, whether represented by tax liens held by the taxing unit or included in the list of insolvents, shall, for purposes of collection, be recharged to the tax collector or charged to some other person designated by the governing body of the taxing unit under statutory authority. The person charged with uncollected taxes shall:

- a. Give bond satisfactory to the governing body;
- b. Receive the tax receipts and tax records representing the uncollected taxes;
- c. Have and exercise all powers and duties conferred or imposed by law upon tax collectors; and
- d. Receive compensation as determined by the governing body.

(b) **Settlements for Delinquent Taxes.** — Annually, at the time prescribed for the settlement provided in subdivision (a)(3), above, all persons having in their hands for collection any taxes for years prior to the year involved in the settlement shall settle with the governing body of the taxing unit for collections made on each such year's taxes. The settlement for the taxes for prior years shall be made in whatever form is satisfactory to the chief accounting officer and the governing body of the taxing unit, and it shall be entered in full upon the minutes of the governing body.

(c) **Settlement at End of Term.** — Whenever any tax collector fails to succeed himself at the end of his term of office, he shall, on the last business day of his term, make full and complete settlement for all taxes (current or delinquent) in his hands and deliver the tax records, tax receipts, tax sale certificates, and accounts to his successor in office. The settlement shall be made in whatever form is satisfactory to the chief accounting officer and the governing body of the taxing unit, and it shall be entered in full upon the minutes of the governing body.

(d) **Settlement upon Vacancy during Term.** — When a tax collector voluntarily resigns, he shall, upon his last day in office, make full settlement (in the manner provided in subsection (c), above) for all taxes in his hands for collection. In default of such a settlement, or in case of a vacancy occurring during a term for any reason, it shall be the duty of the chief accounting officer or, in the discretion of the governing body, of some other qualified person appointed by it immediately to prepare and submit to the governing body a report in the nature of a settlement made on behalf of the former tax collector. The report, together with the governing body's action with respect thereto, shall be entered in full upon the minutes of the governing body. Whenever a settlement must be made in behalf of a former tax collector, as provided in this subsection (d), the governing body may deliver the tax receipts, tax records, and tax sale certificates to a successor collector immediately upon the occurrence of the vacancy, or it may make whatever temporary arrangements for the collection of taxes as may be expedient, but in no event shall any person be permitted to collect taxes until he has given bond satisfactory to the governing body.

(e) **Effect of Approval of Settlement.** — Approval of any settlement by the governing body does not relieve the tax collector or his bondsmen of liability for any shortage actually existing at the time of the settlement and thereafter discovered; nor does it relieve the collector of any criminal liability.

(f) **Penalties.** — In addition to any other civil or criminal penalties provided by law, any member of a governing body of a taxing unit, tax collector, or chief accounting officer who fails to perform any duty imposed upon him by this section shall be guilty of a Class 1 misdemeanor.

(g) **Relief from Collecting Insolvents.** — The governing body of any taxing unit may, in its discretion, relieve the tax collector of the charge of taxes owed by persons on the insolvent list that are five or more years past due when it appears to the governing body that such taxes are uncollectible.



(h) Relief from Collecting Taxes on Classified Motor Vehicles. The board of county commissioners may, in its discretion, relieve the tax collector of the charge of taxes on classified motor vehicles listed pursuant to G.S. 105-330.3(a)(1) that are one year or more past due when it appears to the board that the taxes are uncollectible. This relief, when granted, shall include municipal and special district taxes charged to the collector. (1939, c. 310, s. 1719; 1945, c. 635; 1947, c. 484, ss. 3, 4; 1951, c. 300, s. 1; c. 1036, s. 1; 1953, c. 176, s. 2; 1955, c. 908; 1967, c. 705, s. 1; 1971, c. 806, s. 1; 1983, c. 670, s. 22; c. 808, ss. 5-7; 1987, c. 16; 1991, c. 624, s. 3; 1991 (Reg. Sess., 1992), c. 961, s. 10; 1993, c. 539, s. 726; 1994, Ex. Sess., c. 24, s. 14(c); 1997-456, s. 27; 2006-30, s. 7.)

**Effect of Amendments.** — Session Laws subdivision (a)(3)b.7; and made related 2006-30, s. 7, effective June 29, 2006, added changes.

## **§ 105-374. Foreclosure of tax lien by action in nature of action to foreclose a mortgage.**

(a) General Nature of Action. — The foreclosure action authorized by this section shall be instituted in the appropriate division of the General Court of Justice in the county in which the real property is situated and shall be an action in the nature of an action to foreclose a mortgage.

(b) Taxing units may proceed under this section, either on the original tax lien created by G.S. 105-355(a) or on the lien acquired at a tax lien sale held under former G.S. 105-369 before July 1, 1983, with or without a lien sale certificate; and the amount of recovery in either case shall be the same. To this end, it is hereby declared that the original attachment of the tax lien under G.S. 105-355(a) is sufficient to support a tax foreclosure action by a taxing unit, that the issuance of a lien sale certificate to the taxing unit for lien sales held before July 1, 1983, is a matter of convenience in record keeping within the discretion of the governing body of the taxing unit, and that issuance of such certificates is not a prerequisite to perfection of the tax lien.

(c) Parties; Summonses. — The owner of record as of the date the taxes became delinquent and spouse (if any), any subsequent owner, all other taxing units having tax liens, all other lienholders of record, and all persons who would be entitled to be made parties to a court action (in which no deficiency judgment is sought) to foreclose a mortgage on such property, shall be made parties and served with summonses in the manner provided by G.S. 1A-1, Rule 4.

The fact that the owner of record as of the date the taxes became delinquent, any subsequent owner, or any other defendant is a minor, is incompetent, or is under any other disability shall not prevent or delay the tax lien sale or the foreclosure of the tax lien; and all such persons shall be made parties and served with summons in the same manner as in other civil actions.

Persons who have disappeared or who cannot be located and persons whose names and whereabouts are unknown, and all possible heirs or assignees of such persons, may be served by publication; and such persons, their heirs, and assignees may be designated by general description or by fictitious names in such an action.

(c1) Lienholders Separately Designated. — The word “lienholder” shall appear immediately after the name of each lienholder (including trustees and beneficiaries in deeds of trust, and holders of judgment liens) whose name appears in the caption of any action instituted under the provisions of this section. Such designation is intended to make clear to the public the capacity of such persons which necessitated their having been made parties to such action. Failure to add such designation to captions shall not constitute grounds



for attacking the validity of actions brought under this section, or titles to real property derived from such actions.

(d) Complaint as *Lis Pendens*. — The complaint in an action brought under this section shall, from the time it is filed in the office of the clerk of superior court, serve as notice of the pendency of the foreclosure action, and every person whose interest in the real property is subsequently acquired or whose interest therein is subsequently registered or recorded shall be bound by all proceedings taken in the foreclosure action after the filing of the complaint in the same manner as if those persons had been made parties to the action. It shall not be necessary to have the complaint cross-indexed as a notice of action pending to have the effect prescribed by this subsection (d).

(e) Subsequent Taxes. — The complaint in a tax foreclosure action brought under this section by a taxing unit shall, in addition to alleging the tax lien on which the action is based, include a general allegation of subsequent taxes which are or may become a lien on the same real property in favor of the plaintiff unit. Thereafter it shall not be necessary to amend the complaint to incorporate the subsequent taxes by specific allegation. In case of redemption before confirmation of the foreclosure sale, the person redeeming shall be required to pay, before the foreclosure action is discontinued, at least all taxes on the real property which have at the time of discontinuance become due to the plaintiff unit, plus penalties, interest, and costs thereon. Immediately prior to judgment ordering sale in a foreclosure action (if there has been no redemption prior to that time), the tax collector or the attorney for the plaintiff unit shall file in the action a certificate setting forth all taxes which are a lien on the real property in favor of the plaintiff unit (other than taxes the amount of which has not been definitely determined).

Any plaintiff in a tax foreclosure action (other than a taxing unit) may include in his complaint, originally or by amendment, all other taxes and special assessments paid by him which were liens on the same real property.

(f) Joinder of Parcels. — All real property within the taxing unit subject to liens for taxes levied against the same taxpayer for the first year involved in the foreclosure action may be joined in one action. However, if real property is transferred by the listing taxpayer subsequent to the first year involved in the foreclosure action, all subsequent taxes, penalties, interest, and costs (for which the property is ordered sold under the terms of this Subchapter) shall be prorated to such property in the same manner as if payments were being made to release such property from the tax lien under the provisions of G.S. 105-356(b).

(g) Special Benefit Assessments. — A cause of action for the foreclosure of the lien of any special benefit assessments may be included in any complaint filed under this section.

(h) Joint Foreclosure by Two or More Taxing Units. — Liens of different taxing units on the same parcel of real property, representing taxes in the hands of the same tax collector, shall be foreclosed in one action. Liens of different taxing units on the same parcel of real property, representing taxes in the hands of different tax collectors, may be foreclosed in one action in the discretion of the governing bodies of the taxing units.

The lien of any taxing unit made a party defendant in any foreclosure action shall be alleged in an answer filed by the taxing unit, and the tax collector of each answering unit shall, prior to judgment ordering sale, file a certificate of subsequent taxes similar to that filed by the tax collector of the plaintiff unit, and the taxes of each answering unit shall be of equal dignity with the taxes of the plaintiff unit. Any answering unit may, in case of payment of the plaintiff unit's taxes, continue the foreclosure action until all taxes due to it have been paid, and it shall not be necessary for any answering unit to file a separate foreclosure action or to proceed under G.S. 105-375 with respect to any such taxes.

If a taxing unit properly served as a party defendant in a foreclosure action fails to answer and file the certificate provided for in the preceding paragraph, all of its taxes shall be barred by the judgment of sale except to the extent that the purchase price at the foreclosure sale (after payment of costs and of the liens of all taxing units whose liens are properly alleged by complaint or answer and certificates) may be sufficient to pay such taxes. However, if a defendant taxing unit is plaintiff in another foreclosure action pending against the same property, or if it has begun a proceeding under G.S. 105-375, its answer may allege that fact in lieu of alleging its liens, and the court, in its discretion, may order consolidation of such actions or such other disposition thereof (and such disposition of the costs therein) as it may deem advisable. Any such order may be made by the clerk of the superior court, subject to appeal as provided in G.S. 1-301.1.

(i) Costs. — Subject to the provisions of this subsection (i), costs may be taxed in any foreclosure action brought under this section in the same manner as in other civil actions. When costs are collected, either by payment prior to the sale or upon payment of the purchase price at the foreclosure sale, the fees allowed officers shall be paid to those entitled to receive them. In foreclosure actions in which the plaintiff is a taxing unit, no prosecution bond shall be required.

The word "costs," as used in this subsection (i), shall be construed to include one reasonable attorney's fee for the plaintiff in such amount as the court shall, in its discretion, determine and allow. When a taxing unit is made a party defendant in a tax foreclosure action and files answer therein, there may be included in the costs an attorney's fee for the defendant unit in such amount as the court shall, in its discretion, determine and allow. The governing body of any taxing unit may, in its discretion, pay a smaller or greater sum than that allowed as costs to its attorney as a suit fee, and the governing body may allow a reasonable commission to its attorney on taxes collected by him after they have been placed in his hands; or the governing body may arrange with its attorney for the handling of tax foreclosure suits on a salary basis or may make any other reasonable agreement with its attorney or attorneys. Any arrangement made between a taxing unit and its attorney may provide that attorneys' fees collected as costs in foreclosure actions be collected for the use of the taxing unit.

In any foreclosure action in which real property is actually sold after judgment, costs shall include a commissioner's fee to be fixed by the court, not exceeding five percent (5%) of the purchase price; and in case of redemption between the date of sale and the order of confirmation, the fee shall be added to the amount otherwise necessary for redemption. In case more than one sale is made of the same property in any action, the commissioner's fee may be based on the highest amount bid, but the commissioner shall not be allowed a separate fee for each such sale. The governing body of any plaintiff unit may request the court to appoint as commissioner a salaried official, attorney, or employee of the unit and, when the requested appointment is made, may require that the commissioner's fees, when collected, be paid to the plaintiff unit for its use.

(j) Contested Actions. — Any action brought under this section in which an answer raising an issue requiring trial is filed within the time allowed by law shall be entitled to a preference as to time of trial over all other civil actions.

(k) Judgment of Sale. — Any judgment in favor of the plaintiff or any defendant taxing unit in an action brought under this section shall order the sale of the real property or as much as may be necessary for the satisfaction of all of the following:

- (1) Taxes adjudged to be liens in favor of the plaintiff (other than taxes the amount of which has not been definitely determined) together with penalties, interest, and costs thereon.



- (2) Taxes adjudged to be liens in favor of other taxing units (other than taxes the amount of which has not yet been definitely determined) if those taxes have been alleged in answers filed by the other taxing units, together with penalties, interest, and costs thereon.

The judgment shall appoint a commissioner to conduct the sale and shall order that the property be sold in fee simple, free and clear of all interests, rights, claims, and liens whatever except that the sale shall be subject to taxes the amount of which cannot be definitely determined at the time of the judgment, taxes and special assessments of taxing units which are not parties to the action, and, in the discretion of the court, taxes alleged in other tax foreclosure actions or proceedings pending against the same real property.

In all cases in which no answer is filed within the time allowed by law, and in cases in which answers filed do not seek to prevent sale of said property, the clerk of the superior court may enter the judgment, subject to appeal as provided in G.S. 1-301.1.

(l) Advertisement of Sale. — The sale shall be advertised, and all necessary resales shall be advertised, in the manner provided by Article 29A of Chapter 1 of the General Statutes or by any statute enacted in substitution therefor.

(m) Sale. — The sale shall be by public auction to the highest bidder and shall, in accordance with the judgment, be held at the courthouse door on any day of the week except a Sunday or legal holiday when the courthouse is closed for transactions. (In actions brought by a municipality that is not a county seat, the court may, in its discretion, direct that the sale be held at the city or town hall door.) The commissioner conducting the sale may, in his discretion, require from any successful bidder a deposit equal to not more than twenty percent (20%) of his bid, which deposit, in the event that the bidder refuses to take title and a resale becomes necessary, shall be applied to pay the costs of sale and any loss resulting. (However, this provision shall not deprive the commissioner of his right to sue for specific performance of the contract.) No deposit shall be required of a taxing unit that has made the highest bid at the foreclosure sale.

(n) Report of Sale. — Within three days following the foreclosure sale the commissioner shall report the sale to the court giving full particulars thereof.

(o) Exceptions and Increased Bids. — At any time within 10 days after the commissioner files his report of the foreclosure sale, any person having an interest in the real property may file exceptions to the report, and at any time within that 10-day period an increased bid may be filed in the amount specified by and subject to the provisions (other than provisions in conflict herewith) of Article 29A of Chapter 1 of the General Statutes or the provisions (other than provisions in conflict herewith) of any law enacted in substitution therefor. In the absence of exceptions or increased bids, the court may, whenever it deems such action necessary for the best interests of the parties, order resale of the property.

(p) Judgment of Confirmation. — At any time after the expiration of 10 days from the time the commissioner files his report, if no exception or increased bid has been filed, the commissioner may apply for judgment of confirmation, and in like manner he may apply for such a judgment after the court has passed upon exceptions filed, or after any necessary resales have been held and reported and 10 days have elapsed. The judgment of confirmation shall direct the commissioner to deliver the deed upon payment of the purchase price. This judgment may be entered by the clerk of superior court subject to appeal as provided in G.S. 1-301.1.

(q) Application of Proceeds; Commissioner's Final Report. — After delivery of the deed and collection of the purchase price, the commissioner shall apply the proceeds as follows:

- (1) First, to payment of all costs of the action, including the commissioner's fee and the attorney's fee, which costs shall be paid to the officials or funds entitled thereto;



- (2) Then to the payment of taxes, penalties, and interest for which the real property was ordered to be sold, and in case the funds remaining are insufficient for this purpose, they shall be distributed pro rata to the various taxing units for whose taxes the property was ordered sold;
- (3) Then pro rata to the payment of any special benefit assessments for which the property was ordered sold, together with interest and costs thereon;
- (4) Then pro rata to payment of taxes, penalties, interest, and costs of taxing units that were parties to the foreclosure action but which filed no answers therein;
- (5) Then pro rata to payment of special benefit assessments of taxing units that were parties to the foreclosure action but which filed no answers therein, together with interest and costs thereon;
- (6) And any balance then remaining shall be paid in accordance with any directions given by the court and, in the absence of such directions, shall be paid into court for the benefit of the persons entitled thereto. (If the clerk is in doubt as to who is entitled to the surplus or if any adverse claims are asserted thereto, the clerk shall hold the surplus until rights thereto are established in a special proceeding pursuant to G.S. 1-339.71.)

Within five days after delivering the deed, the commissioner shall make a full report to the court showing delivery of the deed, receipt of the purchase price, and the disbursement of the proceeds, accompanied by receipts evidencing all such disbursements.

(r) **Purchase and Resale by Taxing Unit.** — The rights of a taxing unit to purchase real property at a foreclosure sale and resell it are governed by G.S. 105-376. (1939, c. 310, s. 1719; 1945, c. 635; 1947, c. 484, ss. 3, 4; 1951, c. 300, s. 1; c. 1036, s. 1; 1953, c. 176, s. 2; 1955, c. 908; 1967, c. 705, s. 1; 1971, c. 806, s. 1; 1973, c. 788, s. 1; 1981, c. 580; 1983, c. 808, s. 8; 1999-216, ss. 14-16; 2003-337, s. 11; 2006-106, s. 3.)

**Effect of Amendments.** —

Session Laws 2006-106, s. 3, effective for taxes imposed for taxable years beginning on or after July 1, 2006, in subsection (c), substituted “owner of record as of the date the taxes became delinquent” for “listing taxpayer” and “any sub-

sequent owner” for “the current owner” in the first sentence and substituted “owner of record as of the date the taxes became delinquent, any subsequent owner” for “listing taxpayer” in the first sentence of the second paragraph.

## § 105-375. In rem method of foreclosure.

(a) **Intent of Section.** — It is hereby declared to be the intention of this section that proceedings brought under it shall be strictly in rem. It is further declared to be the intention of this section to provide, as an alternative to G.S. 105-374, a simple and inexpensive method of enforcing payment of taxes necessarily levied, to the knowledge of all persons, for the requirements of local governments in this State; and to recognize, in authorizing this proceeding, that all persons owning interests in real property know or should know that the tax lien on their real property may be foreclosed and the property sold for failure to pay taxes.

(b) **Docketing Certificate of Taxes as Judgment.** — In lieu of following the procedure set forth in G.S. 105-374, the governing body of any taxing unit may direct the tax collector to file with the clerk of superior court, no earlier than 30 days after the tax liens were advertised, a certificate showing the following: the name of the taxpayer as defined in G.S. 105-273(17), for each parcel on which the taxing unit has a lien for unpaid taxes, together with the amount of taxes, penalties, interest, and costs that are a lien thereon; the year or years for which the taxes are due; and a description of the property sufficient to

permit its identification by parol testimony. The fees for docketing and indexing the certificate shall be payable to the clerk of superior court at the time the taxes are collected or the property is sold.

(c) Notice to Taxpayer and Others. —

- (1) Notice required. — The tax collector filing the certificate provided for in subsection (b) of this section, shall, at least 30 days prior to docketing the judgment, send notice of the tax lien foreclosure to the taxpayer, as defined in G.S. 105-273(17), at the taxpayer's last known address, and to all lienholders of record who have a lien against the taxpayer (including any liens referred to in the conveyance of the property to the taxpayer).
- (2) Contents of notice. — All notice required by this subsection shall state that a judgment will be docketed and the proposed date of the docketing, that execution will be issued as provided by law, a brief description of the real property affected, and that the lien may be satisfied prior to judgment being entered.
- (3) Service of notice. — The notice required by this subsection shall be sent to the taxpayer by registered or certified mail, return receipt requested.
- (4) Additional efforts may be required. — If within 10 days following the mailing of the notice, a return receipt has not been received by the tax collector indicating receipt of the notice, then the tax collector shall do both of the following:
  - a. Make reasonable efforts to locate and notify the taxpayer and all lienholders of record prior to the docketing of the judgment and the issuance of the execution. Reasonable efforts may include posting the notice in a conspicuous place on the property, or, if the property has an address to which mail may be delivered, mailing the notice by first-class mail to the attention of the occupant.
  - b. Have a notice published in a newspaper of general circulation in the county once a week for two consecutive weeks directed to, and naming, all unnotified lienholders and the taxpayer that a judgment will be docketed against the taxpayer.
- (5) Costs of notice added to lien. — All costs of mailing and publication, plus a charge of fifty dollars (\$50.00) to defray administrative costs, shall be added to the amount of taxes that are a lien on the real property and shall be paid by the taxpayer to the taxing unit at the time the taxes are collected or the property is sold.

(d) Effect of Docketing Certificate of Taxes Due. — Immediately upon the docketing and indexing of a certificate as provided in subsection (b), above, the taxes, penalties, interest, and costs shall constitute a valid judgment against the real property described therein, with the priority provided for tax liens in G.S. 105-356. The judgment, except as expressly provided in this section, shall have the same force and effect as a duly rendered judgment of the superior court directing sale of the property for the satisfaction of the tax lien, and it shall bear interest at an annual rate of eight percent (8%).

(e) Special Assessments. — Street, sidewalk, and other special assessments may be included in any judgment for taxes taken under this section, or the special assessments may be included in a separate judgment docketed under this section. The tax collector may use such a judgment as a method of foreclosing the lien of special assessments. When used to foreclose the lien of special assessments, the procedure may be instituted at any time after the assessment or installment falls due and remains unpaid; the waiting period required by subsection (b) of this section does not apply to the foreclosure of special assessments.

(f) Motion to Set Aside. — At any time prior to the issuance of execution, any person having an interest in the real property to be foreclosed may appear



before the clerk of superior court and move to set aside the judgment on the ground that the tax has been paid or that the tax lien on which the judgment is based is invalid.

(g) Cancellation upon Payment. — Upon payment in full of any judgment docketed under this section, together with interest thereon and costs accrued to the date of payment, the tax collector receiving payment shall certify the fact thereof to the clerk of superior court and cancel the judgment.

(h) Relationship between G.S. 105-374 and This Section. — If, before the issuance of execution on the judgment under subsection (i), below, the taxing unit is made a defendant in a foreclosure action brought against the property under G.S. 105-374, it shall file an answer in that proceeding and thereafter all proceedings shall be governed by order of the court in accordance with that section.

(i) Issuance of Execution. — At any time after three months and before two years from the indexing of the judgment as provided in subsection (b), above, execution shall be issued at the request of the tax collector in the same manner as executions are issued upon other judgments of the superior court, and the real property shall be sold by the sheriff in the same manner as other real property is sold under execution with the following exceptions:

- (1) No debtor's exemption shall be allowed.
- (2) In lieu of personal service of notice on the taxpayer, the sheriff shall send notice by registered or certified mail, return receipt requested, to the taxpayer at the taxpayer's last known address at least 30 days prior to the day fixed for the sale. If within 10 days following the mailing of the notice, a return receipt has not been received by the sheriff indicating receipt of the notice, then the sheriff shall make additional efforts to locate and notify the taxpayer and all lienholders of record of the sale under execution in accordance with subdivision (4) of subsection (c) of this section.
- (3) The sheriff shall add to the amount of the judgment as costs of the sale any postage expenses incurred by the tax collector and the sheriff in foreclosing under this section.
- (4) In any advertisement or posted notice of sale under execution, the sheriff may (and at the request of the governing body shall) combine the advertisements or notices for properties to be sold under executions against the properties of different taxpayers in favor of the same taxing unit or group of units; however, the property included in each judgment shall be separately described and the name of the taxpayer specified in connection with each.

The purchaser at the execution sale shall acquire title to the property in fee simple free and clear of all claims, rights, interests, and liens except the liens of other taxes or special assessments not paid from the purchase price and not included in the judgment.

(j) Attorney's Fee. — The governing body of the taxing unit may make whatever arrangement it deems satisfactory for compensating an attorney rendering assistance or advice in foreclosure proceedings brought under this section, but the attorney's fee shall not be added to the judgment as part of the costs of the action.

(k) Consolidation of Liens. — By agreement between the governing bodies, two or more taxing units may consolidate their tax liens for the purpose of docketing a judgment, or may have one execution issued for separate judgments, against the same property. In like manner, one execution may issue for separate judgments in favor of one or more taxing units against the same property for different years' taxes.

(l) Purchase and Resale by Taxing Unit. — The rights of a taxing unit to purchase real property at a foreclosure sale and resell it are governed by G.S. 105-376.



(m) Procedure if Section Declared Unconstitutional. — If any provisions of this section are declared invalid or unconstitutional by the Supreme Court of North Carolina, a United States district court of three judges, the United States Circuit Court of Appeals, or the United States Supreme Court, all taxing units that have proceeded under this section shall have five years from the date of the filing of the opinion (or, in the case of appeal, from the date of the filing of the opinion on appeal) in which to institute foreclosure actions under G.S. 105-374 for all taxes included in judgments taken under this section and for subsequent taxes due or which, but for purchase of the property by the taxing unit, would have become due; and such judicial decision shall not have the effect of invalidating the tax lien or disturbing its priority. (1939, c. 310, s. 1720; 1945, c. 646; 1957, cc. 91, 1262; 1971, c. 806, s. 1; 1973, c. 108, s. 52; c. 681, ss. 1, 2; 1983, c. 808, s. 9; c. 855, ss. 1, 2; 1987, c. 450; 1989, c. 37, s. 7; c. 682; 1999-439, ss. 2, 3; 2001-139, s. 9; 2006-106, ss. 4-6.)

**Effect of Amendments.** — Session Laws 2006-106, ss. 4 - 6, effective for taxes imposed for taxable years beginning on or after July 1, 2006, substituted “as defined in G.S. 105-273(17), for each parcel on which the taxing

unit has a lien for unpaid taxes” for “listing real property on which the taxes are a lien” in subsection (b), and rewrote subsection (c) and subdivision (i)(2).

## § 105-378. Limitation on use of remedies.

(a) Use of Remedies Barred. — No county or municipality may maintain an action or procedure to enforce any remedy provided by law for the collection of taxes or the enforcement of any tax liens (whether the taxes or tax liens are evidenced by the original tax receipts, tax sales certificates, or otherwise) unless the action or procedure is instituted within 10 years from the date the taxes became due.

(b) Not Applicable to Special Assessments. — The provisions of subsection (a), above, shall not be construed to apply to the lien of special assessments.

(c) Repealed by Session Laws 1998-98, s. 26, effective August 14, 1998.

(d) Enforcement and Collection Delayed Pending Appeal. — When the board of county commissioners or municipal governing body delivers a tax receipt to a tax collector for any assessment that has been or is subsequently appealed to the Property Tax Commission, the tax collector may not seek collection of taxes or enforcement of a tax lien resulting from the assessment until the appeal has been finally adjudicated. The tax collector, however, may send an initial bill or notice to the taxpayer. (1933, c. 181, s. 7; c. 399; 1945, c. 832; 1947, c. 1065, s. 1; 1949, cc. 60, 269, 735; 1951, cc. 71, 306, 572; 1953, cc. 381, 427, 538, 645, 656, 752, 775, 1008; 1955, c. 1087; 1957, cc. 53, 678, 1123; 1959, cc. 373, 608; 1961, cc. 542, 695, 885; 1965, cc. 129, 294; 1967, c. 242; c. 321, s. 1; c. 422, s. 1; 1969, c. 96; 1971, c. 806, s. 1; 1998-98, s. 26; 2006-30, s. 6.)

**Effect of Amendments.** — Session Laws 2006-30, s. 6, effective June 29, 2006, added subsection (d).

## ARTICLE 27.

### *Refunds and Remedies.*

## § 105-380. No taxes to be released, refunded, or compromised.

### **Editor's Note.** —

Session Laws 2006-72, s. 1, provides: “A

taxing unit's governing body may by resolution provide that, notwithstanding the provisions of

G.S. 105-360 regarding the due date and accrual of interest, G.S. 105-380 and G.S. 105-381 regarding the release, refund, and compromise of taxes, and G.S. 160A-58.10 regarding the taxation of newly annexed property, property taxes for the partial fiscal year October 1, 2005, through June 30, 2006, shall be collected over a three-year period with one-third due and payable on September 1, 2006, one-third due and payable on September 1, 2007, and the remaining one-third due and payable on September 1, 2008. The resolution may provide that interest accrues on unpaid property taxes only to the extent that the property taxes have become due and payable under the payment schedule set out in the resolution. To the extent property taxes are due and payable pursuant to a reso-

lution adopted under this act, interest accruing on taxes that remain unpaid shall be computed according to the schedule stated in G.S. 105-360. A resolution adopted pursuant to this act applies only to taxes for the partial fiscal year October 1, 2005, through June 30, 2006, on property located in an area that was annexed between January 1, 2003, and January 1, 2006, and for which effective date of the annexation was set by judicial order."

Session Laws 2006-72, s. 2, provides: "If a resolution adopted by a taxing unit's governing body pursuant to this act delays the due date, accrual of interest, or both for any property taxes, the tax collector's obligations under G.S. 160A-58.10 and G.S. 105-360 with respect to those taxes are delayed to the same extent."

## § 105-381. Taxpayer's remedies.

### Editor's Note. —

Session Laws 2006-72, s. 1, provides: "A taxing unit's governing body may by resolution provide that, notwithstanding the provisions of G.S. 105-360 regarding the due date and accrual of interest, G.S. 105-380 and G.S. 105-381 regarding the release, refund, and compromise of taxes, and G.S. 160A-58.10 regarding the taxation of newly annexed property, property taxes for the partial fiscal year October 1, 2005, through June 30, 2006, shall be collected over a three-year period with one-third due and payable on September 1, 2006, one-third due and payable on September 1, 2007, and the remaining one-third due and payable on September 1, 2008. The resolution may provide that interest accrues on unpaid property taxes only to the extent that the property taxes have become due and payable under the payment schedule set

out in the resolution. To the extent property taxes are due and payable pursuant to a resolution adopted under this act, interest accruing on taxes that remain unpaid shall be computed according to the schedule stated in G.S. 105-360. A resolution adopted pursuant to this act applies only to taxes for the partial fiscal year October 1, 2005, through June 30, 2006, on property located in an area that was annexed between January 1, 2003, and January 1, 2006, and for which effective date of the annexation was set by judicial order."

Session Laws 2006-72, s. 2, provides: "If a resolution adopted by a taxing unit's governing body pursuant to this act delays the due date, accrual of interest, or both for any property taxes, the tax collector's obligations under G.S. 160A-58.10 and G.S. 105-360 with respect to those taxes are delayed to the same extent."

## SUBCHAPTER V. MOTOR FUEL TAXES.

### ARTICLE 36B.

#### *Tax on Carriers Using Fuel Purchased Outside State.*

§ 105-449.48: Repealed by Session Laws 2006-162, s. 12(c), effective July 24, 2006.

## § 105-449.49. Temporary permits.

(a) Issuance. — Upon application to the Secretary and payment of a fee of fifty dollars (\$50.00), a motor carrier may obtain a temporary permit authorizing the carrier to operate a vehicle in the State for three days without registering the vehicle in accordance with G.S. 105-449.47. A motor carrier to whom a temporary permit has been issued may elect not to report its operation of the vehicle during the three-day period. Fees collected under this subsection are credited to the Highway Fund.

(b) Refusal. — The Secretary may refuse to issue a temporary permit to any of the following:

- (1) A motor carrier whose registration has been withheld or revoked.
- (2) A motor carrier who the Secretary determines is evading payment of tax through the successive purchase of temporary permits. (1955, c. 823, s. 13; 1973, c. 476, s. 193; 1979, c. 11; 1981 (Reg. Sess., 1982), c. 1254, s. 1; 1983, c. 713, s. 58; 1991, c. 182, s. 6; c. 487, s. 7; 1991 (Reg. Sess., 1992), c. 913, s. 10; 2003-349, s. 10.1; 2006-162, s. 12(d).)

**Effect of Amendments. —**

Session Laws 2006-162, s. 12(d), effective July 24, 2006, added the subsection designations and subsection catchlines; and, in present

subsection (a), inserted “for three days” following “State” and deleted “for not more than three days” at the end of the first sentence and added the last sentence.

## ARTICLE 36C.

### *Gasoline, Diesel, and Blends.*

#### Part 1. General Provisions.

### § 105-449.60. Definitions.

The following definitions apply in this Article:

- (1) Biodiesel. — Any fuel or mixture of fuels derived in whole or in part from agricultural products or animal fats or wastes from these products or fats.
- (1a) Biodiesel provider. — A person who does any of the following:
  - a. Produces an average of no more than 500,000 gallons of biodiesel per month during a calendar year. A person who produces more than this amount is a refiner.
  - b. Imports biodiesel outside the terminal transfer system by means of a marine vessel, a transport truck, a railroad tank car, or a tank wagon.
- (1b) to (1d) Reserved for future codification purposes.
- (1e) Blended fuel. — A mixture composed of gasoline or diesel fuel and another liquid, other than a de minimus amount of a product such as carburetor detergent or oxidation inhibitor, that can be used as a fuel in a highway vehicle.
- (2) Blender. — A person who produces blended fuel outside the terminal transfer system.
- (3) Bulk-end user. — A person who maintains storage facilities for motor fuel and uses part or all of the stored fuel to operate a highway vehicle.
- (4) Bulk plant. — A motor fuel storage and distribution facility that is not a terminal and from which motor fuel may be removed at a rack.
- (5) Code. — Defined in G.S. 105-228.90.
- (6) Destination state. — The state, territory, or foreign country to which motor fuel is directed for delivery into a storage facility, a receptacle, a container, or a type of transportation equipment for the purpose of resale or use.
- (7) Diesel fuel. — Any liquid, other than gasoline, that is suitable for use as a fuel in a diesel-powered highway vehicle. The term includes biodiesel, fuel oil, heating oil, high-sulfur dyed diesel fuel, and kerosene. The term does not include jet fuel sold to a buyer who is certified to purchase jet fuel under the Code.



- (8) Distributor. — A person who acquires motor fuel from a supplier or from another distributor for subsequent sale.
- (9) Dyed diesel fuel. — Diesel fuel that meets the dyeing and marking requirements of § 4082 of the Code.
- (10) Elective supplier. — A supplier that is required to be licensed in this State and that elects to collect the excise tax due this State on motor fuel that is removed by the supplier at a terminal located in another state and has this State as its destination state.
- (10a) Exempt card or code. — A credit card or an access code that enables the person to whom the card or code is issued to buy motor fuel at retail without paying the motor fuel excise tax on the fuel.
- (11) Export. — To obtain motor fuel in this State for sale or other distribution in another state. In applying this definition, motor fuel delivered out-of-state by or for the seller constitutes an export by the seller and motor fuel delivered out-of-state by or for the purchaser constitutes an export by the purchaser.
- (12) Fuel alcohol. — Alcohol, methanol, or fuel grade ethanol.
- (13) Fuel alcohol provider. — A person who does any of the following:
  - a. Produces an average of no more than 500,000 gallons of fuel alcohol per month during a calendar year. A person who produces more than this amount is a refiner.
  - b. Imports fuel alcohol outside the terminal transfer system by means of a marine vessel, a transport truck, a railroad tank car, or a tank wagon.
- (14) Gasohol. — A blended fuel composed of gasoline and fuel grade ethanol.
- (15) Gasoline. — Any of the following:
  - a. All products that are commonly or commercially known or sold as gasoline and are suitable for use as a fuel in a highway vehicle, other than products that have an American Society for Testing Materials octane number of less than 75 as determined by the motor method.
  - b. A petroleum product component of gasoline, such as naptha, reformat, or toluene.
  - c. Gasohol.
  - d. Fuel alcohol.

The term does not include aviation gasoline sold for use in an aircraft motor. "Aviation gasoline" is gasoline that is designed for use in an aircraft motor and is not adapted for use in an ordinary highway vehicle.
- (16) Gross gallons. — The total amount of motor fuel measured in gallons, exclusive of any temperature, pressure, or other adjustments.
- (17) Highway. — Defined in G.S. 20-4.01(13).
- (18) Highway vehicle. — A self-propelled vehicle that is designed for use on a highway.
- (19) Import. — To bring motor fuel into this State by any means of conveyance other than in the fuel supply tank of a highway vehicle. In applying this definition, motor fuel delivered into this State from out-of-state by or for the seller constitutes an import by the seller, and motor fuel delivered into this State from out-of-state by or for the purchaser constitutes an import by the purchaser.
- (19a) In-State-only supplier. — Either of the following:
  - a. A supplier that is required to have a license and elects not to collect the excise tax due this State on motor fuel that is removed by the supplier at a terminal located in another state and has this State as its destination state.

- b. A supplier that does business only in this State.
- (20) Motor fuel. — Gasoline, diesel fuel, and blended fuel.
- (21) Motor fuel rate. — The rate of tax set in G.S. 105-449.80.
- (22) Motor fuel transporter. — A person who transports motor fuel by pipeline or who transports motor fuel outside the terminal transfer system by means of a transport truck, a railroad tank car, or a marine vessel.
- (23) Net gallons. — The amount of motor fuel measured in gallons when corrected to a temperature of 60 degrees Fahrenheit and a pressure of 14  $\frac{7}{10}$  pounds per square inch.
- (24) Permissive supplier. — An out-of-state supplier that elects, but is not required, to have a supplier's license under this Article.
- (25) Person. — Defined in G.S. 105-228.90.
- (26) Position holder. — The person who holds the inventory position in motor fuel in a terminal, as reflected on the records of the terminal operator. A person holds the inventory position in motor fuel when that person has a contract with the terminal operator for the use of storage facilities and terminaling services for fuel at the terminal. The term includes a terminal operator who owns fuel in the terminal.
- (27) Rack. — A mechanism for delivering motor fuel from a refinery, a terminal, or a bulk plant into a transport truck, a railroad tank car, or another means of transfer that is outside the terminal transfer system.
- (27a) Refiner. — A person who owns, operates, or controls a refinery. The term includes a person who produces an average of more than 500,000 gallons of fuel alcohol or biodiesel a month during a calendar year.
- (27b) Refinery. — A facility used to process crude oil, unfinished oils, natural gas liquids, or other hydrocarbons into motor fuel and from which fuel may be removed by pipeline or vessel or at a rack. The term does not include a facility that produces only blended fuel or gasohol.
- (28) Removal. — A physical transfer other than by evaporation, loss, or destruction. A physical transfer to a transport truck or another means of conveyance outside the terminal transfer system is complete upon delivery into the means of conveyance.
- (29) Retailer. — A person who maintains storage facilities for motor fuel and who sells the fuel at retail or dispenses the fuel at a retail location.
- (30) Secretary. — Defined in G.S. 105-228.90.
- (31) Supplier. — Any of the following:
- a. A position holder or a person who receives motor fuel pursuant to a two-party exchange.
  - b. A fuel alcohol provider.
  - c. A biodiesel provider.
  - d. A refiner.
- (32) System transfer. — Either of the following:
- a. A transfer of motor fuel within the terminal transfer system.
  - b. A transfer, by transport truck or railroad tank car, of fuel grade ethanol.
- (33) Tank wagon. — A truck that is not a transport truck and is designed or used to carry at least 1,000 gallons of motor fuel.
- (33a) Tax. — An inspection or other excise tax on motor fuel and any other fee or charge imposed on motor fuel on a per-gallon basis.
- (34) Terminal. — A motor fuel storage and distribution facility that has been assigned a terminal control number by the Internal Revenue Service, is supplied by pipeline or marine vessel, and from which motor fuel may be removed at a rack.

- (35) Terminal operator. — A person who owns, operates, or otherwise controls a terminal.
- (36) Terminal transfer system. — The motor fuel distribution system consisting of refineries, pipelines, marine vessels, and terminals. The term has the same meaning as “bulk transfer/terminal system” under 26 C.F.R. § 48.4081-1.
- (37) Transmix. — Either of the following:
  - a. The buffer or interface between two different products in a pipeline shipment.
  - b. A mix of two different products within a refinery or terminal that results in an off-grade mixture.
- (38) Transport truck. — A semitrailer combination rig designed or used to transport loads of motor fuel over a highway.
- (39) Trustee. — A person who is licensed as a supplier, an elective supplier, or a permissive supplier and who receives tax payments from and on behalf of a licensed distributor.
- (40) Two-party exchange. — A transaction in which motor fuel is transferred from one licensed supplier to another licensed supplier pursuant to an exchange agreement under which the supplier that is the position holder agrees to deliver motor fuel to the other supplier or the other supplier’s customer at the rack of the terminal at which the delivering supplier is the position holder.
- (41) User. — A person who owns or operates a licensed highway vehicle that has a registered gross vehicle weight of at least 10,001 pounds and who does not maintain storage facilities for motor fuel. (1995, c. 390, s. 3; 1995 (Reg. Sess., 1996), c. 647, ss. 1, 2; 1998-146, s. 3; 2000-173, ss. 13(a), 14(a); 2001-414, s. 27; 2002-108, ss. 5, 6; 2003-349, s. 10.2; 2004-170, s. 27; 2006-162, s. 14(a).)

**Editor’s Note. —**

Session Laws 2006-162, s. 33, provides, in part, that: “An exempt card or code will not be valid for sales of motor fuel at the terminal rack on or after January 1, 2007.”

**Effect of Amendments. —**

Session Laws 2006-162, s. 14(a), effective January 1, 2007, and applicable to motor fuel purchased on or after January 1, 2007, added subdivision (10a). See Editor’s note.

## Part 2. Licensing.

### § 105-449.65. List of persons who must have a license.

(a) License. — A person may not engage in business in this State as any of the following unless the person has a license issued by the Secretary authorizing the person to engage in that business:

- (1) A refiner.
- (2) A supplier.
- (3) A terminal operator.
- (4) An importer.
- (5) An exporter.
- (6) A blender.
- (7) A motor fuel transporter.
- (8) Repealed by Session Laws 1999-438, s. 20, effective August 10, 1999.
- (9) Repealed by Session Laws 1999-438, s. 21, effective August 10, 1999.
- (10) A distributor who purchases motor fuel from an elective or permissive supplier at an out-of-state terminal for import into this State.

(b) **(Effective until July 1, 2007)** Multiple Activity. — A person who is engaged in more than one activity for which a license is required must have a separate license for each activity, unless this subsection provides otherwise. A



G.S. 105-449.65(b) is set out twice. See notes.

person who is licensed as a supplier is considered to have a license as a distributor. A person who is licensed as an occasional importer or a tank wagon importer is not required to obtain a separate license as a distributor unless the importer is also purchasing motor fuel, at the terminal rack, from an elective or permissive supplier who is authorized to collect and remit the tax to the State. A person who is licensed as a distributor is not required to obtain a separate license as an importer if the distributor acquires fuel for import only from an elective supplier or a permissive supplier and is not required to obtain a separate license as an exporter. A person who is licensed as a distributor or a blender is not required to obtain a separate license as a motor fuel transporter if the distributor or blender does not transport motor fuel for others for hire.

(b) **(Effective July 1, 2007) Multiple Activity.** — A person who is engaged in more than one activity for which a license is required must have a separate license for each activity, unless this subsection provides otherwise. A person who is licensed as a supplier is considered to have a license as a distributor. A person who is licensed as an occasional importer or a tank wagon importer is not required to obtain a separate license as a distributor unless the importer is also purchasing motor fuel, at the terminal rack, from an elective or permissive supplier who is authorized to collect and remit the tax to the State. A person who is licensed as a distributor is not required to obtain a separate license as an importer if the distributor acquires fuel for import only from an elective supplier or a permissive supplier and is not required to obtain a separate license as an exporter. A person who is licensed as a distributor or a blender and who transports fuel is considered to be licensed as a motor fuel transporter. (1995, c. 390, s. 3; 1995 (Reg. Sess., 1996), c. 647, s. 3; 1997-60, s. 2; 1999-438, ss. 20, 21; 2003-349, s. 10.3; 2005-435, s. 9; 2006-162, s. 13(a).)

**Subsection (b) set out twice.** — The first version of subsection (b) set out above is effective until July 1, 2007, and applicable to motor fuel transported on or after that date. The second version of subsection (b) set out above is effective July 1, 2007, and applicable to motor fuel transported on or after that date.

**Effect of Amendments.** —

Session Laws 2006-162, s. 13(a), effective July 1, 2007, and applicable to motor fuel

transported on or after that date, substituted “and who transports fuel is considered to be licensed as motor fuel transporter” for “is not required to obtain a separate license as a motor fuel transporter if the distributor or blender does not transport motor fuel for others for hire” at the end of the last sentence in subsection (b).

Part 3. Tax and Liability.

§ 105-449.80. Tax rate.

**Editor’s Note.** — Session Laws 2006-66, s. 1.2, provides: “This act shall be known as ‘The Current Operations and Capital Improvements Appropriations Act of 2006.’”

Session Laws 2006-66, s. 2.2(g), provides: “There is created in the General Fund a Reserve for the Motor Fuels Tax Ceiling. The sum of twenty-two million nine hundred thirty-three thousand dollars (\$22,933,000) is hereby transferred from the Savings Reserve Account to the Reserve for the Motor Fuels Tax Ceiling for the 2006-2007 fiscal year.

“The State Treasurer shall transfer funds reserved to hold harmless the Highway Fund and the Highway Trust Fund from the Reserve for the Motor Fuels Tax Ceiling only if the variable wholesale component of the motor fuel excise tax rate in G.S. 105-449.80 would, without the imposition of the cap imposed by Section 24.3 of this act, exceed twelve and four-tenths cents (12.4¢) a gallon. A transfer required under this subsection must be made on a monthly basis. The amount to be transferred from the Reserve for the Motor Fuels Tax

Ceiling to the Highway Fund is the difference between the amount of motor fuel excise tax revenue allocated to the Highway Fund under G.S. 105-449.125 for a month and the amount that would have been allocated to it if the variable wholesale component were not capped at twelve and four-tenths cents (12.4¢) a gallon. The total amount transferred to the Highway Fund under this subsection during fiscal year 2006-2007 may not exceed seventeen million six hundred thousand dollars (\$17,600,000). The amount to be transferred from the Reserve for the Motor Fuels Tax Ceiling to the Highway Trust Fund is the difference between the amount of motor fuel excise tax revenue allocated to the Highway Trust Fund under G.S. 105-449.125 for a month and the amount that would have been allocated to it if the variable wholesale component were not capped at twelve and four-tenths cents (12.4¢) a gallon. The total amount transferred to the Highway Trust Fund under this subsection during fiscal

year 2006-2007 may not exceed five million seven hundred thousand dollars (\$5,700,000).

"Funds remaining in the Reserve for the Motor Fuels Tax Ceiling on June 30, 2007, shall revert to the Savings Reserve Account on June 30, 2007."

Session Laws 2006-66, s. 24.3(a), provides: "Notwithstanding G.S. 105-449.80(a), for the period July 1, 2006, through June 30, 2007, the variable wholesale component of the motor fuel excise tax rate may not exceed twelve and four-tenths cents (12.4¢) a gallon."

Session Laws 2006-66, s. 28.3, provides: "Except for statutory changes or other provisions that clearly indicate an intention to have effects beyond the 2006 2007 fiscal year, the textual provisions of this act apply only to funds appropriated for, and activities occurring during, the 2006 2007 fiscal year."

Session Laws 2006-66, s. 28.6 is a severability clause.

### § 105-449.88A. Liability for tax due on motor fuel designated as exempt by the use of cards or codes.

(a) Repealed by Session Laws 2006-162, s. 14(b), effective January 1, 2007, and applicable to motor fuel purchased on or after that date.

(b) Exempt Card or Code. — An entity that issues an exempt card or code has a duty to determine if the person to whom it is issued is exempt from the motor fuel excise tax. An entity that issues an exempt card or code to a person who is not exempt from tax is liable for tax due on motor fuel the person purchases at retail by use of the exempt card or code. If a supplier authorizes another entity to issue an exempt card or code to a person who is not exempt from tax, the supplier and the entity that issued the card are jointly and severally liable for tax due on motor fuel the person purchases at retail by use of the exempt card or code.

(c) Card Holder. — A person to whom an exempt card or code is issued is liable for any tax due on fuel purchased with the card or code for a purpose that is not exempt. A person who misuses an exempt card or code by purchasing fuel with the card or code for a purpose that is not exempt is liable for the tax due on the fuel. (1997-60, s. 9; 2001-205, s. 4; 2006-162, s. 14(b).)

**Editor's Note.** — Session Laws 2006-162, s. 33, provides, in part, that: "An exempt card or code will not be valid for sales of motor fuel at the terminal rack on or after January 1, 2007."

**Effect of Amendments.** — Session Laws 2006-162, s. 14(b), effective January 1, 2007, and applicable to motor fuel purchased on or after that date, deleted former (a) concerning exempt cards at rack; in subsection (b), substituted "Card or Code" for "Cards at Retail" in the subsection catchline and deleted the former

first sentence which read: "An 'exempt card or code' is a credit card or an access code that enables the person to whom the card or code is issued to buy motor fuel at retail without paying the motor fuel excise tax on the fuel"; in the first sentence of subsection (c), substituted "code is issued" for "exempt access card is issued for use at a terminal or at retail" near the beginning and inserted "or code" near the end.

## Part 4. Payment and Reporting.

### § 105-449.90. When tax return and payment are due.

(a) Filing Periods. — The excise tax imposed by this Article is payable when



a return is due. A return is due annually or monthly, as specified in this section. A return must be filed with the Secretary and be in the form required by the Secretary.

An annual return is due within 45 days after the end of each calendar year. An annual return covers tax liabilities that accrue in the calendar year preceding the date the return is due.

A monthly return of a person other than an occasional importer is due within 22 days after the end of each month. A monthly return of an occasional importer is due by the 3rd of each month. A monthly return covers tax liabilities that accrue in the calendar month preceding the date the return is due.

(b) Annual Filers. — A terminal operator must file an annual return for the compensating tax imposed by G.S. 105-449.85.

(c) Repealed by Session Laws 2006-162, s. 14(c), effective January 1, 2007, and applicable to motor fuel purchased on or after that date.

(d) Monthly Filers on 22nd. — The following persons must file a monthly return by the 22nd of each month:

- (1) A refiner.
- (2) A supplier.
- (3) A bonded importer.
- (4) A blender.
- (5) A tank wagon importer.
- (6) A person that incurred a liability under G.S. 105-449.86 during the preceding month for the tax on dyed diesel fuel used to operate certain highway vehicles.
- (7) A person that incurred a liability under G.S. 105-449.87 during the preceding month for the backup tax on motor fuel.

(e) Monthly Filers on 3rd. — An occasional importer must file a monthly return by the third day of each month. An occasional importer is not required to file a return, however, if all the motor fuel imported by the importer in a reporting period was removed at a terminal located in another state and the supplier of the fuel is an elective supplier or a permissive supplier. (1995, c. 390, s. 3; 1995 (Reg. Sess., 1996), c. 647, s. 23; 1997-60, s. 11; 2006-162, s. 14(c).)

**Editor's Note.** — Session Laws 2006-162, s. 33, provides, in part, that: "An exempt card or code will not be valid for sales of motor fuel at the terminal rack on or after January 1, 2007."

**Effect of Amendments.** — Session Laws 2006-162, s. 14(c), effective January 1, 2007, and applicable to motor fuel purchased on or after that date, in subsection (a), substituted "annually" for "annually, quarterly," near the beginning of the second sentence, and deleted the former third paragraph which read: "A

quarterly return is due by the last day of the month that follows the end of a calendar quarter. A quarterly return covers tax liabilities that accrue in the calendar quarter preceding the date the return is due"; and deleted former subsection (c) which read: "Quarterly Filers. A licensed importer that removes fuel at a terminal rack of a permissive or an elective supplier and a licensed distributor must file a quarterly return under G.S. 105-449.94 to reconcile exempt sales."

## § 105-449.93. Percentage discount for licensed distributors and some licensed importers.

(a) Repealed by Session Laws 2006-162, s. 14(d), effective January 1, 2007, and applicable to motor fuel purchased on or after that date.

(b) Percentage Discount. — A licensed distributor that pays the tax due a supplier by the date the supplier must pay the tax to the State may deduct from the amount due a discount of one percent (1%) of the amount of tax payable. A licensed importer that removes motor fuel from a terminal rack of a permissive or an elective supplier and that pays the tax due the supplier by the date the supplier must pay the tax to the State may deduct from the



amount due a discount of the same amount allowed a licensed distributor. The discount covers the expense of furnishing a bond and losses due to shrinkage or evaporation. A supplier may not directly or indirectly deny this discount to a licensed distributor or licensed importer that pays the tax due the supplier by the date the supplier must pay the tax to the State. (1995, c. 390, s. 3; 1995 (Reg. Sess., 1996), c. 647, s. 27; 2006-162, s. 14(d).)

**Editor's Note.** — Session Laws 2006-162, s. 33, provides, in part, that: "An exempt card or code will not be valid for sales of motor fuel at the terminal rack on or after January 1, 2007."

**Effect of Amendments.** — Session Laws 2006-162, s. 14(d), effective January 1, 2007, and applicable to motor fuel purchased on or after that date, deleted "Exempt sale deduction and" at the beginning of the section catchline; deleted former subsection (a) which read: "Deduction. A license holder listed below may deduct from the amount of tax otherwise payable

to a supplier the amount calculated on motor fuel the license holder received from the supplier and resold to a governmental unit whose purchases of motor fuel are exempt from the tax under G.S. 105-449.88 if, when removing the fuel, the license holder used an access card or code specified by the supplier to notify the supplier of the license holder's intent to resell the fuel in an exempt sale: (1) A licensed distributor. (2) A licensed importer that removed the motor fuel from a terminal rack of a permissive or an elective supplier."

**§ 105-449.94:** Repealed by Session Laws 2006-162, s. 14(e), effective January 1, 2007, and applicable to motor fuels purchased on or after that date.

## **§ 105-449.97. Deductions and discounts allowed a supplier when filing a return.**

(a) Taxes Not Remitted. — When a supplier files a return, the supplier may deduct from the amount of tax payable with the return the amount of tax any of the following license holders owes the supplier but failed to remit to the supplier:

- (1) A licensed distributor.
- (2) A licensed importer that removed the motor fuel on which the tax is due from a terminal of an elective or a permissive supplier.
- (3) Repealed by Session Laws 1995, c. 647, s. 32.

A supplier is not liable for tax a license holder listed in this subsection owes the supplier but fails to pay. If a listed license holder pays tax owed to a supplier after the supplier deducts the amount on a return, the supplier must promptly remit the payment to the Secretary.

(b) Administrative Discount. — A supplier that files a timely return and sends a timely payment may deduct from the amount of tax payable with the return an administrative discount of one-tenth of one percent (0.1%) of the amount of tax payable to this State as the trustee, not to exceed eight thousand dollars (\$8,000) a month. The discount covers expenses incurred in collecting taxes on motor fuel.

(c) Percentage Discount. — A supplier that sells motor fuel directly to an unlicensed distributor or to the bulk-end user, the retailer, or the user of the fuel may take the same percentage discount on the fuel that a licensed distributor may take under G.S. 105-449.93(b) when making deferred payments of tax to the supplier.

(d) Taxes Paid on Exempt Retail Sales. — When filing a return, a supplier that issues or authorizes the issuance of an exempt card or code to a person that enables the person to buy motor fuel without paying tax on the fuel may deduct the amount of excise tax imposed on fuel purchased with the exempt card or code. The amount of excise tax imposed on fuel purchased with an exempt card or code is the amount that was imposed on the fuel when it was

delivered to the retailer of the fuel. (1995, c. 390, s. 3; 1995 (Reg. Sess., 1996), c. 647, ss. 31, 32; 1997-60, s. 15; 1999-438, s. 23; 2000-173, s. 14(c); 2006-162, s. 14(f).)

**Editor's Note.** — Session Laws 2006-162, s. 33, provides, in part, that: "An exempt card or code will not be valid for sales of motor fuel at the terminal rack on or after January 1, 2007."

**Effect of Amendments.** — Session Laws 2006-162, s. 14(f), effective January 1, 2007, and applicable to motor fuel purchased on or

after that date, in subsection (d), deleted "an exempt access" before "code to a person," "at retail" following "buy motor fuel" and "retail" before "card or code" at the end of the first sentence and in the second sentence deleted "at retail" after "fuel purchased" and "retail" after "with an exempt."

### **§ 105-449.100. Terminal operator to file informational return showing changes in amount of motor fuel at the terminal.**

A terminal operator must file a monthly informational return with the Secretary that shows the amount of motor fuel received or removed from the terminal during the month. The return is due on the same date as a monthly return due under G.S. 105-449.90. The return must contain the following information and any other information required by the Secretary:

- (1) The number of gallons of motor fuel received in inventory at the terminal during the month and each position holder for the fuel.
- (2) The number of gallons of motor fuel removed from inventory at the terminal during the month and, for each removal, the position holder for the fuel and the destination state of the fuel.
- (3) The number of gallons of motor fuel gained or lost at the terminal during the month. (1995, c. 390, s. 3; 1995 (Reg. Sess., 1996), c. 647, s. 34; 2006-162, s. 15(a).)

**Editor's Note.** — Session Laws 2006-162, s. 33, provides, in part, that: "An exempt card or code will not be valid for sales of motor fuel at the terminal rack on or after January 1, 2007."

**Effect of Amendments.** — Session Laws 2006-162, s. 15(a), effective January 1, 2007, and applicable to motor fuel purchased on or

after that date, substituted "on the same date as a monthly return due under G.S. 105-449.90" for "by the 25th day of the month following the month covered by the return" at the end of the first sentence of the introductory paragraph.

### **§ 105-449.101. (Effective until July 1, 2007) Motor fuel transporter to file informational return showing deliveries of imported or exported motor fuel.**

(a) Requirement. — A motor fuel transporter that imports motor fuel into this State or exports motor fuel from this State must file a monthly informational return with the Secretary that shows motor fuel received or delivered for import or export by the transporter during the month. This requirement does not apply to a distributor that is not required to be licensed as a motor fuel transporter.

(b) Content. — The return required by this section must contain the following information and any other information required by the Secretary:

- (1) The name and address of each person from whom the transporter received motor fuel outside the State for delivery in the State, the amount of motor fuel received, the date the motor fuel was received, and the destination state of the fuel.



**G.S. 105-449.101 is set out twice. See notes.**

- (2) The name and address of each person from whom the transporter received motor fuel in the State for delivery outside the State, the amount of motor fuel delivered, the date the motor fuel was delivered, and the destination state of the fuel.

(c) **Due Date.** — The return required by this section is due on the same date as a monthly return due under G.S. 105-449.90. (1995, c. 390, s. 3; 1995 (Reg. Sess., 1996), c. 647, s. 35; 2002-108, s. 12; 2006-162, s. 15(b).)

**Section Set Out Twice.** — The version of the section set out above is effective until July 1, 2007, and applicable to motor fuel purchased on or after that date. For this section as in effect on July 1, 2007, and applicable to motor fuel transported on or after that date, see the following version, also numbered G.S. 105-449.101.

**Editor's Note.** — Session Laws 2006-162, s. 33, provides, in part, that: "An exempt card or

code will not be valid for sales of motor fuel at the terminal rack on or after January 1, 2007."

**Effect of Amendments.** — Session Laws 2006-162, s. 15(b), effective January 1, 2007, and applicable to motor fuel purchased on or after that date, deleted "is due by the 25th day of the month following the month covered by the return. The return" following "by this section" at the beginning of the first sentence of subsection (b) and added subsection (c).

**§ 105-449.101. (Effective July 1, 2007) Motor fuel transporter to file informational return showing deliveries of motor fuel.**

(a) **Requirement.** — A motor fuel transporter must file a monthly informational return with the Secretary that shows motor fuel transported in this State by the transporter during the month.

(b) **Content.** — The return required by this section must contain the following information and any other information required by the Secretary:

- (1) The name and address of each person from whom the transporter received motor fuel outside the State for delivery in the State, the amount of motor fuel received, the date the motor fuel was received, and the destination state of the fuel.
- (2) The name and address of each person from whom the transporter received motor fuel in the State for delivery outside the State, the amount of motor fuel delivered, the date the motor fuel was delivered, and the destination state of the fuel.
- (3) The name and address of each person from whom the transporter received motor fuel in the State for delivery in the State, the amount of motor fuel received, the date the motor fuel was received, and the destination state of the fuel.

(c) **Due Date.** — The return required by this section is due on the same date as a monthly return due under G.S. 105-449.90. (1995, c. 390, s. 3; 1995 (Reg. Sess., 1996), c. 647, s. 35; 2002-108, s. 12; 2006-162, ss. 13(b), 15(b).)

**Section Set Out Twice.** — The version of the section set out above is effective July 1, 2007, and applicable to motor fuel transported on or after that date. For this section as in effect until July 1, 2007, and applicable to motor fuel purchased on or after that date, see the preceding version, also numbered G.S. 105-449.101.

**Effect of Amendments.** —

Session Laws 2006-162, s. 13(b), effective July 1, 2007, and applicable to motor fuel transported on or after that date, deleted "imported or exported" preceding "motor fuel" in

the section catchline; in subsection (a), in the first sentence, deleted "that imports motor fuel into this State or exports motor fuel from this State" following "transporter" at the beginning and substituted "transported in this State" for "received or delivered for import or export", and deleted the former last sentence which read: "This requirement does not apply to a distributor that is not required to be licensed as a motor fuel transporter"; and added subdivision (b)(3).



## § 105-449.102. Distributor to file return showing exports from a bulk plant.

(a) Return. — A distributor that exports motor fuel from a bulk plant located in this State must file a monthly return with the Secretary that shows the exports. The return is due on the same date as a monthly return due under G.S. 105-449.90. The return serves as a claim for refund by the distributor for tax paid to this State on the exported motor fuel.

(b) Content. — The return must contain the following information and any other information required by the Secretary:

- (1) The number of gallons of motor fuel exported during the month.
- (2) The destination state of the motor fuel exported during the month.
- (3) A certification that the distributor has paid to the destination state of the motor fuel exported during the month, or will pay on a timely basis, the amount of tax due that state on the fuel. (1995, c. 390, s. 3; 1995 (Reg. Sess., 1996), c. 647, s. 36; 2006-162, s. 15(c).)

**Editor's Note.** — Session Laws 2006-162, s. 33, provides, in part, that: "An exempt card or code will not be valid for sales of motor fuel at the terminal rack on or after January 1, 2007."

**Effect of Amendments.** — Session Laws 2006-162, s. 15(c), effective January 1, 2007,

and applicable to motor fuel purchased on or after that date, substituted "on the same date as a monthly return due under G.S. 105-449.90" for "by the 25th day of the month following the month covered by the return" at the end of the second sentence in (a).

## Part 5. Refunds.

### § 105-449.105A. Monthly refunds for kerosene.

(a) Refund. — A distributor who sells kerosene to any of the following may obtain a refund for the excise tax the distributor paid on the kerosene, less the amount of any discount allowed on the kerosene under G.S. 105-449.93:

- (1) The end user of the kerosene, if the distributor dispenses the kerosene into a storage facility of the end user that contains fuel used only for one of the following purposes and the storage facility is installed in a manner that makes use of the fuel for any other purpose improbable:
  - a. Heating.
  - b. Drying crops.
  - c. A manufacturing process.
- (2) A retailer of kerosene, if the distributor dispenses the kerosene into a storage facility that meets both of the following conditions:
  - a. It is marked with the phrase "Undyed, Untaxed Kerosene, Non-taxable Use Only" or a similar phrase that clearly indicates that the fuel is not to be used to operate a highway vehicle.
  - b. It either has a dispensing device that is not suitable for use in fueling a highway vehicle or is kept locked by the retailer and must be unlocked by the retailer for each sale of kerosene.
- (3) An airport, if the distributor dispenses the kerosene into a storage facility that contains fuel used only for fueling airplanes and that meets at least one of the following conditions:
  - a. It is marked with the phrase "Undyed, Untaxed Kerosene, Non-taxable Use Only" or a similar phrase that clearly indicates that the fuel is not to be used to operate a highway vehicle.
  - b. It has a dispensing device that is not suitable for use in fueling a highway vehicle.

(b) Liability. — If the Secretary determines that the Department overpaid a distributor by refunding more tax to the distributor than is due under this

section, the distributor is liable for the amount of the overpayment. This liability applies regardless of whether the actions of a retailer of kerosene contributed to the overpayment. (1998-146, s. 8; 2000-173, s. 17; 2001-205, s. 6; 2006-162, s. 14(g).)

**Editor's Note.** — Session Laws 2006-162, s. 33, provides, in part, that: "An exempt card or code will not be valid for sales of motor fuel at the terminal rack on or after January 1, 2007."

**Effect of Amendments.** — Session Laws 2006-162, s. 14(g), effective January 1, 2007, and applicable to motor fuel purchased on or after that date, added subdivision (a)(3).

## § 105-449.106. Quarterly refunds for nonprofit organizations, taxicabs, and special mobile equipment.

(a) Nonprofits. — A nonprofit organization listed below that purchases and uses motor fuel may receive a quarterly refund, for the excise tax paid during the preceding quarter, at a rate equal to the amount of the flat cents-per-gallon rate plus the variable cents-per-gallon rate in effect during the quarter for which the refund is claimed, less one cent (1¢) per gallon.

An application for a refund allowed under this subsection must be made in accordance with this Part and must be signed by the chief executive officer of the organization. The chief executive officer of a nonprofit organization is the president of the organization or another officer of the organization designated in the charter or bylaws of the organization.

Any of the following entities may receive a refund under this subsection:

- (1) Repealed by Session Laws 2002-108, s. 13, effective January 1, 2003.
- (2) A private, nonprofit organization that transports passengers under contract with or at the express designation of a unit of local government.
- (3) A volunteer fire department.
- (4) A volunteer rescue squad.
- (5) A sheltered workshop recognized by the Department of Health and Human Services.

(b) Taxi. — A person who purchases and uses motor fuel in a taxicab, as defined in G.S. 20-87(1), while the taxicab is engaged in transporting passengers for hire, or in a bus operated as part of a city transit system that is exempt from regulation by the North Carolina Utilities Commission under G.S. 62-260(a)(8), may receive a quarterly refund, for the excise tax paid during the preceding quarter, at a rate equal to the flat cents-per-gallon rate plus the variable cents-per-gallon rate in effect during the quarter for which the refund is claimed, less one cent (1¢) per gallon. An application for a refund must be made in accordance with this Part.

(c) Special Mobile Equipment. — A person who purchases and uses motor fuel to operate special mobile equipment off-highway may receive a quarterly refund, for the excise tax paid during the preceding quarter, at a rate equal to the flat cents-per-gallon rate plus the variable cents-per-gallon rate in effect during the quarter for which the refund is claimed, less the amount of sales and use tax or privilege tax due on the fuel under this Chapter, as determined in accordance with G.S. 105-449.107(c). An application for a refund must be made in accordance with this Part. (1995, c. 390, s. 3; 1997-6, s. 13; 1997-443, s. 11A.118(a); 1999-438, s. 24; 2002-108, s. 13; 2005-435, s. 15; 2006-162, s. 16(a).)

**Effect of Amendments.** — Session Laws 2006-162, s. 16(a), effective

July 24, 2006, inserted "or privilege tax" near the end of the first sentence in subsection (c).



## § 105-449.107. Annual refunds for off-highway use and use by certain vehicles with power attachments.

(a) Off-Highway. — A person who purchases and uses motor fuel for a purpose other than to operate a licensed highway vehicle may receive an annual refund for the excise tax the person paid on fuel used during the preceding calendar year. The amount of refund allowed is the amount of the flat cents-per-gallon rate in effect during the year for which the refund is claimed plus the average of the two variable cents-per-gallon rates in effect during that year, less the amount of sales and use tax or privilege tax due on the fuel under this Chapter. An application for a refund allowed under this section must be made in accordance with this Part.

(b) Certain Vehicles. — A person who purchases and uses motor fuel in one of the vehicles listed below may receive an annual refund for the amount of fuel consumed by the vehicle:

- (1) A concrete mixing vehicle.
- (2) A solid waste compacting vehicle.
- (3) A bulk feed vehicle that delivers feed to poultry or livestock and uses a power takeoff to unload the feed.
- (4) A vehicle that delivers lime or fertilizer in bulk to farms and uses a power takeoff to unload the lime or fertilizer.
- (5) A tank wagon that delivers alternative fuel, as defined in G.S. 105-449.130, or motor fuel or another type of liquid fuel into storage tanks and uses a power takeoff to make the delivery.
- (6) A commercial vehicle that delivers and spreads mulch, soils, composts, sand, sawdust, and similar materials and that uses a power takeoff to unload, blow, and spread the materials.
- (7) A commercial vehicle that uses a power takeoff to remove and dispose of septage and for which an annual fee is required to be paid to the Department of Environment and Natural Resources under G.S. 130A-291.1.
- (8) A sweeper.

The amount of refund allowed is thirty-three and one-third percent (33 1/3%) of the following: the sum of the flat cents-per-gallon rate in effect during the year for which the refund is claimed and the average of the two variable cents-per-gallon rates in effect during that year, less the amount of sales and use tax or privilege tax due on the fuel under this Chapter. An application for a refund allowed under this section must be made in accordance with this Part. This refund is allowed for the amount of fuel consumed by the vehicle in its mixing, compacting, or unloading operations, as distinguished from propelling the vehicle, which amount is considered to be one-third of the amount of fuel consumed by the vehicle.

(c) Sales Tax Amount. — Article 5 of this Chapter determines the amount of sales and use tax to be deducted under this section from a motor fuel excise tax refund. Article 5F of this Chapter determines the amount of privilege tax to be deducted under this section from a motor fuel excise tax refund. The sales price and the cost price of motor fuel to be used in determining the amount to deduct is the average of the wholesale prices used under G.S. 105-449.80 to determine the excise tax rates in effect for the two six-month periods of the year for which the refund is claimed. (1995, c. 390, s. 3; 1997-6, s. 14; 1997-423, s. 4; 2001-408, s. 1; 2005-377, s. 1; 2006-162, s. 16(b).)

### Effect of Amendments. —

Session Laws 2006-162, s. 16(b), effective July 24, 2006, inserted “or privilege tax” near the end of the second sentence in subsection (a)

and at the end of the first sentence of the undesignated paragraph in subsection (b), and added the second sentence of subsection (c).



## Part 6. Enforcement and Administration.

### § 105-449.120. Acts that are misdemeanors.

(a) Class 1. — A person who commits any of the following acts is guilty of a Class 1 misdemeanor:

- (1) Fails to obtain a license required by this Article.
- (2) Willfully fails to file a return required by this Article.
- (3) Willfully fails to pay a tax when due under this Article or under former Article 36 or 36A of this Chapter. Failure to comply with a requirement of a supplier to remit tax payable to the supplier by electronic funds transfer is considered a failure to make a timely payment.
- (3a) Repealed by Session Laws 2006-162, s. 17, effective January 1, 2007, and applicable to motor fuel purchased on or after that date.
- (4) Makes a false statement in an application, a return, or a statement required under this Article.
- (5) Makes a false statement in an application for a refund.
- (6) Fails to keep records as required under this Article.
- (7) Refuses to allow the Secretary or a representative of the Secretary to examine the person's books and records concerning motor fuel.
- (8) Fails to disclose the correct amount of motor fuel sold or used in this State.
- (9) Fails to file a replacement bond or an additional bond as required under this Article.
- (10) Fails to show or give a shipping document as required under this Article.
- (11) Willfully refuses to allow a licensed distributor, a licensed exporter, or a licensed importer to defer payment of tax to the supplier, as required by G.S. 105-449.91.
- (12) Willfully refuses to allow a licensed distributor or a licensed importer to take the discount allowed by G.S. 105-449.93 when remitting tax to the supplier.

(b) Class 2. — A person who commits any of the following acts is guilty of a Class 2 misdemeanor:

- (1) Knowingly dispenses non-tax-paid motor fuel into the supply tank of a highway vehicle.
- (2) Knowingly allows non-tax-paid fuel to be dispensed into the supply tank of a highway vehicle. (1995, c. 390, s. 3; 1995 (Reg. Sess., 1996), c. 647, s. 42; 1997-60, s. 20; 2006-162, s. 17.)

**Editor's Note.** — Session Laws 2006-162, s. 33, provides, in part, that: "An exempt card or code will not be valid for sales of motor fuel at the terminal rack on or after January 1, 2007."

**Effect of Amendments.** — Session Laws 2006-162, s. 17, effective January 1, 2007, and

applicable to motor fuel purchased on or after that date, deleted subdivision (a)(3a), which read: "Willfully fails to pay a tax collected on behalf of a destination state to that state when it is due."

## Part 7. Use of Revenue.

### § 105-449.125. Distribution of tax revenue among various funds and accounts.

**Editor's Note.** —

Session Laws 2006-66, s. 1.2, provides: "This act shall be known as 'The Current Operations

and Capital Improvements Appropriations Act of 2006'."

Session Laws 2006-66, s. 2.2(g), provides:

“There is created in the General Fund a Reserve for the Motor Fuels Tax Ceiling. The sum of twenty-two million nine hundred thirty-three thousand dollars (\$22,933,000) is hereby transferred from the Savings Reserve Account to the Reserve for the Motor Fuels Tax Ceiling for the 2006-2007 fiscal year.

“The State Treasurer shall transfer funds reserved to hold harmless the Highway Fund and the Highway Trust Fund from the Reserve for the Motor Fuels Tax Ceiling only if the variable wholesale component of the motor fuel excise tax rate in G.S. 105-449.80 would, without the imposition of the cap imposed by Section 24.3 of this act, exceed twelve and four-tenths cents (12.4¢) a gallon. A transfer required under this subsection must be made on a monthly basis. The amount to be transferred from the Reserve for the Motor Fuels Tax Ceiling to the Highway Fund is the difference between the amount of motor fuel excise tax revenue allocated to the Highway Fund under G.S. 105-449.125 for a month and the amount that would have been allocated to it if the variable wholesale component were not capped at twelve and four-tenths cents (12.4¢) a gallon. The total amount transferred to the Highway Fund under this subsection during fiscal year 2006-2007 may not exceed seventeen million six hundred thousand dollars (\$17,600,000). The amount to be transferred from the Reserve

for the Motor Fuels Tax Ceiling to the Highway Trust Fund is the difference between the amount of motor fuel excise tax revenue allocated to the Highway Trust Fund under G.S. 105-449.125 for a month and the amount that would have been allocated to it if the variable wholesale component were not capped at twelve and four-tenths cents (12.4¢) a gallon. The total amount transferred to the Highway Trust Fund under this subsection during fiscal year 2006-2007 may not exceed five million seven hundred thousand dollars (\$5,700,000).

“Funds remaining in the Reserve for the Motor Fuels Tax Ceiling on June 30, 2007, shall revert to the Savings Reserve Account on June 30, 2007.”

Session Laws 2006-66, s. 24.3(a), provides: “Notwithstanding G.S. 105-449.80(a), for the period July 1, 2006, through June 30, 2007, the variable wholesale component of the motor fuel excise tax rate may not exceed twelve and four-tenths cents (12.4¢) a gallon.”

Session Laws 2006-66, s. 28.3, provides: “Except for statutory changes or other provisions that clearly indicate an intention to have effects beyond the 2006 2007 fiscal year, the textual provisions of this act apply only to funds appropriated for, and activities occurring during, the 2006 2007 fiscal year.”

Session Laws 2006-66, s. 28.6 is a severability clause.

**§ 105-449.127:** Repealed by Session Laws 2006-162, s. 12(c), effective July 24, 2006.

## ARTICLE 36D.

### *Alternative Fuel.*

#### **§ 105-449.137. Liability for and payment of the tax.**

(a) **Liability.** — A bulk-end user or retailer that stores highway and nonhighway alternative fuel in the same storage facility is liable for the tax imposed by this Article. The tax payable by a bulk-end user or retailer applies when fuel is withdrawn from the storage facility. The alternative fuel provider that sells or delivers alternative fuel is liable for the tax imposed by this Article on all other alternative fuel.

(b) **Payment.** — The tax imposed by this Article is payable when a return is due. A return is due on the same date as a monthly return due under G.S. 105-449.90. A monthly return covers liabilities that accrue in the calendar month preceding the date the return is due. A return must be filed with the Secretary and must be in the form and contain the information required by the Secretary. (1995, c. 390, s. 3; 1997-60, s. 24; 2006-162, s. 15(d).)

**Editor’s Note.** — Session Laws 2006-162, s. 33, provides, in part, that: “An exempt card or code will not be valid for sales of motor fuel at the terminal rack on or after January 1, 2007.”

**Effect of Amendments.** — Session Laws 2006-162, s. 15(d), effective January 1, 2007, and applicable to motor fuel purchased on or after that date, substituted “on the same date



as a monthly return due under G.S. 105-449.90" for "monthly within 25 days after the end of each month" at the end of the second sentence in subsection (b).

## SUBCHAPTER VIII. LOCAL GOVERNMENT SALES AND USE TAX.

### ARTICLE 39.

#### *First One-Cent (1¢) Local Government Sales and Use Tax.*

#### **§ 105-467. Scope of sales tax.**

(a) Sales Tax. — The sales tax that may be imposed under this Article is limited to a tax at the rate of one percent (1%) of the transactions listed in this subsection. The sales tax authorized by this Article does not apply to sales that are taxable by the State under G.S. 105-164.4 but are not specifically included in this subsection.

- (1) The sales price of tangible personal property subject to the general rate of sales tax imposed by the State under G.S. 105-164.4(a)(1) and (a)(4b).
- (2) The gross receipts derived from the lease or rental of tangible personal property when the lease or rental of the property is subject to the general rate of sales tax imposed by the State under G.S. 105-164.4(a)(2).
- (3) The gross receipts derived from the rental of any room or other accommodations subject to the general rate of sales tax imposed by the State under G.S. 105-164.4(a)(3).
- (4) The gross receipts derived from services rendered by laundries, dry cleaners, and other businesses subject to the general rate of sales tax imposed by the State under G.S. 105-164.4(a)(4).
- (5) The sales price of food that is not otherwise exempt from tax pursuant to G.S. 105-164.13 but is exempt from the State sales and use tax pursuant to G.S. 105-164.13B.
- (6) The sales price of prepaid telephone calling service taxed as tangible personal property under G.S. 105-164.4(a)(4d).
- (7) The gross receipts derived from providing satellite digital audio radio service subject to the general rate of tax under G.S. 105-164.4(a)(6a).

(b) Exemptions and Refunds. — The State exemptions and exclusions contained in G.S. 105-164.13, the State sales and use tax holiday contained in G.S. 105-164.13C, and the State refund provisions contained in G.S. 105-164.14 apply to the local sales and use tax authorized to be levied and imposed under this Article. Except as provided in this subsection, a taxing county may not allow an exemption, exclusion, or refund that is not allowed under the State sales and use tax. A local school administrative unit and a joint agency created by interlocal agreement among local school administrative units pursuant to G.S. 160A-462 to jointly purchase food service-related materials, supplies, and equipment on their behalf is allowed an annual refund of sales and use taxes paid by it under this Article on direct purchases of tangible personal property and services, other than electricity, telecommunications service, and ancillary service. Sales and use tax liability indirectly incurred by the entity on building materials, supplies, fixtures, and equipment that become a part of or annexed to any building or structure that is owned or leased by the entity and is being erected, altered, or repaired for use by the entity is considered a sales or use tax liability incurred on direct purchases by the entity for the purpose of this subsection. A request for a refund shall be in



writing and shall include any information and documentation required by the Secretary. A request for a refund is due within six months after the end of the entity's fiscal year. Refunds applied for more than three years after the due date are barred.

(c) Sourcing. — The local sales tax authorized to be imposed and levied under this Article applies to taxable transactions by retailers whose place of business is located within the taxing county. The sourcing principles in G.S. 105-164.4B apply in determining whether the local sales tax applies to a transaction. (1971, c. 77, s. 2; 1983 (Reg. Sess., 1984), c. 1097, s. 9; 1987, c. 557, s. 7; c. 832, s. 4; 1989, c. 692, s. 3.7; 1991, c. 689, s. 316; 1996, 2nd Ex. Sess., c. 13, s. 1.3; 1998-98, s. 30.1; 1998-171, s. 9; 2001-347, s. 2.15; 2001-414, s. 29; 2001-424, s. 34.16(b); 2001-430, s. 13; 2001-487, s. 67(e); 2002-16, s. 12; 2002-159, s. 61; 2005-276, s. 33.23; 2006-66, s. 7.20(a); 2006-162, s. 32.)

**Editor's Note. —**

Session Laws 2006-66, s. 1.2, provides: "This act shall be known as 'The Current Operations and Capital Improvements Appropriations Act of 2006'."

Session Laws 2006-66, s. 28.6 is a severability clause.

**Effect of Amendments. —**

Session Laws 2006-66, s. 7.20(a), effective July 1, 2005, and applicable to sales made on or

after that date, in subsection (b), inserted the exception at the beginning of the second sentence and added the last five sentences.

Session Laws 2006-162, s. 32, effective January 1, 2007, substituted "electricity, telecommunications service, and ancillary service" for "electricity and telecommunications service" at the end of the third sentence in subsection (b).

## ARTICLE 42.

### *Second One-Half Cent (1/2¢) Local Government Sales and Use Tax.*

#### **§ 105-501. Distribution of additional taxes.**

The Secretary shall, on a monthly basis, allocate the net proceeds of the additional one-half percent (1/2%) sales and use taxes levied under this Article to the taxing counties on a per capita basis according to the most recent annual population estimates certified to the Secretary by the State Budget Officer. The Secretary shall then adjust the amount allocated to each county as provided in G.S. 105-486(b). The amount allocated to each taxing county shall then be divided among the county and the municipalities located in the county in accordance with the method by which the one percent (1%) sales and use taxes levied in that county pursuant to Article 39 of this Chapter or Chapter 1096 of the 1967 Session Laws are distributed. No municipality may receive any funds under this section if it was incorporated with an effective date of on or after January 1, 2000, and is disqualified from receiving funds under G.S. 136-41.2. No municipality may receive any funds under this section, incorporated with an effective date on or after January 1, 2000, unless a majority of the mileage of its streets are open to the public. The previous sentence becomes effective with respect to distribution of funds on or after July 1, 1999.

In determining the net proceeds of the tax to be distributed, the Secretary shall deduct from the collections to be allocated an amount equal to one-twelfth of the costs during the preceding fiscal year of:

- (1) The Department of Revenue in performing the duties imposed by G.S. 105-275.2 and by Article 15 of this Chapter.
- (1a) Seventy percent (70%) of the expenses of the Department of Revenue in performing the duties imposed by Article 2D of this Chapter.
- (2) The Property Tax Commission.

- (3) The School of Government at the University of North Carolina at Chapel Hill in operating a training program in property tax appraisal and assessment.
- (4) The personnel and operations provided by the Department of State Treasurer for the Local Government Commission. (1985 (Reg. Sess., 1986), c. 906, s. 1; 1987, c. 832, s. 8; 1987 (Reg. Sess., 1988), c. 1082, s. 4; 1995, c. 41, s. 4; c. 370, s. 1; 1999-458, s. 9; 2001-427, s. 13(d); 2002-126, s. 30D(a); 2006-264, s. 29(f).)

**Effect of Amendments.** — Session Laws 2006-264, s. 29(f), effective August 27, 2006, substituted “School of Government at the Uni-

versity of North Carolina at Chapel Hill” for “Institute of Government” in subdivision (3).

## SUBCHAPTER IX. MULTICOUNTY TAXES.

### ARTICLE 50.

#### *Regional Transit Authority Vehicle Rental Tax.*

### § 105-550. Definitions.

**Editor’s Note.** — Session Laws 2006-162, s. 30, amended Part 3 of S.L. 1997-417, by adding a section to read: “3.1. A county authorized to impose a tax under Article 43 of Chapter 105 of the General Statutes, as enacted by Part 1 of this act [applies only to Mecklenburg County], is considered an authority under Article 50 of Chapter 105 of the General Statutes, as enacted by Section 3 of this act, and the board of commissioners of that county is considered the board of trustees of the authority under Article 50. G.S. 105-554 of Article 50 does not apply to the proceeds of a tax imposed by a county

considered an authority under this section. The proceeds of a tax imposed by a county considered an authority under this section must be transferred to the largest city in that county operating a public transportation system and used only for financing, constructing, operating, and maintaining a public transportation system. The proceeds may supplant existing funds allocated for a public transportation system. The term ‘public transportation system’ has the same meaning as defined in G.S. 105-506 of Article 43.”

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